Some thoughts on dispute settlement under a new legal instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

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Distinguished delegates,
Ladies and gentlemen,

1. Let me first express my gratitude to you, Ambassador Heusgen, and to the Permanent Mission of Germany for hosting this event again here in the German House. It creates an occasion for an exchange of views on issues pertinent both to States parties and the International Tribunal for the Law of Sea, in a more informal setting than during the Meeting of States Parties, without a strict agenda and rules of procedure. Let me add that I also wish to thank the staff here at the Mission for their work in organizing this event and for the warm welcome extended to us.

2. The topic of my brief talk and our exchange of views today is the settlement of disputes in a future international instrument on marine biological diversity of areas beyond national jurisdiction under the United Nations Convention on the Law of the Sea ("the Convention").

3. This topic is, without doubt, as important as it is timely today. Since the General Assembly decided, in December 2017,[1] to convene an intergovernmental conference with a view to developing an international instrument of this nature as soon as possible, the negotiations have proceeded speedily. Two of the four sessions planned have already taken place, the latest one only very recently from 25 March to 5 April 2019.[2]

4. Not only have negotiations moved forward swiftly, they are also becoming more concrete. According to the statement of the President of the Conference at the closing of the second session, it is intended to prepare, for the upcoming third session of the Conference in August this year, "a document with the aim of enabling delegations to negotiate the text of the future instrument."[3] Also, this document "would likely be structured in a form more akin to a treaty, and containing treaty language." [4]

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[1] Resolution 72/249 of 24 December 2017.
[2] First session: 4 to 17 September 2018; third session: 19 to 30 August 2019; fourth session: first half of 2020.
[3] A/CONF.232/2019/5, 18 April 2019, p. 2.
[4] A/CONF.232/2019/5, 18 April 2019, p. 2.

5. Despite the obvious progress, the negotiations are of course not completed yet. I take the liberty to refer again to the aforementioned statement of the President of the Conference in which she highlighted the fact that the negotiations had "enabled the identification of areas of convergence, but also at the same time, areas in which much more work is required, in order to build a fair, balanced and effective outcome."[5]

6. Therefore, it has to be conceded that the contents of the instrument, in particular the rights and obligations that it will entail for States parties, are not exactly specified yet. And, admittedly, this does have an influence on what can be said, at this time, on the topic of dispute settlement with regard to this instrument. Indeed, the discussions on this issue in the informal working group on cross-cutting issues at the latest session of the Conference seem to have been rather brief.

7. The corresponding report of the facilitator of the working group notes, however, that "the need to settle disputes concerning the interpretation or application of the instrument by peaceful means was underscored."[6] Delegates also seem to have discussed different possibilities in this regard. They included modelling the new instrument's dispute-settlement mechanism "on the dispute settlement procedures set out in the United Nations Convention on the Law of the Sea, or in the United Nations Fish Stocks Agreement".[7] Alternatively, reference was also made to a "tailored dispute settlement arrangement".[8]

8. On this basis, and bearing in mind that the substantive outcome of the negotiation process is not yet known in detail, I wish to offer a few comments on the perspectives for dispute settlement under the new agreement and the potential role of the Tribunal in this respect.

9. Let me first, however, express my appreciation for the commitment that, according to the report of the working group on cross-cutting issues, was expressed in the working group to the idea of the peaceful settlement of disputes. Indeed, today, 25 years after the entry into force of the Convention, we should be careful not to underestimate the achievement that the Convention's dispute-settlement mechanism meant for the development of international law and for the peaceful resolution of disputes between States in the field of the law of the sea. And I think all those making decisions in this context are well advised not to take this achievement for granted these days.

10. The dispute-settlement procedures of the Convention have indeed been very successful. You may recall that, in the statement I made to the Meeting of States Parties, I reported that two new cases have been brought before the Tribunal since the beginning of this year. This brings the total number of cases submitted to the Tribunal to 27. In addition, since the entry into force of the Convention, States parties instituted arbitral proceedings pursuant to Annex VII of the Convention in 16 cases. This demonstrates that States parties have trust in the system and are committed to the idea of dispute settlement through international courts and tribunals.

