Preparatory Committee established by General Assembly resolution 69/292: Development of 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

Chair's overview of the third session of the Preparatory Committee

1. In its resolution 69/292 of 19 June 2015, the General Assembly decided to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. To that end, it decided to establish, prior to holding an intergovernmental conference, a Preparatory Committee, open to all Member States of the United Nations, members of the specialized agencies and parties to the Convention, with others invited as observers in accordance with past practice of the United Nations, to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under UNCLOS, taking into account the various reports of the Co-Chairs on the work of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The Assembly also decided that the Preparatory Committee would start its work in 2016 and, by the end of 2017, report to the Assembly on its progress.

2. Before the end of its seventy-second session, and taking into account the aforementioned report of the Preparatory Committee, the General Assembly will decide on the convening and on the starting date of an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under UNCLOS.

3. The General Assembly also decided that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology.

4. By letter dated 24 January 2017, His Excellency Mr. Peter Thomson, President of the seventy-first session of the General Assembly, informed Member States that His Excellency Mr. Eden Charles (Trinidad and Tobago), who had been appointed Chair of the Preparatory Committee on 4 September 2015, would no longer be in a position to serve as Chair. He further informed that following consultations with Member States, he had appointed, in accordance with paragraph 1(d) of resolution 69/292, His Excellency Mr. Carlos Sergio Sobral Duarte, Ambassador, Deputy Permanent Representative of Brazil to the United Nations, as Chair of the Preparatory Committee.

5. Pursuant to paragraph 243 of General Assembly resolution 71/257, the third session of the Preparatory Committee was convened by the Secretary-General from 27 March to 7 April 2017. Representatives from 147 Member States of the United Nations, two non-Member States, five United Nations funds and programmes, bodies and offices, 18 intergovernmental organizations, and 19 non-governmental organizations attended the session.

6. In accordance with paragraph 1(e) of General Assembly resolution 69/292, and in light of the agreement reached in the Latin American and Caribbean States Group, the Preparatory Committee elected Mr. Pablo Adrían Arrocha Olabuenaga (Mexico) and Mr. José Luis Fernandez Valoni (Argentina) as members of the Bureau in replacement of Mr. Javier Gorostegui Obanoz (Chile) and Ms. Gina Guillén-Grillo (Costa Rica). In light of information received from Malaysia as Chair of the Asia-Pacific States Group according to which, in accordance with the agreement reached in that Group, Mr. Ma Xinmin would be resigning from his position as a member of the Bureau on 27 May 2017, the Preparatory Committee further elected Mr. Jun Hasebe (Japan) to serve as member of the Bureau from 28 May 2017.

7. On 27 March, following opening statements by the Chair and the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, the Preparatory Committee adopted the agenda (A/AC.287/2017/PC.3/1) without amendment and agreed to proceed on the basis of the proposed programme of work (A/AC.287/2017/PC.3/L.2). Upon agreement by the Committee, Ms. Juliette Rosita Riley (Barbados), Co-Chair of the Ad Hoc Working Group of the Whole on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects, introduced the advance and unedited text of the Technical Abstract of the First Global Integrated Marine Assessment on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, under “Other matters”. Upon resuming this agenda item, the Committee heard an address from His Excellency Mr. Peter Thomson, President of the seventy-first session of the General Assembly on 4 April; and received information from the secretariat on the status of the Voluntary Trust Fund established pursuant to General Assembly 69/292 on 7 April.

8. From 27 March to 4 April, the Committee convened in Informal working group sessions as follows: Informal working group on marine genetic resources, including questions on the sharing of benefits, facilitated by Her Excellency Ms. Janine Elizabeth Coye-Felson (Belize);[1] Informal working group on measures such as area-based management tools, including marine protected areas, facilitated by Ms. Alice Revell (New Zealand);[2] Informal working group on environmental impact assessments, facilitated by Mr. René Lefeber (the Netherlands); Informal working group on capacity-building and the transfer of marine technology, facilitated by Ms. Rena Lee

[1] In replacement of His Excellency Mr. Carlos Duarte (Brazil) owing to his new role as Chair of the Preparatory Committee.

[2] In replacement of Mr. John Adank (New Zealand) who had informed the Chair that he was no longer in a position to assume his functions as Facilitator owing to his departure from the Ministry of Foreign Affairs and Trade of New Zealand.

(Singapore); and Informal working group on cross-cutting issues, facilitated by the Chair, His Excellency Mr. Carlos Duarte.

9. From 4 April to 7 April, the Committee convened in Plenary to further consider the issues discussed under the five Informal working groups, including on the basis of oral reports prepared by each of the Facilitators. The Committee also considered the Chair's proposed road map for the intersessional period and the fourth session of the Committee, to be held from 10 to 21 July 2017.

Road map

10. In accordance with the road map proposed by the Chair and approved by the Preparatory Committee on 7April 2016, the Chair prepared the present overview of the third session of the Preparatory Committee, which includes the oral reports from the Facilitators of the Informal working groups (annex I) and the Chair's general observations (annex II).

11. In advance of the fourth session of the Preparatory Committee, the Chair will prepare and circulate a document containing indicative suggestions to assist the Preparatory Committee in developing draft recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument. In addition, the Chair will prepare and circulate a new non-paper which will be based on the Chair's non-paper and its supplement that had been made available to delegationsin advance of the third session[3] and also take into account the proposals, issues and ideas presented by delegations. This new non-paper will aim to provide a streamlined version of the previous non-paper. It will be under the Chair's full responsibility and is not meant to preclude delegations from raising issues that may not be addressed in it.

12. The Chair intends to devote the fourth session of the Preparatory Committee to the consideration of the draft recommendations and the report of the Preparatory Committee to the General Assembly.

13. Delegations are encouraged to continue organizing side events and workshops both prior to and during the fourth session of the Preparatory Committee in order to make further progress on those issues that require further discussion.

14. The Chair intends to convene a preparatory meeting before the fourth session of the Preparatory Committee on 30 May.

[3] Chair's non-paper on elements of a draft text of 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 and its supplement, available at: http://www.un.org/depts/los/biodiversity/prepcom.htm.

Annex I

Oral reports of the Facilitators of the Informal working groups to the plenary

Appendix 1

Informal working group on marine genetic resources, including questions on the sharing of benefits

Oral report of the Facilitator to the plenary
(Tuesday, 4 April 2017)

Mr. Chair,

It is my pleasure to report to you on the discussions of the Informal working group on marine genetic resources, including questions on the sharing of benefits. The Informal working group met on Monday, 27 March, and Tuesday, 28 March.

The mandate of the Informal working group was to focus on the issues that were identified at the second session of the Preparatory Committee as requiring further discussions as reflected in the Chair's understanding of possible areas of convergence of views and possible issues for further discussion. These issues were related to three main clusters, namely:

- guiding principles;
- scope and definitions; and
- access and benefit-sharing.

I was pleased with the spirit of cooperation and the solution-focused disposition with which delegations engaged in the discussions on marine genetic resources, including questions on the sharing of benefits. This is particularly true of the exchange of views on how benefit-sharing may be effectuated through an international instrument.

Before taking each cluster of issues in sequence, let me say that I do not intend to provide a comprehensive summary of the extensive and complex discussions that took place, but will rather give an overview of the main issues discussed, the general trends and the areas which could benefit from further focus.

