

Separate Opinion of Judge Lucky

I find it difficult to concur with all the responses to the questions submitted by the Sub-Regional Fisheries Commission (SRFC) in the Advisory Opinion (“the Opinion”) of the majority of the Tribunal. I have provided some additions to the reasons for jurisdiction.

I voted against the response to question 2 for the reasons set out under that heading. With regard to question 4, I find the statement of Mr Papa Kebe, the specialist in pelagic species, very helpful. I include a summary of his statement.

Jurisdiction

1. With respect to the question whether the Tribunal has the jurisdiction to accept and give an advisory opinion, I agree in principle with the view set out in the Opinion. However, in the light of the submissions of the States that argue that the Tribunal does not have jurisdiction, I find it necessary to elaborate on and enlarge the reasons set out in the Opinion. I am of the view that the Opinion does not fully consider the submissions of the States that oppose jurisdiction. The arguments were cogent, clear and articulate, as well as considerably persuasive. Therefore, reasons ought to be given to justify a contrary view.
2. The diverse reasons advanced in support of the respective contentions, in my view, demonstrate that article 21 of the Statute of the International Tribunal for the Law of the Sea (“the Statute”) is not as clear and unambiguous as it may seem. Therefore, the question of the interpretation and construction of the article is relevant in determining whether the Tribunal has the jurisdiction to accept and give an advisory opinion.
3. In the light of the submissions, it seems to me that the question of jurisdiction should be fully explained. The interpretation of article 21 requires explicit interpretation to answer the queries raised. These are:
 - (a) whether the Tribunal has jurisdiction to accept and consider the request for an advisory opinion; and

- (b) if the answer to (a) is positive, then whether the Tribunal's jurisdiction is restricted to the subject matter set out in the Request for an advisory opinion pursuant to a resolution of the Conference of Ministers of the SRFC.

The submissions

4. Some States, among them Australia, China, Ireland, Spain and the United Kingdom, argued that the Tribunal does not have jurisdiction to give an advisory opinion. They contend that:

- (a) the Statute of the Tribunal does not provide for advisory jurisdiction. If this is so, the article will expressly provide for advisory opinions.
- (b) there is no express conferral of advisory jurisdiction on the Tribunal by the States Parties to the 1982 United Nations Convention on the Law of the Sea ("the Convention").
- (c) article 21 does not relate to "matters" specifically provided for in any other agreement that confers jurisdiction on the Tribunal.
- (d) the Statute of the Tribunal does not provide for an advisory jurisdiction of a general scope by the Tribunal
- (e) no article in the Convention or in the Statute of the Tribunal provides expressly for such a jurisdiction.
- (f) the Convention expressly provides for the Seabed Disputes Chamber to issue advisory opinions. There is no similar provision for giving an advisory opinion in the Statute for the Tribunal. Article 191 of the Convention provides that the Chamber shall give advisory opinions. It reads

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

States have also argued that:

- i. ITLOS is a creature of a Statute.
- ii. any powers ITLOS has must be expressly set out in the Statute.
- iii. there must be an express provision in the Statute to confer the right to give an advisory opinion.
- iv. the wording in article 21 is clear and unambiguous.

- v. applying the accepted rules of statutory interpretation, the meaning of the words is clear.
- vi. rules in a Statute are procedural. In other words, they provide for a procedure when a matter is before the Tribunal. A rule cannot be used to provide for jurisdiction if the Statute does not provide for jurisdiction. A rule is subjective to a Statute, not *vice versa*. With reference to article 138 of the Rules and article 16 of the Statute, that gives the Tribunal rule-making power. In his oral submission, Mr William McFadyen Campbell QC said

It would not be possible for the Tribunal, by making a rule, to confer upon itself a jurisdiction to give an advisory opinion that it did not otherwise possess under the 1982 Convention, or the Statute of the Tribunal. To do so would in the words of Sir Hersch Lauterpacht, amount to “an excess of zeal”.

- vii. ITLOS was established to deal with disputes between States (Parties). Therefore, there must be a dispute before ITLOS can act. In other words, there must be a **matter (a dispute)** before the Tribunal.
- viii. article 21 is not ambiguous. If it was the intention of the drafters of the Statute to include the authority to give advisory opinions the article would have specified this function.
- ix. if ITLOS accepts that it has jurisdiction to give advisory opinions it will be acting *ultra vires* the Statute. Supplemental articles and/or agreements cannot be used to remedy the wording of an article or “fix” an article. ITLOS is a court and theoretical arguments cannot be used in these circumstances.
- x. to determine that ITLOS has jurisdiction to give an advisory opinion in the absence of a dispute will encourage States to come to ITLOS for advisory opinions in the absence of a dispute between parties. It could mean that any group of States or a single State can seek an advisory opinion, thereby making the true purport of ITLOS, i.e. to hear and determine matters involving disputes, seem absurd.
- xi. the arguments in support of jurisdiction, if carefully analyzed, seem bogus. The rhetorical question must be posed: Is there any legal authority to support the view that in such circumstances a court will have jurisdiction, if an agreement between States says so, without there being a dispute?