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[5] A/CONF.232/2019/5, 18 April 2019, p. 2.
[6] A/CONF.232/2019/5, 18 April 2019, p. 23, at para. 17.
[7] A/CONF.232/2019/5, 18 April 2019, p. 23, at para. 17.
[8] A/CONF.232/2019/5, 18 April 2019, p. 23, at para. 17.

11. Let me add that the Convention's dispute-settlement system is also highly efficient. The decisions of the Tribunal, for instance, are rendered swiftly, without any unnecessary delays. Thus, even complex cases, including those concerning maritime delimitation, are decided within comparatively short time-frames. In addition, in urgent proceedings, such as requests for the prescription of provisional measures, the Tribunal usually hands down its decisions within a few weeks.

12. The dispute-settlement system established by the Convention is also a flexible system that takes account of States parties' sovereignty and allows them to exercise different choices. In particular, as you know, pursuant to article 287 of the Convention, States parties can select their preferred forum from among the International Tribunal for the Law of the Sea, the International Court of Justice and arbitration.

13. Finally, the decisions emanating from those courts and tribunals not only serve the important purpose of settling a concrete dispute between the parties to a case. In addition to that, many decisions make significant contributions to the development of international law, for instance by clarifying the understanding of rights and obligations contained in the Convention or by reinforcing their significance.

14. The jurisprudence of the Tribunal is full of such examples. Let me only briefly mention a few. For instance, the Tribunal has consistently emphasized in several of its cases, relating either to the protection of the marine environment or to the conservation of marine living resources, that States parties have a duty to cooperate with regard to those issues.[9] It has also called upon them to "act with prudence and caution" in a number of those cases[10] and, at a later stage, the Tribunal's Seabed Disputes Chamber has identified "a trend towards making" the precautionary approach "part of customary international law."[11]

15. In another case, the *M/V "Virginia G" case*, the Tribunal interpreted the Convention in such way as to give coastal States the competence to regulate the bunkering of foreign fishing vessels in their exclusive economic zones. The Tribunal found that this was "among those measures which the coastal State may take … to conserve and manage its living resources" under the pertinent provisions of the

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[9] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* pp. 293-294, para. 48; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 110, para. 82; see also *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 25, para. 92; *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 160, para. 73.

[10] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 296, paras. 77 and 79; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 110, para. 84; *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 26, para. 99.

[11] *Responsibilities and obligations of States with Respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, ITLOS Reports 2011,* p. 47, para. 135.

Convention.[12] It may be noted that the Convention does not explicitly address the issue of bunkering and that therefore it was an open question as to whether and to what extent coastal States have regulatory competence over it. Given that bunkering at sea has a considerable impact on fishing, as it "enables" fishing vessels "to continue their activities without interruption",[13] the Tribunal has, in its judgment, clarified an important and unresolved issue which had not been foreseen at the time when the Convention was drafted.

16. It is my view, therefore, that the dispute-settlement system established by the Convention has demonstrated that it is a highly useful and important tool for States parties. And I would assume that States will take into account the achievements and the significance of that system when they are negotiating the text of the future instrument on marine biological diversity of areas beyond national jurisdiction, in particular since this instrument is intended to implement the provisions of the Convention.

17. Allow me to refer again, in this connection, to the statement by the President of the Conference at the closing of the second session. In her statement, she recalled that delegations, in their general statements at that session, had *inter alia* "reaffirmed the importance of the United Nations Convention on the Law of the Sea" and had noted, in particular, "that the instrument should operationalize and strengthen the provisions of the Convention."[14]

18. Of course, the dispute-settlement system of an implementation agreement does not have to be completely identical to that of the Convention. This is demonstrated by the 1995 Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, in short: the Fish Stocks Agreement. As I noted before, the dispute-settlement system was also referred to during the recent discussion at the second session of the Conference on marine biological diversity of areas beyond national jurisdiction.

19. The dispute-settlement provisions of the Fish Stocks Agreement are based on those set out in Part XV of the Convention which, pursuant to article 30, paragraph 1, of the Agreement, "apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement".