Guiding principles

With regard to guiding principles, discussions focused on the legal regime applicable to marine genetic resources of areas beyond national jurisdiction with views still divergent on the applicable legal regime, namely the common heritage of mankind or the freedom of the high seas. Different views were also expressed as to whether the common heritage of mankind and the freedom of the high seas are mutually exclusive or could apply concurrently in an international instrument, for example by applying the common heritage of mankind to the marine genetic resources of the Area and the freedom of the high seas to

marine genetic resources of the high seas and leaving for further definition the regime for the resources straddling/overlapping both the high seas and the Area or the high seas and the continental shelf beyond 200 nautical miles.

Different views were also expressed regarding the application of the concept of common concern of humankind.

Finally, views also remain divided on whether or not it is necessary to reach agreement on the applicable legal regime in order to consider a possible access and benefit-sharing regime.

Going forward, it would be useful to consider what other guiding principles and approaches are applicable to marine genetic resources, including questions on the sharing of benefits, and how to progress on this topic in light of the continued and principled divergence regarding the applicable legal regime.

Scope and definitions

Turning to the issue of the scope and definitions, while there seems to be a general recognition of the need to include fish in the scope of marine genetic resources as far as it is used for its genetic properties, there remains some divergence regarding the inclusion of fish used as a commodity as it is the subject of regulation in a number of other legal instruments. A proposal was made to establish a scientifically informed threshold for extraction activities pursuant to which if a particular resource or a number of resources were harvested beyond a certain amount, it should be considered a commodity. In my assessment, it could be useful to further discuss the practical consequences of such approach, thus moving beyond the definitional issue.

Different views also continued to be expressedwith regard to whether to include derivatives or not in the scope of an instrument, as well as on whether access to resources *ex situ, in silico* and genetic sequence data should be included in an access and benefit-sharing regime. These issues thus clearly require further discussion. Information on the experiences of other fora where such issues are being or have been discussed could be beneficial in that regard.

Access and benefit sharing

Good discussionswere held on the cluster of issues related to access and benefit-sharing and a number of concrete ideas and proposals were put forward.

Specifically, on access, there seemed to be some convergence on the need to not hinder, but rather promote, marine scientific research and to facilitate access to marine genetic resources. While the importance of sharing of information and knowledge, as well as the dissemination of results from such research was generally underscored, different views were expressedconcerning whether access should be regulated and, if so, to what extent. Suggestions ranged from the institution of a notification requirement, to a prior informed consent procedure, access permits and fees, and conditioning access to payments to a

benefit-sharing fund. The need to take into account whether an activity is causing harm to the marine environment in considering whether to regulate access or not was also underlined. Furthermore, the suggestion was made to prioritize some uses of marine genetic resources, such as those beneficial to food security and improvement.

Discussions also took place on whether to distinguish between marine scientific research and bioprospecting, with suggestions to only regulate access to marine genetic resources for bioprospecting. The difficulty of distinguishing between marine scientific research and bioprospecting was however noted. It was also stressed that agreeing on a definition of marine scientific research had not been possible during the negotiations of the United Nations Convention on the Law of the Sea (UNCLOS) and the term had therefore been left undefined.

Generally, the issue of access seemed increasingly intertwined with modalities for benefit-sharing. It is also linked to the issue of the scope of marine genetic resources under an international instrument. In that context, it may be useful to further discuss practical ways in which access could be facilitated to various resources – that is, resources *in situ*, *ex situ*, *in silico* and to genetic sequence data, and the related benefits. I note, in that regard, that a number of suggestions were made on how to facilitate access. This included, for example, the promotion of capacity-building, transfer of technology, the sharing of information and data, as well as access to samples. References were also made to common pool resources. Further discussions on thesesuggestions could be useful.

Mr. Chair,

This takes me to the issue of benefit-sharing modalities, for which very concrete proposals were made.

First, while there seemed to be a convergence on the principle of benefit-sharing, different views were expressed on its scope, more specifically regarding the inclusion of marine genetic resources of the water column beyond areas of national jurisdiction in a benefit-sharing mechanism. I note that this issue is intrinsically linked to the principles issue and may be better discussed at a later stage in that context.

While there were many commonalities on the kind of non-monetary benefits that could be shared, different views continued to be expressed on whether to include monetary benefits or not in a benefit-sharing mechanism.There seemed to be openness in further considering suggestions to depart from the dichotomy between monetary and non-monetary benefits and to focus on the different stages at which benefits became available. In that regard, it was noted that different benefits would be available at the collection stage, the analysis stage and the utilization stage. Another suggestion was made, in light of the difficulty of determining the commercial value of marine genetic resources at the early phases of research, to consider the use of “earn-out provisions”, common in commercial transactions.

Going forward, further discussions on these practical suggestions could be useful.

Next, with regard to specific modalities of benefit-sharing, the number of references that were made to existing instruments and processes suggests that these could be further explored, including:

- the provisions of UNCLOS related to marine scientific research and the transfer of marine technology as well as article 82;
- the International Seabed Authority, with capacity-building and transfer of technology as preconditions for permits to explore and exploit the Area's resources; and
- the Nagoya Protocol, the International Treaty on Plant Genetic Resources for Food and Agriculture and the WHO PIP Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits, with the establishment of a global multilateral benefit-sharing mechanism.

There seemed to be some convergence on the establishment of a clearing-house mechanism, as well as on the functions that such a mechanism could perform. In that regard, the need to make use of existing mechanisms was also highlighted. Suggestions were also made to establish a benefit-sharing fund and ways to replenish the fund, but there are still divergent views on such a fund.

There seemed to be a general recognition of the need to take into account the special circumstances of specific groups of States, such as SIDS, coastal African States, least developed countries and land-locked developing countries in benefit-sharing modalities.

With regard to the role of traditional knowledge, a suggestion was made that there should be a requirement to seek prior informed consent for accessing traditional knowledge, with benefits accruing for the holders of such traditional knowledge.

Suggestions were also made on how to address traceability for the purpose of monitoring the utilization of marine genetic resources of areas beyond national jurisdiction, including an obligation to register activities in areas beyond national jurisdiction, the issuance of a compliance certificate modelled on the certificate under the Nagoya Protocol, and a requirement for mandatory disclosure of source or origin in patent applications. Different views continued to be expressed regarding the extent to which intellectual property rightsshould be addressed in an instrument.

Going forward, there may be merit in fleshing out practical issues relating to benefit-sharing modalities, such as the types of benefits which might accrue and at what stages, who might be required to share benefits, who might the beneficiaries be, how might the shared benefits be used, how a prior informed consent requirement may work in practice, the modalities for monitoring the utilization of marine genetic resources, including issues related to a potential compliance certificate, as well as what kind of institutional arrangements might be required to administer an access and benefit-sharing regime. It would also be useful to consider the interlinkages between issues relating to marine genetic resources, including questions on the sharing of benefits, with other elements of the package of issues that are under consideration by the Preparatory Committee. I note, in particular, that issues related to a clearing-house mechanism and a fund were also extensively discussed in the context of the Informal working group on capacity-building and the transfer of marine technology.

Mr. Chair,

This takes me to the end of my report on the discussions of the Informal working group on marine genetic resources, including questions on the sharing of benefits. As I mentioned when I started, this report is not meant to be an exhaustive summary of discussions. It is, rather, a reflection of my assessment of where the discussions stand at this stage and, in particular, of the issues which may require further discussions in order to move forward.

I wish to thank delegations for their cooperative spirit during the discussions.

I thank you for your attention.