The jurisdiction of the Seabed Disputes Chamber

5. In this context, it will be useful to consider the jurisdiction of the Seabed Disputes Chamber in comparison to that of the Tribunal in respect of the jurisdiction to receive and issue advisory opinions. The Chamber is established in accordance with article 14 of the Statute of the International Tribunal for the Law of the Sea. Its jurisdiction, powers and functions are set out in Part XI, section 5, article 187, which provides for the jurisdiction of the Chamber and relates to “disputes” (see paragraph 4(a) to (f) above). Article 191 of the Convention deals with advisory opinions and specifies that the Chamber **shall** “*give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities*”.

6. Unlike article 21 of the Statute, which provides for the jurisdiction of the Tribunal, the provisions relating to jurisdiction of the Seabed Disputes Chamber are mandatory. The jurisdiction of the Seabed Disputes Chamber is set out in Section 5, articles 186 to 191 of the Convention under the heading “Settlement of Disputes and Advisory Opinions”. Articles 159(10) and 187 set out the jurisdiction of the Chamber. Article 159(10) provides that upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion in respect of a specific proposal. Article 187 of the Convention deals with specified disputes between

- (a) States Parties to the Convention concerning the interpretation or application of this Part and the Annexes relating thereto;
- (b) a State Party and the Authority concerning specific acts or omissions;
- (c) parties to a contract;
- (d) the Authority and a prospective contractor;
- (e) the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party; and
- (f) any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.

7. The Seabed Disputes Chamber issued an opinion envisaged in the above articles in Case No. 17 of the Tribunal. It must be pointed out that the above-mentioned article 187 deals with “disputes” whereas article 191 deals with advisory opinions.

8. Further, the States that argued against jurisdiction contend that the Tribunal is not vested with the power to give an advisory opinion. If this were the case, the Tribunal would be given express power in its Statute. They contend that the absence of an express conferral of an advisory jurisdiction as a whole is crucial.

9. States that oppose the view that the full Tribunal has jurisdiction to give advisory opinions also dispute the notion that the Convention is a “living instrument”. The “living tree” doctrine is one that is frequently used in the interpretation of articles of the constitutions of States. The Convention is regarded as the constitution of the oceans and, in my opinion, is akin to (*comparable with*) a national constitution. Therefore, it must “grow” in accordance with the times.

10. It is accepted that judges do not make law, but they can point out deficiencies or ambiguities in the law or give a wide interpretation to an article or section of a treaty or convention to assist in the development of the jurisprudence of international law. I think this is a perfect case to determine whether there are any ambiguities or deficiencies in article 21 and, if there are any, to give a wide interpretation to the said article.

11. A constitution is “a growing tree”. Its provisions must be given a wide interpretation; it should not be construed as strictly as municipal legislation and there ought not to be what has been referred to as “the austerity of tabulated legalism” by Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648. The United Nations Convention on the Law of the Sea has been called the constitution of the oceans. In my opinion, it is a constitution of the States Parties and a codification of the customary law of the sea. However, since its inception, there have been no amendments, additions, revisions or reforms. Yet technology continues to advance and, in my view, reform, addition and revision of some of the articles may be necessary.

12. Since 1982, the law of the sea has developed and continues to develop. International courts and tribunals could, through a robust interpretation of the relevant articles, add to this development. For example, in the *M/V “Virginia” G Case*, the Tribunal decided that a constructive interpretation and application of articles 56, 58, and 62(4) and (k), by implication, included “bunkering” as a form of fishing activities. The national law of States to include “bunkering” as an offence is within the framework of the Convention. Further, the practice of many States to make bunkering without permission of the coastal State an offence is consistent with the Convention. While I shall develop the argument later on, I think the Tribunal has to take a robust approach, bearing in mind the fact that the law must keep abreast of technological advancement, for example scientific methods of attracting and catching fish in areas outside of the EEZ of coastal States.