20. However, the Fish Stocks Agreement also brought about some modifications to the Convention's provisions that took account of the specific characteristics of this Agreement. Thus, for instance, pursuant to article 31, paragraph 2, of the Agreement, provisional measures may be prescribed for reasons not provided for in article 290 of the Convention, namely "to prevent damage to the stocks in question".

21. In addition, article 30 of the Fish Stocks Agreement extends the application of the Convention's dispute-settlement system to all States parties "whether or not they

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[12] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014,* p. 69, para. 217. The Tribunal referred to article 56 of the Convention read together with article 62, paragraph 4, of the Convention.
[13] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014,* p. 68, para. 215.
[14] A/CONF.232/2019/5, 18 April 2019, p. 1.

are also Parties to the Convention." States that are not parties to the Convention also participate in the mechanism established by article 287 of the Convention for choosing their preferred means of dispute settlement (article 30, paragraph 4, of the Agreement). However, such States may opt out of article 290, paragraph 5, of the Convention, pursuant to which the Tribunal can prescribe provisional measures pending the constitution of an arbitral tribunal (article 31, paragraph 3, of the Agreement).

22. These provisions of the Fish Stocks Agreement are proof that it is possible to design the dispute-settlement mechanism of an implementation agreement in such a way as to reach two goals at one time: First, to keep that mechanism within the framework of the Convention's dispute-settlement system. And second, to make necessary adjustments to take account of specific requirements of the implementation agreement. The drafters of the new instrument on marine biological diversity of areas beyond national jurisdiction may wish to consider taking a similar approach.

23. In this connection, I also wish to offer some thoughts about the question as to how dispute settlement under the new instrument could be specifically tailored to its needs. The Convention itself might provide inspiration here. In fact, the Convention not only includes the general dispute-settlement system set out in its Part XV. It also features, in section 5 of its Part XI, a specialized mechanism for disputes arising from activities in the Area, i.e., the seabed and subsoil beyond national jurisdiction.

24. As you are aware, the Convention declares the Area to be the common heritage of mankind and submits the exploitation of the Area's resources to an international regime administered by the International Seabed Authority. The specialized dispute-settlement system takes account of the particularities of this regime. It is focussed on the Seabed Disputes Chamber of the Tribunal, which has exclusive competence for a number of disputes with respect to activities in the Area, including those between States parties and the Authority or between contractors and the Authority (article 187 of the Convention). The exclusive character of the Seabed Disputes Chamber's jurisdiction makes it independent of any choice of forum by the States parties and thereby distinguishes it from the general dispute-settlement system of Part XV of the Convention.

25. The granting of exclusive jurisdiction to the Seabed Disputes Chamber was discussed extensively at the Third United Nations Conference on the Law of the Sea. In favour of such jurisdiction, it was argued that there was "the need to preserve the unity and continuity of jurisprudence with respect to activities in the area".[15] Also, the view was expressed that "a certain public order should prevail in the international area" and that, therefore, "all disputes regarding activities in the area should be submitted to a single tribunal".[16]

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[15] "Report of the Chairman of the group of legal experts on the settlement of disputes relating to part XI of the informal composite negotiating text", UN document A/CONF.62/C.1/L.25 and Add.1 (26 April and 23 May 1979), p. 117.

[16] "Report of the Chairman of the group of legal experts on the settlement of disputes relating to part XI of the informal composite negotiating text", UN document A/CONF.62/C.1/L.25 and Add.1 (26 April and 23 May 1979), p. 117.

26. As those views finally prevailed, the Seabed Disputes Chamber now plays a central role in disputes relating to the application or interpretation of the Convention's regime concerning activities in the Area. Accordingly, in its Advisory Opinion of 1 February 2011, the Chamber pointed out that it "is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area."[17] The Chamber has also highlighted that its "functions … are relevant for the good governance of the Area."[18]

27. Despite the central role of the Seabed Disputes Chamber, the dispute-settlement system of Part XI of the Convention leaves room for flexibility. Thus, pursuant to article 188, paragraph 2, of the Convention, certain disputes may be submitted to binding commercial arbitration instead of the Chamber. Some parties may have a preference for this kind of dispute settlement and the Convention takes account of that.