Appendix 2

Informal working group on measures such as area-based management tools, including marine protected areas

Oral report of the Facilitator to the plenary
(Wednesday, 5 April 2017)

Mr. Chair,

It is my pleasure to report to you on the discussions of the informal working group on measures such as area-based management tools (ABMTs), including marine protected areas (MPAs).

The Informal working group met on Tuesday, 28 March, and Wednesday, 29 March.
This Informal working group was mandated to consider the topic of measures such as area-based management tools, including marine protected areas.

The Informal working group provided an opportunity for delegations to express their views on a number of issues relating to the topic at hand, including four clusters of issues identified by the Prep Com Chair as possible issues requiring further discussion, namely:

- Objectives of ABMTs, including MPAs;
- Definitions of ABMTs, including MPAs, and other relevant terms;
- Processes for proposing and identifying ABMTs, including MPAs, and associated decision-making; and
- Guiding principles and approaches.

While the discussions on the issues at hand have not been exhausted, delegations had an opportunity to delve deeper into and reflect on some of the specific questions that may need to be further addressed when considering ABMTs, including MPAs, in the context of an international legally binding instrument. Before taking each cluster of issues in sequence, let me say that I do not intend to provide a comprehensive summary of the extensive discussions that took place, but will rather give an overview of the main issues discussed, the general trends and the areas which could benefit from further focus.

<u>Objectives</u>

In relation to objectives, ABMTs, including MPAs, were seen as a tool to contribute to the overall objective of conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, and it was suggested that in the case of MPAs the focus would be on long-term conservation.

It was also generally recognized that ABMTs are possible tools within a broader suite of management measures to achieve these objectives, and that in some cases ABMTs may not be the most suitable tools. It was acknowledged that the full range of available area-based tools would need to be considered, including marine spatial planning and integrated ocean management, as well as ABMTs used by existing regional and sectoral bodies. Discussions

indicated that MPAs should be based on clear ecological criteria and that ABMTs generally should have defined management objectives, follow an ecosystem-based approach, be based on the best scientific information available and the precautionary approach, consider socioeconomic implications and be adaptable to changing circumstances. There was a sense that there would be a need to provide for different categories of ABMTs and MPAs, with some marine reserves and some areas where sustainable use was allowed.

More specific objectives that were mentioned during the discussions included: enhancing cooperation and coordination amongst relevant existing bodies - also considered a tool to achieve the objectives; the rehabilitation and restoration of ecosystems and biodiversity, including with a view to enhancing productivity, health and promoting resilience to multiple stressors, including those related to climate change and ocean acidification; supporting the efforts of adjacent coastal States in the management of areas within national jurisdiction; the establishment of effectively managed, ecologically representative networks of MPAs; supporting food security and other socioeconomic objectives; and intergenerational equity. References were also made to assisting the implementation of the obligations of States under Part XII of the United Nations Convention on the Law of the Sea (UNCLOS), as well as of the commitments under internationally-agreed targets, such as Sustainable Development Goal 14 (SDG 14) and the Convention on Biological Diversity (CBD) Aichi Biodiversity Targets.

Going forward, these issues merit further consideration, including on possible objectives for the full range of ABMTs, including MPAs.

Definitions

Discussions on possible definitions of ABMTs, MPAs, and other relevant terms indicated that specific definitions may better be identified following agreement on the substance of the instrument. It was also suggested that clarity on the purpose for including such definitions would be a prerequisite. While ABMTs and MPAs may need definitions in the instrument, other terms were seen as less likely to.

Discussions indicated that, if needed, a definition of MPAs could be based on definitions already included in existing instruments and practice. There was no universally accepted definition of ABMTs, and it was recognised that many types of ABMTs with distinct purposes are being used in different contexts under existing frameworks. Therefore a functional approach based on practice could be followed to define ABMTs, with a view to avoiding undermining existing tools. In general, it was felt that any definition of ABMTs could incorporate the following: the tool's objective, a geographical/spatial element, and a management or function element.

It would be useful to have further discussion on other subcategories of ABMTs.

Processes

Discussions with regard to the processes for the establishment of ABMTs, including MPAs, were very rich. References were made to the need for a clear process, driven by the objectives of an international instrument and flexible enough to accommodate evolving threats and pressures, as well as new uses of the ocean.

The discussions on that topic focused primarily on the nature and possible steps of a process. The Chair's non-paper and its supplement were referred to extensively in that context as they reflect, in great detail, the various proposals made on possible elements of a process. I will not present all those proposals in detail, but wish to highlight the different approaches that seem to be emerging, as well as the points that, in my assessment, could merit further discussion during plenary.

Generally, the following broad steps of a process were highlighted: identification of areas requiring protection or management, proposal, evaluation, decision-making, implementation, as well as monitoring and review.

During the discussions, a number of commonalities emerged regarding the steps involved.

In terms of *identification of areas requiring protection*, there seemed to be some convergence on the need to use existing scientific standards and criteria. However, it was also noted that these would need to be adapted to the objectives and purposes of an international instrument. Criteria such as uniqueness and rarity of the areas, vulnerability, fragility, sensitivity of the area, biological or ecological productivity and diversity, representativeness, dependency and naturalness were mentioned during the discussions, as were the need to incorporate socioeconomic concerns, traditional knowledge as well as elements of intra and inter-generational equity.

In terms of the *proposals*, there also seemed to be some commonalities on the elements to be included in a proposal to establish an ABMT, including the following: geographic/spatial description, threats/vulnerabilities and values, objectives, existing measures in the area or areas adjacent to it, specific human activities to be managed, and monitoring and review plans. The primary role of States, individually or collectively, in making proposals was highlighted, with references also made to a potential role for other stakeholders in contributing to proposals. The temporal scope of the measures was also discussed.

In terms of the *evaluation process*, there seemed to be some convergence on the need to have broad consultations, through a process which would include relevant global, regional and sectoral bodies, adjacent coastal States, and other relevant stakeholders.

In terms of the basis for *decision-making*, there seemed to be some convergence on making decisions based on the best available scientific knowledge/information, following a process of scientific assessment, as well as taking into account regional perspectives and traditional knowledge.

With regard to implementation, there seemed to be some convergence towards the responsibility of flag States to ensure implementation of the measures adopted for a particular area.

The need for *monitoring and review* mechanisms was also discussed, as means to assess the effectiveness of the ABMTs and to evaluate the need of maintaining them, suspending them or adopting additional measures in line with an adaptive management approach.

While there were commonalities regarding the steps in the process, a number of issues may require further discussions, in particular regarding the roles and responsibilities in

undertaking those steps, namely: how would potential areas be identified; who could be included in the evaluation process for ABMT and MPA proposals, including stakeholder consultations; how would scientific advice be provided; who would be making the decision to designate an ABMT or MPA; what decisions would be taken at the global level, at regional and/or sectoral levels under existing or amended mandates, or by States themselves at the national level; what role, if any, there would be for adjacent States; how would decisions be taken, by consensus only or also by a qualified majority; and who would undertake the monitoring and review.

Another issue that was raised in the discussions is how to address issues of compatibility with the measures adopted by adjacent States. As regards implementation, the responsibility of regional/sectoral bodies may require further discussion.