13. The argument was raised that while article 21 of the Statute deals with three categories over which the Tribunal has jurisdictional competence, the categories do not encompass an advisory jurisdiction (oral submission of Australia, p. 16, paras 35–39). It was submitted that the meaning ascribed to the words “applications” in article 21 refers to a request for provisional measures and applications for prompt release of vessels. I do not agree with that interpretation. I also do not subscribe to the view that if the said article prescribes that the Tribunal has jurisdiction to give advisory opinions, the article expressly says so. The words of the article do not specifically address this question of jurisdiction, although it can be argued that the different interpretations, well articulated and presented, could result in uncertainty and ambiguity when construing the said article.

Counsel for the SRFC contends that there is a difference in meaning when the French text is considered. The words “*différend*” and “*demande*” have different meanings. The first relates to contentious cases and the second to non-contentious matters. Therefore, the Tribunal can accept a request for an advisory opinion and issue such an opinion. The International Tribunal for the Law of the Sea is an independent body. Article 16 of the Statute provides that “the Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure”. The words of the article are clear and unambiguous. In accordance with the said article, the Tribunal framed article 138 of its Rules. Article 138 reads:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.

In my view, the Tribunal was not conferring jurisdiction upon itself, but it acted in accordance with articles 16 and 21 of the Statute.

14. The crucial question revolves around the interpretation of article 21 of the Statute. Article 21 reads:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

I think it will be helpful if the wording in the article is divided as follows: the first sentence is clear. The Tribunal's jurisdiction includes all disputes and all applications submitted to it in accordance with the Convention. These will include applications for prompt release of vessels, requests for provisional measures and determination of cases on the merits. The second sentence provides for "all matters". This must be different from the first because "all matters" is a generic and all encompassing term. Therefore, it will include applications related to a case and requests for an advisory opinion. If a matter such as a request for an advisory opinion is excluded, the article will say so. Consequently, it would have ended at the word "Convention" in the first sentence. In accordance with article 16 of the Statute, the Tribunal, in exercising its power to lay down rules of procedure, established article 138 to provide *inter alia* for the acceptance of advisory opinions, thereby setting out the procedural requirements for giving an advisory opinion. The SRFC has fulfilled the requirements.

15. The question seems to be: what is the "other agreement"? Is it the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the Member States of the Sub-Regional Fisheries Commission ("the MCA Convention")? Does the MCA Convention relate to the purposes of the Convention and does the MCA Convention provide for the submission of a request? Those who oppose jurisdiction of the Tribunal contend that if the Tribunal gives a generous and wide interpretation to article 21 to include jurisdiction for an advisory opinion then it will be legislating by giving itself

jurisdiction. They submit that a Court cannot legislate. “Its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules” (*ICJ Reports 1996*, p. 237, paragraph 18, *Advisory Opinion*).

16. For the reasons set out below, I do not agree with the above arguments. I am of the view that the Tribunal has jurisdiction to accept and issue an advisory opinion.

17. The conditions for establishing jurisdiction of the full Tribunal are set out in article 21 of the Statute of the Tribunal. “All matters” includes all disputes and all applications (the matter before the Tribunal is an application for an advisory opinion). It is not a dispute that will involve more than one party; in other words, an application for an advisory opinion is not a dispute. It is argued that matters specifically provided for in any other agreement will include the MCA Convention and that agreement, in conjunction with article 21 of the Statute and article 138 of the Rules, confers jurisdiction on the Tribunal. The question seems to be whether “another agreement” can confer jurisdiction on the Tribunal where the Statute itself does not expressly confer jurisdiction. In order to fortify my views I have considered the following question: where there is a legislative “gap”, can the judge make sense of the article by applying the literal rule or by using the purposive rule?

18. The crucial words are “all applications” and “all matters specifically provided for in any other agreement”. The question is whether the words of the article are clear and unambiguous. Therefore, it is necessary to construe and interpret the article by using accepted methods of construction to determine whether article 21 of the Statute confers jurisdiction upon the Tribunal that is not limited to the settlement of disputes, but is all encompassing, including advisory opinions. It is accepted that a court must not “fill in gaps” in a statute or law. If it does so, this can be described as a “*naked usurpation of the legislative function under the thin guise of interpretation. If a gap is disclosed the remedy lies in an amending act*” (Lord Simonds in *Magor and St. Mellons v. Newport Borough Council (1952) HL*).

If States parties disagree with the Tribunal possessing and exercising jurisdiction to issue the advisory opinion requested in Case No. 21, then the proper course of action is for States parties to amend UNCLOS to explicitly limit or renounce the Tribunal's advisory jurisdiction. For the time being, the Tribunal can only proceed in accordance with the adopted and ratified provisions of UNCLOS and its subsidiary instruments, provisions that arguably grant the Tribunal advisory jurisdiction.