28. At the same time, the Convention makes it clear that a commercial arbitral tribunal to which the dispute is submitted does not have jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, that question has to be referred to the Seabed Disputes Chamber for a ruling. Through this approach, the Convention ensures the consistency of the interpretation of the provisions of Part XI and thereby seeks to safeguard the special status of the Area.

29. If delegations negotiating the new instrument on marine biological diversity of areas beyond national jurisdiction are looking for ways of adapting dispute settlement to the specific requirements of the instrument, they may wish to examine the Convention's mechanism for the settlement of disputes relating to activities in the Area. Some elements of that mechanism might be useful for the new instrument.

30. For instance, consideration might be given to assigning exclusive jurisdiction to a chamber of the Tribunal over specific categories of disputes emanating from the new instrument. In this respect, reasoning similar to that underlying the exclusive jurisdiction of the Seabed Disputes Chamber - and to which I referred a short while ago - may be applied.

31. The handling of specific categories of disputes by one single chamber of the Tribunal would assure the unity of jurisprudence and a consistent and uniform interpretation of the provisions of the new instrument. This would stabilize the new regime and facilitate its implementation. It would also contribute to and strengthen public order in the areas beyond national jurisdiction. Of course, the exact scope of the jurisdiction of such a chamber of the Tribunal could only be determined once there was clarity about the rights and obligations that the new instrument will provide for.

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[17] Advisory Opinion of 1 February 2011, para. 25.
[18] Advisory Opinion of 1 February 2011, para. 29.

32. Furthermore, the eventual dispute-settlement mechanism of a new instrument might also provide for the possibility to request advisory opinions from the Tribunal on matters arising under the instrument. As you are aware, under the Convention, both the Seabed Disputes Chamber and the full Tribunal may give advisory opinions and have done so in the past. If the drafters of the new instrument consider such possibility desirable, it might be advisable to make explicit reference to it in the framework of the dispute-settlement mechanism. A body entrusted to request such an advisory opinion might, for example, be the Meeting of States Parties to the new instrument.

33. Advisory opinions, while not having binding force, offer authoritative guidance on the interpretation of a legal instrument. They do not require a situation of a contentious dispute opposing two States. Rather, they can be requested jointly by a multitude of States in a spirit of cooperation and with a view to obtaining answers to questions arising from the interpretation or application of a legal instrument. Thus, advisory opinions can in fact help to prevent contentious disputes before they come into being.

34. This might be seen as a particular advantage for a new legal instrument that will be the outcome of intricate negotiations. Typically, such instruments contain numerous provisions of a general character and others that will need interpretation and clarification in order to be applied in a consistent manner. Here, advisory opinions might be a useful tool that helps to strengthen the newly established regime.

35. The Seabed Disputes Chamber of the Tribunal, in its Advisory Opinion requested by the International Seabed Authority, has made some pertinent remarks on the functions of advisory opinions that might be of general interest. Thus, in the view of the Chamber, “the underlying reason for [its] advisory jurisdiction” is that, “[i]n order to exercise its functions properly in accordance with the Convention, the [International Seabed] Authority may require the assistance of an independent and impartial judicial body.”[19] The Chamber was also mindful of the fact that, by answering the questions put to it by the Council of the Authority, “it will assist the Council in the performance of its activities and contribute to the implementation of the Convention’s regime.”[20]

Distinguished delegates,
Ladies and gentlemen,

36. This concludes the comments I wish to make today on the issue of dispute settlement under the future instrument on marine biological diversity of areas beyond national jurisdiction.

37. Let me add that the Tribunal would be well placed to contribute to the implementation of the new instrument and to play a key role in its dispute-settlement mechanism. The Tribunal is one of the main fora for the adjudication of disputes concerning the interpretation and application of the Convention and has gained more

[19] Advisory Opinion of 1 February 2011, para. 26.
[20] Advisory Opinion of 1 February 2011, para. 30.

than 20 years of experience in the settlement of disputes under the Convention. It has also demonstrated the quality and efficiency of its procedures in a variety of different cases, ranging from urgent proceedings to cases on the merits as well as advisory opinions. I wish to assure you that the Tribunal stands ready to deal with any further tasks with which the States parties wish to entrust it under the new instrument.

Thank you very much for your attention.