This leads me to the underlying issue that would require further discussions in terms of process, namely: what may be the most appropriate decision-making and institutional set up, with a view to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks and the mandates of regional and/or sectoral bodies. In that regard, different views continue to be expressed and three main approaches were put forward as follows:

- One approach, which could be termed the “global model”, envisages that a global institution would be given the mandate to consider proposals for ABMTs, including MPAs. It would, with the assistance of a subsidiary scientific or technical body and a mechanism for stakeholder consultations, take decisions on the establishment of such areas, possibly through a conference of the parties; monitor and review implementation by sectoral/regional bodies; and monitor compliance. This approach also foresees the enhancement of cooperation and coordination through consultations with existing regional and sectoral mechanisms. ABMTs adopted by existing regional and sectoral mechanisms could go through a process of recognition by the global mechanism.

- The second approach could be termed a “hybrid model”, under which the scientific and technical expertise and decision-making mandates of regional and sectoral organizations in the establishment of ABMTs would be relied upon and reinforced, possibly through regional coordination mechanisms. At the same time, at the global level, general guidance and objectives would be developed, building on existing knowledge and the exchange of information between stakeholders, to enhance cooperation and coordination and provide a level of oversight to the decision-making and implementation by regional and/or sectoral mechanisms.

- A third approach would rely on a “regional and/or sectoral model”, which envisages that general policy guidance to promote cooperation and coordination could be provided under the new instrument at the global level, while recognising the full authority, without oversight from a global mechanism, of regional and sectoral organizations in decision-making, monitoring and review. This approach considers that regional and sectoral bodies represent the most efficient mechanisms to regulate activities in ABNJ, including through ABMTs, as they have the knowledge and expertise necessary for the adoption of measures.

While these are the three major approaches discussed, I wish to note that different delegations placed slightly different emphasis on the elements of each approach, which I could not capture in detail in this general report.

In my view, Mr. Chair, it may be beneficial to continue discussing these different approaches and the proposed allocation of roles and responsibilities within them, including how to deal with existing regional and sectoral measures, with the goal of identifying strengths and weaknesses in each approach and building a better understanding of the possible options.

Guiding principles and approaches

Finally, Mr. Chair, in relation to guiding principles and approaches, there seemed to be some convergence around the importance of a number of principles and approaches. I do not wish to provide an exhaustive list of all those that were mentioned during the discussions, but allow me to mention those most frequently referred to, including: cooperation and coordination, as provided for under UNCLOS; the use of best available scientific knowledge/information, including traditional knowledge; the precautionary approach; an ecosystem approach; and integrated and adaptive approaches. The need to respect the sovereign rights of coastal States over their continental shelf beyond 200 nautical miles was acknowledged. Reference was also made to the need to avoid a disproportionate burden of conservation and management measures for SIDS.

There was also some commonality around the need to apply principles of good governance, such as: transparency, accountability, inclusiveness, public participation and public access to environmental information.

Going forward, there would be merit in further discussing how best to give effect to the various principles. It would also be useful to consider the interlinkages between measures, such as ABMTs, including MPAs, with other elements of the package of issues that are under consideration by the Preparatory Committee, including environmental impact assessments and capacity-building and the transfer of marine technology.

I wish to thank all delegations for their constructive engagement in the Informal working group.

Thank you Mr. Chair.

Appendix 3

Informal working group on environmental impact assessments

Oral report of the Facilitator to the plenary
(Wednesday, 5 April 2017)

Mr. Chair,

It is my pleasure to report to you on the discussions of the Informal working group on environmental impacts assessments (EIAs), which I had the honour of facilitating.

The Informal working group met on Wednesday, 29 March, and Thursday, 30 March.

The mandate of the Informal working group was to focus on the issues identified at the second session of the Preparatory Committee as requiring further discussions. In order to facilitate discussions, I organized these issues into five main clusters, namely:

- Geographical scope;
- Trigger for EIAs;
- Procedural steps;
- Governance; and
- Strategic environmental assessments and other issues.

The Informal working group had a good, constructive and substantive exchange of views, which assisted in better understanding how the issue of EIAs may be addressed in an international instrument. During the discussions, some further areas of convergence seemed to emerge. However, there are a number of issues that still require further discussion.

The discussions also benefitted from the proposals that had been submitted by participants as reflected in the Chair's non-paper and its supplement.

Before taking each cluster of issues in sequence, let me say that I do not intend to provide a comprehensive summary of the complex discussions that took place, but rather an overview of the main issues, as well as the general trends, and areas which could benefit from further discussions.

Geographical scope

With regard to the geographical scope, there seems to be general recognition that an international instrument should cover activities conducted in areas beyond national jurisdiction that have an impact therein and should exclude activities conducted within areas of national jurisdiction that have impacts only in those areas.

The question of whether transboundary impacts should be included and whether a separate procedure is required to address transboundary environmental impact assessments requires

further discussion. Two different approaches, which are not mutually exclusive and could be combined, were put forward on how to deal with transboundary impacts:

- an "activity-oriented" approach based on the location of the activity not the location of the impacts. Under this approach an international instrument would only cover activities that are conducted in areas beyond national jurisdiction, irrespective of whether impacts might occur in areas within or beyond national jurisdiction; and
- an "impact-oriented" approach based on the location of the impact, not the location of the activity. Under this approach, an international instrument would cover activities that have impacts in areas beyond national jurisdiction irrespective of whether those activities are conducted in areas beyond national jurisdiction or in areas within national jurisdiction. The need to consider cross-sectoral and cumulative impacts was stressed in this context, as these impacts may not be covered by existing organizations.

The importance of respecting the territorial integrity and sovereignty of coastal States was underlined, as was the need to respect the rights of coastal States over their continental shelf.

There seemed to be convergence on the need to respectthe work of global, regional and sectoral bodies that have already developed frameworks or regulations on EIAs. Specific reference was made in this regard to the work of the International Seabed Authority (ISA).

Trigger for EIAs

With regard to the trigger for EIAs, there was general recognition that article 206 of the United Nations Convention on the Law of the Sea is the point of departure for discussions on thresholds for EIAs. However, guidance was needed on how to operationalize this provision in respect of areas beyond national jurisdiction. There were, however, divergent views on the form and substance of such guidance. It was suggested that guidelines could be developed, either in an annex to an international instrument or by States parties to an international instrument at a later stage.

Further discussions are required on whether the threshold approach in article 206 should be complemented by a list of activities which require or do not require an EIA. Divergent views were expressed on the utility of developing an indicative list of activities requiring an EIA. A list was considered only useful if it was flexible and could be regularly updated, in particular to address new and emerging uses and advances in technology. Arguments against a listing approach included the need to consider, as a justification for an EIA, not only the severity of the impacts, but also the area in which the activity in question was taking place and the scale of the activity.

Reference was made to the need for a special provision for EIAs in areas identified as ecologically or biologically significant or vulnerable. This issue merits further consideration.

Cumulative impacts, as well as other stressors, such as climate-induced impacts, were mentioned as factors that also needed to be taken into account in deciding whether a

threshold was met. A tiered approach, modelled on the Environmental Protocol to the Antarctic Treaty, was also suggested.

Different views were expressed on whether certain activities that were already subject to regulation under existing instruments and bodies should be subject to EIA requirements in an international instrument. These issues merit further discussion, including whether an international instrument should provide for the possibility of review of existing regulations in order to ascertain their conformity with the applicable threshold.

Finally, it is also important to consider the guiding principles and approaches for the conduct of EIAs. Reference was made to a number of guiding principles and approaches, including the precautionary principle/approach, ecosystem approach, ecosystem-based approach, science-based approach, transparency in decision-making, inter- and intra-generational equity, the obligation to protect and preserve the marine environment, stewardship, and the no-net-loss principle.