(Oral statement of Clement Yow Mulalap, Legal Advisor of Micronesia)

I agree with the above statement. The Tribunal applied *lex lata*, the law as it currently exists, and not *lex ferenda*, the law as some think it ought to be.

The 1982 Convention and the Statute of the Tribunal are “living instruments”. This means that they “grow” and adapt to changing circumstances. An act/statute is always “speaking”. The law of the sea is not static. It is dynamic and, therefore, through interpretation and construction of the relevant articles a court or tribunal can adhere and give positive effect to this dynamism. Since 1982, technology has advanced and therefore in my view judges must take a robust approach and apply the law in a legal but pragmatic way. Contrary to the views of many, this Tribunal is a court of superior record not a tribunal set up to enquire into or to determine a specific matter.

19. I am of the view that there is a presumption that a rational construction ought to be given where circumstances have changed and technology has advanced. Courts are not only interpreters of the law but, in limited circumstances, they can in fact give full effect to the law without being accused of indecent “*judicial overreaching*”.

20. Therefore, article 21 must be construed not only by using the literal rule of construction but by applying other rules of construction to clarify any uncertainty or doubt.

21. Article 21 provides for jurisdiction. Article 16 of the Statute prescribes that the Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure. The Rules came into force when the Tribunal began to function in 1997. The Rules are in force. No State has asked that the Rules, and specifically article 138, be amended, or has challenged that article as it applies to advisory opinions. This is the first time the application of the rule and the interpretation of article 21 has been challenged in a court. The rule prescribes that it must be a legal question. Article 33 of the MCA Convention

provides for the submission of legal matters to the Tribunal for advisory opinions. It appears that the questions as framed are legal questions. The MCA Convention is related to the purposes of UNCLOS and is an international agreement that expressly provides for such a request. The SRFC is an authorised body. Therefore, in my view, the requirements of article 138 are satisfied (see article 3(1) of the MCA Convention, which is in reality similar to article 62(2) of the United Nations Convention of the Law of the Sea (see also article 33 of the MCA Convention)). Article 138 of the Rules performs a legitimate role as contemplated by articles 16 and 21 of Annex VI. Taken together, these articles allow the Tribunal to issue advisory opinions. It is my view that the relevant articles mentioned above should be given a wide and generous interpretation and not one that is narrow and restrictive. This necessitates considering the principles set out in article 31 of the Vienna Convention on the Law of Treaties. These methods are similar to those in several national jurisdictions. In addition, they are set out in the leading authorities on statutory interpretation. Article 16 grants the Tribunal the authority to “frame rules for carrying out its functions”. Article 21 provides that the Tribunal has jurisdiction to carry out some of those functions.

22. The phrase “all matters” in article 21 includes “all disputes and all applications”. In my opinion, article 21 recognises the distinction between disputes and applications. The article provides that the Tribunal has jurisdiction to hear and determine contentious matters – disputes – and non-contentious matters such as requests for advisory opinions. Unlike contentious matters, where the consent of the parties is necessary before the Tribunal can accept, hear and determine a case, there is no such requirement for consent in a request for an advisory opinion. The request from the SRFC to the full Tribunal for an advisory opinion meets the procedural requirements of article 138 of the Rules. The four questions submitted by the SRFC are legal questions. The MCA is an international agreement and its articles relate to the purposes of the Convention.

23. I am firmly of the view that article 138 of the Rules of the Tribunal is in conformity with articles 16 and 21 of the Statute of the Tribunal and, when read together, authorizes the Tribunal to accept and issue advisory opinions. There is in reality no need to consider other means of statutory interpretation and construction of legal documents. However, for the avoidance of doubt, and to answer the concerns and submissions that the Tribunal does not have jurisdiction, I will consider other accepted means of statutory interpretation.

I do not think there is any need to consider the *travaux préparatoires* of UNCLOS or Annex VI because the literal or ordinary meaning of the language of the articles is clear and unambiguous.

24. Article 31(1) of the Vienna Convention on the Law of Treaties provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

25. The provisions of articles 16 and 21 of the Statute and article 138 of the Rules of the Tribunal set out the object and purpose of the said articles, i.e. to make rules in respect of jurisdiction in all matters, and set out the procedural requirements. I am of the view that the full Tribunal has jurisdiction to accept and issue an advisory opinion.

26. Before dealing with admissibility, I have to agree that article 288(2) of the Convention deals with “disputes” in the context of that article and cannot be extended to support an argument that the Tribunal has jurisdiction to give an advisory opinion.