Procedural steps

With regard to procedural steps for EIAs, there seemed to be some convergence that an international instrument should include the following: screening, scoping, access to information, public notification and consultation at the global level, independent scientific review, and consideration and publication of reports. In addition, it was recognized that it would be necessary to support the collection and dissemination of baseline data for the conduct of EIAs.

There also seemed to be some convergence on the need for coordination with existing regional and sectoral organizations.

In addition, there was general recognition of the need to consult stakeholders and conduct the EIA process in an inclusive and transparent manner. Civil society, industry and competent international organizations were highlighted as examples of possible stakeholders, in addition to the States parties to an instrument.

Further discussions are needed on the nature and form of public notification and consultation at the global level, including the adequacy of web-based platforms, as well as the level at which the independent scientific review should be conducted. Further consideration is also needed on the nature and degree of involvement of the coastal State in the EIA process that may be affected in the event that transboundary impacts would be covered, including in the approval of any activity. The compatibility provisions in the United Nations Fish Stocks Agreement were cited as a useful model in that regard.

With regard to the content of EIA reports, the following components were proposed: a description of assessed activities and likelihood of impacts; consultations being undertaken; reasonable alternatives, including non-action alternative measures; the environment likely to be significantly affected; cumulative impacts; measures for avoiding, preventing, mitigating impacts; predictive methods and underlying assumptions and data used; identification of gaps of knowledge and uncertainties; an outline for monitoring and management programmes; and a non-technical summary. The components mentioned in the Espoo Convention were also cited as a useful model.

There were also divergent views on whether the costs for EIAs should be borne by the proponent of an activity, or the decision on the allocation of costs should be left to the State under whose jurisdiction the proposing entity operated. The ISA procedures on costs were cited as a possible model on this question.

Governance

With regard to governance, there seemed to be some convergence on including provisions for clear decision-making and reporting, ongoing monitoring and reviewwith respect to activities in an international instrument. However, there seemed to be some convergence of views that the creation of a list of prohibited activities should not be pursued.

With regard tothe process for making decisions on the authorization of a proposed activity, including any conditions attached, such as the adoption of compensatory measures to offset harm to the marine environment, divergent views continued to be expressed on the degree to which the process should be conducted by States or be "internationalized".

According to a suggested approach, a scientific and technical committee would review an EIA report and submit recommendations to a decision-making body, such as a Conference of the Parties,which would make a decision regarding the proposed activities. An appeal process was also proposed.

Under another suggested approach, it would be the responsibility of States parties to review EIA reports and make a decision on whether to authorize proposed activities, and under which conditions, in accordance with the guidelines or standards set out under an international instrument. Related to this approach, it was proposed that the evaluating body should also engage in regular spot checksto ensure that self-reporting by the activity's proponentwas accurate.

There were also divergent views on the issue of monitoring and review, including the role of adaptive management, with one approach favouring that an international body should perform this role under an international instrument; while another approach favoured that this role should be performed by the State, or the proponent of an activity with regular reporting to the State concerned.

The issue of compliance and liability requires further consideration, including the suggestions to provide for a reporting mechanism, a dispute settlement mechanism, or a consultative process between States parties, and to provide for the establishment of a rehabilitation fund. The distinction between compliance and liability in relation to a specific activity, on the one hand, and compliance and liability in relation to the international instrument, on the other, was explored.

These and other issues will require further discussion, including in combination with other issues being addressed in the other Informal working groups, such as those relating to cross-cutting issues.

Strategic environmental assessments

Further discussions are also required on the inclusion of strategic environmental assessments (SEAs) in an international instrument, as views remain divided.

SEAs were described as useful for, inter alia, addressing cumulative impacts and conductingsubsequent project-based EIAs. It was also suggested that the links between SEAs and marine spatial planning could be further explored.

Capacity-building and other issues

There seems to be a general recognition of the need to address capacity-building for conducting and reviewing EIAs, as well as SEAs. Reference was made to the need to avoid a disproportionate burden being placed on SIDS as a result of the obligation to carry out EIAs. More discussions are needed on how to build capacity and how to finance such activities. In order to address some aspects of capacity-building, a reference was made to the possibility of providing for joint EIAs and joint monitoring.

There also seemed to be general recognition of the usefulness of a central repository or clearing-house mechanism, for example for baseline data as well as reports of EIAs and SEAs, although details of these mechanisms, including confidentiality requirements, would require further discussions.

Going forward, it would be useful to consider the interlinkages between EIAs with other elements of the package of issues that are under consideration by the Preparatory Committee, including capacity-building and transfer of marine technology and measures, such as area-based management tools, including marine protected areas. For example, the importance of baseline information for EIAs was deemed important also for the designation of area-based management tools, including marine protected areas.

Concluding remarks

Mr. Chair,

This concludes my report on the discussions held during the Informal working group on environmental impact assessments. I would like to thank all delegations for their constructive engagement in the discussions and their support to me as Facilitator.

I thank you for your attention.

Appendix 4

Informal working group on capacity-building and the transfer of marine technology

Oral report of the Facilitator to the plenary
(Thursday, 6 April 2017)

Mr. Chair,

It is my pleasure to report to you on the discussions of the Informal working group on capacity-building and the transfer of marine technology.

The Informal working group met on Friday, 31 March, and Monday, 3 April.

The mandate of the Informal working group was to focus on the issues that were identified at the second session of the Preparatory Committee as requiring further discussions as reflected in the Chair's understanding of possible areas of convergence of views and possible issues for further discussion.

The Informal working group was invited to focus on the "how" to provide for capacity-building and the transfer of marine technology. The discussions provided an opportunity for delegations to express their views on a number of issues relating to the topic at hand, including issues related to:

- Objectives and guiding principles for capacity-building and transfer of marine technology;
- Types and modalities for capacity-building and transfer of marine technology, including issues relating to a clearing-house mechanism and funding;
- Monitoring, review and follow-up;
- Scope; and
- Design and structure.

The discussions also benefitted from the proposals submitted by participants as reflected in the Chair's non-paper and its supplement.

Before taking each cluster of issues in sequence, let me say that I do not intend to provide a comprehensive summary of the complex discussions that took place, but rather an overview of the main issues, as well as the general trends, and areas which could benefit from further discussions.

<u>Objectives and guiding principles</u>

There was convergence on the view that capacity-building and the transfer of marine technology are an essential component of an international instrument towards achieving the objective of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In that regard, there also seemed to be convergence on the view that capacity-building and transfer of marine technology should be developed on the basis of UNCLOS, in particular Part XIV, and should involve the participation of all

stakeholders, including from the private sector; be meaningful, sustainable and responsive to periodically assessed needs and priorities of developing States at regional and national levels. Comments were also made about how capacity-building and transfer of marine technology should be long-term and result in co-benefits for providers and recipients.

There also seemed to be some convergence around the view that the following duties, from UNCLOS, were relevant: the duty to cooperate and collaborate; to promote the development of the marine scientific and technological capacities of States; duty to provide scientific and technical assistance to developing countries; and to provide preferential treatment for developing countries. Additionally, there seemed to be convergence around the need to factor in the special needs of small island developing States (SIDS) and least developed countries, land-locked developing countries, geographically disadvantaged countries, coastal African States and coastal communities vulnerable to the impacts of climate change; and the specific challenges for middle income countries. A suggestion was received on using language in UNCLOS as a basis for referencing the special needs of various categories of States.

Some further consideration on whether there should be specific objectives and underlying principles for capacity-building and transfer of marine technology could be useful.

Types and modalities

With regard to the types and modalities of capacity-building and the transfer of technology, there continued to be convergence around the view that capacity-building and transfer of marine technology were cross-cutting issues to support the implementation of all elements of the package.

In addition, it was suggested that capacity-building could strengthen human and institutional capacities of developing countries (at the national and regional levels), the development and support for marine scientific research as well as science and innovation.

Types of capacity-building that were suggested included scientific, educational and technical assistance at the institutional level as well as individual development of capacity through training and scholarships, awareness-raising and knowledge-sharing related to all relevant natural and social sciences, including through training, scholarships, fellowships, grants, research cooperation, exchange programmes and collaborative research, as well as access to equipment and data. The importance of learning and benefiting from best practices of meaningful capacity-building, such as the programmes under the International Seabed Authority, and national technical assistance programmes, was highlighted. The role of traditional knowledge in contributing to capacity-building and transfer of marine technology was also underscored.

Examples were provided of what transfer of technology, both infrastructure and data/knowledge, could cover, including development of manuals; training and technical advice and assistance; development ofnecessary infrastructure and acquisition of appropriate, modern, reliable and environmentally sound technologies; access to data,

samples and knowledge, including publications, related to taxonomy; genomics; bioinformatics; and advanced geoengineering.

There were divergent views on the utility of developing a list of capacity-building and technology transfer activities for inclusion in an international instrument. It was only considered useful if it was indicative, non-exhaustive, and flexible. On the other hand, it was considered that a list might be too prescriptive and could hamper the ability to adapt to future developments. Suggestions were made that types of capacity-building and transfer of marine technology could be dealt with on a case-by-case basis, or that only general categories should be specified. There was some openness to considering the inclusion of a general requirement in an international instrument, leaving the details to be further developed by an ad hoc working group. The Working Group established under Part 6 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing was cited as a possible example.

Further discussion may be needed on whether there is a need to specify the types of capacity-building and transfer of marine technology in an international instrument and if there is a need, the modalities for doing so.

There continued to be some convergence on the need for direct or indirect capacity-building and transfer of marine technology, at all levels including, north-south, south-south, and triangular cooperation driven by the needs and priorities of target States, and facilitated through simple and accessible procedures. There appeared to be openness to considering strategic partnerships, including private-public partnerships, and in that regard, the need for incentives for private sector engagement was noted.

There continued to be some convergence on the usefulness of the definitions contained in the Criteria and Guidelines on the Transfer of Marine Technology of the International Oceanographic Commission (IOC) of UNESCO, in particular, the definition of technology, which could be adapted or revised as necessary.

Different views continued to be expressed on the terms and conditions for the transfer of marine technology. Options put forward included the transfer of marine technology: 1) without terms and conditions attached; 2) at no cost or low cost; 3) on fair and reasonable terms and conditions as well as through favourable terms and conditions; or 4) through mutually agreed upon terms and conditions. The importance of the transfer of marine technology on a bilateral basis, in addition to multilateral cooperation, was also highlighted.

Clearing-house mechanism. There was a rich discussion and concrete ideas provided on the establishment of a clearing-house mechanism. I am also aware that this issue was also touched upon in other Informal working groups.

There was convergence on the need for a clearing-house mechanism. It was suggested that such mechanism could act as a central repository for knowledge, including traditional knowledge, and data and information, and provide a means to facilitate training and networking and a method for matching needs and opportunities for capacity-building and transfer of marine technology.

There is merit in further exploring what kinds of information would go into a clearing-house mechanism in the context of capacity-building and transfer of marine technology. For example, whether the focus should be on information on capacity-building or technology transfer programmes and activities, information on the needs and priorities of users, etc. An understanding of what goes into the clearing-house mechanism for the purposes of capacity-building and transfer of marine technology, will help to inform discussions on how such a clearing-house mechanism could be designed, for example whether there should be one or more clearing-house mechanisms provided for in an international instrument, who can access the mechanisms and who should manage the mechanism.

There seemed to be openness to considering whether it could be a global system, linking clearing-house mechanisms networks at the global, regional and national levels and providing a central "one stop shop" access to information. The possibility of having several clearing-house networks, such as regional networks, with hyperlinks to each other was also mentioned.

There seemed to be some convergence around the view that the modalities for capacity-building and transfer of marine technology, including a clearing-house mechanism, could build on existing instruments, mechanisms and frameworks such as Part XIV of UNCLOS, the IOC Criteria and Guidelines on the Transfer of Marine Technology, the work of the International Seabed Authority, the Nagoya Protocol of the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change and the Paris Agreement. The need to build upon and not duplicate existing mechanisms, such as the Ocean Biogeographic Information System, was noted.

Whether a new clearing-house mechanism should be established under an international instrument or whether to build on and strengthen existing ones may require further discussions. To assist the discussions, it was suggested that a report from the IOC of UNESCO, in particular on how its clearing-house mechanism could be utilized for the purposes of the new instrument and why the mechanism is not yet operational, would be useful in advance of the fourth session of the Preparatory Committee. There were also suggestions about the need for a report or inventory of existing processes in relation to capacity-building and transfer of marine technology.

Funding. There seemed to be convergence on the need for sustainable funding. The point was raised that modalities for a funding mechanism under an international instrument should be readily and easily accessible to developing countries, in particular SIDS, with streamlined application processes.

There were divergent views on the kind of funding mechanism that could be established. Different options mentioned included: a dedicated fund linked to existing funding mechanisms, a discrete fund with a combination of mandatory and voluntary funding, a Global BBNJ Trust Fund, or an entirely voluntary mechanism. The important role of the Endowment Fund under the International Seabed Authority was highlighted. Reference was also made to the possibility of utilizing existing funding mechanisms, such as the Global Environment Facility.

There were divergent views on the need for a mandatory funding mechanism that would be linked to access and benefit-sharing and funded through, for example, mandatory contributions, fees or royalties associated with the utilization of marine genetic resources, and/or fees for the approval process for environmental impact assessments, and penalties for non-compliance with environmental impact assessments.

On the issue of funding, further discussions may be needed in relation to the sources of funding, including the question of whether a new fund/funds should be established or whether existing funds can be utilized. A better understanding of what existing funds there are may be helpful to this discussion.

A point was raised that intellectual property rights (IPRs) should not constitute a barrier to capacity-building and transfer of marine technology. Divergent views were expressed on whether or not to address IPRs in this context. The extent to which IPRs should be included/factored into a new instrument may require further consideration.

Monitoring, review and follow-up

Discussions considered what is to be monitored or reviewed and who is to undertake such monitoring or review. There seemed to be some recognition that monitoring and review would be instrumental for measuring the success of capacity-building and the transfer of marine technology. Suggested modalities for such a process included a regular or periodic, transparent review process to assess progress, using quantitative and qualitative indicators and carried out through joint collaborative efforts; a peer review process; a conference of the parties or assembly of States; or regional centers. Reference was made to the need for any reporting requirements to be streamlined and not onerous, in particular for SIDS.

The monitoring, review and follow-up process could be further explored, including from an institutional perspective, while recognizing that the question of monitoring and review of an international instrument as a whole is also being discussed in the context of cross-cutting issues.

Scope and design and structure

Two options were put forward on how capacity-building and transfer of marine technology, as a cross-cutting issue, could be addressed in an international instrument: 1) to mainstream capacity-building and transfer of marine technology across the various elements of the package in an international instrument; or 2) to include a dedicated section which would focus on the various elements with links to the other sections. Views were expressed regarding the need to understand the substantive provisions in the other elements before consideration of how linkages may be built. The issue of how the linkages may be expressed within the international instrument merits further consideration.

Mr. Chair,

This concludes my report on the discussions held during the Informal working group on capacity-building and transfer of marine technology. I would like to thank all delegations for their constructive engagement in the discussions and their support to me as Facilitator.

I thank you for your attention.

Appendix 5

Informal working group on cross-cutting issues

Oral report of the Facilitator to the plenary
(Thursday, 6 April 2017)

It is my pleasure to report to you on the discussions of the Informal working group on cross-cutting issues. The Informal working group met on Monday, 3 April, and Tuesday, 4 April.

The mandate of the Informal working group was to focus on the issues that were identified by the Chair at the second session of the Preparatory Committee as requiring further discussions, as reflected in the Chair's understanding of possible areas of convergence of views and possible issues for further discussion. These issues were related to seven main clusters, namely:

- Scope and relationship with UNCLOS and other instruments;
- Institutional arrangements;
- Review, monitoring and compliance;
- Responsibility and liability;
- Dispute settlement;
- Final elements; and
- Objectives and guiding principles and approaches.

Before taking each cluster of issues in sequence, let me say that I do not intend to provide a comprehensive summary of the extensive and complex discussions that took place, but will rather give an overview of the main issues discussed, the general trends and the areas which could benefit from further focus.

I also wish to indicate, at the outset, that it was noted that while the discussion of cross-cutting issues was useful, greater clarity on the substantive issues concerning the elements of the package would be requiredto allow in-depth discussion of cross-cutting issues.

<u>Scope and relationship with UNCLOS and other instruments</u>

With regard to the scope of an international instrument, there was convergence around the idea that an international instrument should address the so-called "package of issues", as reflected in resolution 69/292.

With regard to the geographical scope, there was convergence on the idea that an international instrument would apply to the high seas and the Area as defined in UNCLOS. In that regard, proposals were made to include a specific provision excluding the continental shelf, both within and beyond 200 nautical miles, from the scope of application of an instrument, in order to ensure respect for the sovereign rights of coastal States. With regard to the personal scope of an international instrument, there was general recognition that an instrument should be open to both Parties and non-Parties to the United Nations

Convention on the Law of the Sea (UNCLOS) with the aim of achieving universality. References were also made to the participation of international organizations. Different views continued to be expressed, however, regarding whether an international instrument should only apply to activities taking place in areas beyond national jurisdiction or whether it should also apply to activities that have the potential to have impacts in areas beyond national jurisdiction even if undertaken in areas within national jurisdiction.

The suggestion was made to clarify that any measure adopted under the instrument would be without prejudice to existing land or maritime sovereignty disputes or to disputes concerning the delimitation of maritime areas, and reference was made to the Guidelines annexed to the Resolution of the Executive Council of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC) on the deployment of profiling floats in the high seas, in the framework of the ARGO programme.

In terms of the relationship of an international instrument with UNCLOS, there was convergence that an international instrument should be without prejudice to the rights, jurisdiction andduties of States under the Convention and that the instrument should be interpreted andapplied in the context of and in a manner consistent with the Convention. In that regard, article 4 of the United Nations Fish Stocks Agreement was cited as a possible approach.The need to also address the relationship of a new instrument with the two implementing agreements under the Convention was also noted. It was further suggested that participation in the instrument should not affect the status and rights of non-Parties to UNCLOS.

With regard to the relationship of an international instrument with other instruments and with regional and sectoral bodies, there was convergence that, as provided in resolution 69/292, an international instrument should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. However, different understandings were given of the meaning of “not undermining”. Different views were also expressed regarding whether relevant existing bodies should report or be accountable to an institutional arrangement established under the instrument and how to address the situation where no regional or sectoral organization exists. Suggestions were made to get inspiration from article 8 of the United Nations Fish Stocks Agreement to address such situations.

Going forward, it would be useful to further consider how to articulate the relationship between a new instrument and the arrangements established thereunder with relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

Institutional arrangements

This takes me to the cluster of issues related to institutional arrangements for which very concrete and detailed proposals were made, as also reflected in the Chair’s non-paper and its supplement, which were referred to by delegations during the discussions. While I cannot provide all the details of those proposals through this brief oral report, the main ideas were as follows.

There seemed to be some convergence around the fact that the form of institutional arrangements under an international instrument should follow the substance and functions set out under the instrument, and be cost effective.

I note that there were many commonalities regarding the various institutions that might be needed under an international instrument, as well as the functions that they might perform. These, it was generally suggested, should include, at the very least: an assembly or conference of the parties, a scientific and/or technical body and a secretariat. There also seemed to be convergence in regard of the development of a clearing-house mechanism. Different views were expressed, however, with regard to the necessity of establishing other bodies, such as a capacity-building and transfer of technology committee, a monitoring, review and compliance committee, and regional scientific committees.

There seemed to be general recognition that existing institutions and mechanisms should be built upon. Specific references were made, in that regard, to the International Seabed Authority, the Division for Ocean Affairs and the Law of the Sea, and the IOC, in particular, depending on the functions that would be performed.

I note that the discussions on institutional arrangements also touched upon the issue of the relationship between the institutions established under an international instrument and relevant existing sectoral and regional bodies. In that regard, there were three main approaches suggested – and I note that these different approaches also emerged in the context of discussions on area-based management tools, including marine protected areas. These included:

- a global model with scientific advice, decision-making, review and monitoring of implementation done at the global level;
- a hybrid model with general guidance, criteria and standards set at the global level and a reliance on regional and sectoral organizations for scientific advice and implementation and compliance, with a level of oversight as regards decision-making and implementation at the global level; and
- a regional or sectoral approach envisaging a global mechanism that would aim at facilitating coordination and cooperation while leaving regional and sectoral bodies with the full authority to decide on measures and ensure follow-up and review of implementation.

Further discussions may be useful on these various approaches, including their strengths and weaknesses, including as they apply to each element of the package.

Review, monitoring and compliance

With regard to review, monitoring and compliance, I have to stress that this is a particular issue where delegations noted the need for more clarity on the substance of an international instrument before being able to address the issue comprehensively.

Nonetheless, there seemed to be some convergence on the need to undertake periodic reviews of the effectiveness of the instrument in achieving its objectives akin to the reviews

undertaken pursuant to article 154 of UNCLOS and article 36 of the United Nations Fish Stocks Agreement.

Different views were expressed, however, on whether and how to review and monitor implementation by States Parties and regional and sectoral bodies and ensure compliance. Suggestions, in that regard, ranged from voluntary or mandatory reporting to the establishment of compliance mechanisms. The need to make reports publicly available and allow all interested stakeholders, including civil society, to comment on those reports was highlighted.

With regard to compliance mechanisms, the need to further consider the overall approach or purpose, i.e. facilitative or punitive, as well as issues such as the triggers, decision-making and follow-up was raised. Whether review, monitoring and compliance should be done at the global or regional level was also the subject of divergent views.

There may be merit in further considering these issues, while recognizing that greater clarity on the substance would be needed before significant advances can be made on this topic.

Responsibility and liability

Discussions also took place on issues related to responsibility and liability. Different views were expressed on whether provisions on responsibility and liability should be included in an international instrument. References were made, in that context, to articles 235 and 304 of UNCLOS as sufficiently addressing these issues. Article 35 of the United Nations Fish Stocks Agreement was cited as a possible model.

It was recognized that the International Law Commission Draft articles on the responsibility of States for internationally wrongful acts, which were considered to reflect customary international law, sufficiently addressed the responsibility issue. Suggestions were made, however, that an instrument could reflect the relevant content of the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

With regard to liability, it was noted that, in accordance with the polluter-pays principle, those responsible for polluting the marine environment in areas beyond national jurisdiction should be responsible for paying for the damage. References were made, in that context, to the work of the International Law Commission on international liability in case of loss from transboundary harm arising out of hazardous activities. There were also discussions around the establishment of a rehabilitation fund and a contingency fund or a single fund for the purposes of providing compensation for restoration activities and damages caused by disasters.

Further discussion may be needed on how to address liability for damage to marine biodiversity of areas beyond national jurisdiction.

It was noted that further consideration of the topic of responsibility and liability would also benefit from greater clarity on the elements of the package.

Dispute settlement

With regard to dispute settlement, there was general recognition that disputes should be prevented and that those that might arise from an international instrument should be resolved peacefully in accordance with the Charter of the United Nations and UNCLOS. There also seemed to be some commonalities on getting inspiration from the dispute settlement provisions found in the United Nations Fish Stocks Agreement, including in relation to disputes of a technical nature.

Suggestions regarding models and institutions for the settlement of disputes included the International Court of Justice, ITLOS, including the establishment of a special chamber of the Tribunal, arbitral tribunals and special tribunals for disputes of a technical nature. The issue of standing of entities other than States in proceedings was also raised.

The possibility to request advisory opinions from ITLOS was discussed, with diverging views as to who might be entitled to make such requests.

As is the case with some of the other cross-cutting issues, greater clarity on the substance of an international instrument would be required to further advance on this issue.

Final elements

With regard to final elements, while there was some convergence that final clauses would be better addressed at a later stage during an intergovernmental conference, it was also noted that the final clauses included in the United Nations Fish Stocks Agreement provided helpful guidance, including as regards participation, entry into force and provisional application.

Whilesome support was expressed for aprovisional application of an international instrument, it was also noted that clarity was first needed with regard to the obligations that would be includedin the instrument in order to assess whether provisional application was feasible.

Objectives and guiding principles and approaches

With regard to objectives, there is general recognition that the objective of an instrument is the conservation and sustainable use of biological diversity of areas beyond national jurisdiction.

A number of guiding principles and approaches were highlighted but no detailed discussion could be held owing to time constraints.

Brief discussions also took place on how to reflect these principles and approaches in an international instrument. Suggestions included presenting them in a preamble, identifying

them in the operative provisions and giving them a practical effect through the provisions of the instrument.

Going forward, it could be useful to further discuss how the various principles and approaches could be featured in an international instrument as well as how they might be applied in the context of the various elements of the package.

Distinguished delegates,

This takes me to the end of my report. As I mentioned when I started, this report is not meant to be an exhaustive summary of discussions. It is, rather, a reflection of my assessment of where the discussions stand at this stage and, in particular, of the issues which may require further discussions in order to move forward.

I wish to thank all delegations for their constructive engagement in the Informal working group.

Annex II

Chair's general observations

1. The Chair is pleased with the broad attendance at the third session of the Preparatory Committee established by General Assembly resolution 69/292: Development of 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. Such attendance was partly facilitated by the contributions made to the Voluntary Trust Fund established pursuant to paragraph 5 of resolution 69/292, as a result of which assistance could be provided to representatives from developing countries to participate in the third session.

2. The Chair thanks all delegations for their hard work and constructive engagement during the intersessional period and at the third session of the Preparatory Committee. In particular, the Chair is encouraged by the concrete proposals and ideas reflected in the written submissions sent to him prior to the third session of the Preparatory Committee and in the statements made at that session. The Chair is of the view that these proposals and ideas have greatly assisted in gaining a better understanding of delegations' positions on various issues and also in identifying additional areas of convergence of views and issues requiring further discussion. The Chair observes that, under the very skilful guidance of the Facilitators, the Informal working groups have continued to make progress in unpacking the package of issues to be considered by the Preparatory Committee in accordance with resolution 69/292, in a transparent and inclusive manner. The Facilitators' oral reports provide a useful overview of the main issues discussed during the third session, and the Facilitators' assessment of the general trends and the areas which could benefit from further focused discussions also facilitated the subsequent consideration of the issues in the plenary. Although the plenary sessions provided an opportunity to further delve deeper into and reflect on specific issues, the Chair considers that the possible areas of convergence and issues for further discussion indicated in the Facilitators' oral reports remain pertinent.

3. The Chair encourages delegations to engage in consultations in the intersessional period on the issues which require further discussion, with a view to ensuring that the Preparatory Committee can deliver on its mandate at the fourth session of the Preparatory Committee.

4. In relation to marine genetic resources, including questions on the sharing of benefits, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including those relating to guiding principles and scope, as well as access and benefit-sharing modalities, including the different benefits that may be had at various stages, who might be required to share benefits, who might the beneficiaries be, and how might the shared benefits be used; issues relating to monitoring the utilization of marine genetic resources, including issues related to traceability; and what kind of institutional arrangements might be required to administer an access and benefit-sharing regime.

5. With regard to measures such as area-based management tools (ABMTs), including marine protected areas (MPAs), the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including additional consideration of the subcategories of ABMTs, other than MPAs, as well as the relevant decision-making process and institutional set up for the establishment of ABMTs, including MPAs, taking into account the different approaches that have been put forward and the proposed allocation of roles and responsibilities within each approach, including how to deal with existing regional and sectoral measures.

6. In relation to environmental impact assessments, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including how to address transboundary impacts; the form and substance of guidance on operationalizing article 206 of UNCLOS, in particular as regards thresholds, and the relationship with existing regulations; issues related to governance, including the degree to which the process should be conducted by States or be "internationalized"; and whether strategic environmental assessments should be included.

7. On capacity-building and the transfer of marine technology, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including on: whether there is a need to specify the types of capacity-building and transfer of marine technology in an international instrument and, if there is such a need, the modalities for doing so; the terms and conditions for transfer of marine technology; the form and content of a clearing-house mechanism; issues relating to funding; and whether capacity-building and transfer of marine technology should be mainstreamed across the various topics of the package in an international instrumentor includedin a dedicated section with links to other sections of the instrument.

8. With regard to cross-cutting issues, the Chair encourages further consideration of the issues identified in the Facilitator's oral report, including on how guiding principles and approaches could be featured in an international instrument and how they might be applied in the context of the various elements of the package, as well as on issues relating to institutional arrangements, while acknowledging that further in-depth discussion on some aspects thereof and on a number of the other cross-cutting issues, including review, monitoring and compliance, responsibility and liability as well as dispute settlement, is also dependent on gaining greater clarity on the substantive elements of an international instrument.

9. Overall, the Chair is of the view that it would be useful to consider the interlinkages between the various topics of the package, including with a view to ensuring coherence and identifying how they mutually support one another. Finally, the Chair encourages delegations to consider the various proposals and approaches put forward in relation to the various issues discussed by the Preparatory Committeein order to identify constructive ways forward on the issues that require further consideration.