27. I do not agree that if the Tribunal were to exercise jurisdiction in a request for an advisory opinion it would be acting *ultra vires* to its mandate. Such an assertion cannot be cured by invoking the *compétence de la compétence* principle reflected in article 288, paragraph 4, of the Convention. Article 288, specifically article 288, paragraphs 2 and 4, is not applicable or relevant to this matter. In these circumstances, article 288 as a whole refers to a court or tribunal specified in article 287 of the Convention, and to jurisdiction over a dispute concerning interpretation and application of the Convention. Article 288 is within the ambit of Part xv, section 2, of the Convention. Part xv deals with the *Settlement of Disputes*. A request for an advisory opinion does not fall

within the category of a dispute. Therefore, there is no need for the consent of any interested party. The advisory opinion applies to the SRFC and to no other party.

28. In summary, it seems to me that, taken together, articles 21 and 16 of the Statute, article 138 of the Rules and article 33 of the MCA Convention certify that the Tribunal has the jurisdiction to accept and issue an advisory opinion in this matter. Nevertheless, for the avoidance of doubt in future requests for advisory opinions, I think article 21 should be amended to clear up any questions of jurisdiction.

Question 1

29. I agree with the response set out in the Advisory Opinion of the Tribunal. However I would have included relevant articles of the Convention that set out the rights of coastal States in matters relating to fishing. The Convention does not provide a definition of illegal, unreported and unregulated (IUU) fishing. Nevertheless, without referring specifically to IUU fishing, the Convention does specify where and when fishing activities are legal, lawful and regulated in the exclusive economic zone (EEZ) of coastal States and the adjacent waters. The relevant articles are article 56 (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone); article 58 (Rights and duties of other States in the exclusive economic zone); article 61 (Conservation of the living resources in a coastal State's EEZ) and article 62 (Utilization of the living resources in the EEZ). Article 73, which provides for the enforcement of laws and regulations of the coastal State, can also be included. Therefore, it seems to me that fishing activities in contravention of the abovementioned articles can be considered IUU fishing.

30. The coastal State has not only sovereign rights over its living resources in its EEZ but also the right to enact and enforce legislation with respect to these rights, as long as the laws and regulations are in conformity with the Convention. The provisions of the MCA Convention are in conformity with the Convention and are applicable not only to SRFC States but to other States whose vessels carry out fishing activities in the EEZ of the SRFC States.

31. It seems clear to me that under the Convention coastal States, specifically the SRFC States, are within their legal rights to define IUU fishing and to implement and enforce their national laws and regulations against States that infringe the said laws. In this context, article 2, paragraph 4, of the MCA Convention (set out in paragraph 90 of the Opinion) defines IUU fishing. This definition is in harmony with the definition of IUU fishing in paragraph 3 of the International Plan of Action to Prevent Deter and Eliminate IUU Fishing (IPOA-IUU). It is noteworthy that the definition of IUU fishing is included in the legislation of several national and in the legal instruments of some regional organizations.

32. To answer the question succinctly: flag States are obliged to comply with the laws and regulations of the coastal State when conducting fishing activities in the EEZ of SRFC States. These obligations are set out in the Convention (see article 94 of the Convention) and in the MCA Convention.

Question 2

33. This question is too broad-based and general. It does not specify the area where the fishing activities are conducted. One must ask whether the activities referred to are in the high seas or in the EEZ of a third State. Further, are the vessels privately owned vessels sailing under the flag of a specific State and, if so, is it a “flag of convenience”? Alternatively, is there a genuine link between the flag State and the vessel? Another relevant query is whether there is a breach of an international obligation by the vessel, such as the duties of the flag State, for example, under article 94 of the Convention or the United Nations Fish Stocks Agreement, the IPOA-IUU or the MCA Convention. It seems to me that the liability of the flag State depends on proof of a failure to comply with a specific law relating to IUU fishing. Consequently, the requirement of evidence is crucial. Therefore, the question as framed is not clear and specific.

35. I do not agree with the construction of the term “responsibility as meaning liability” in the paragraph 145 of the Opinion. In order to be liable, a person

has to be responsible, and to be responsible for an act there must be a duty of care and knowledge of an obligation. Lord Atkin, in the well-known case of *Donahue and Stevenson* [1932] AC 562, said

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The *ratio decidendi* in this case is still accepted and applied by judges in several jurisdictions.

36. Consequently, a person or State will be held responsible only if there is concrete evidence to support a claim. Once responsibility is established, then a court or tribunal will be able to determine, after assessing the evidence, whether the person or State is liable and award compensation if liability is established.

37. I agree, in principle, with the response to question 3 in the Opinion.

38. I agree to a lesser extent with what is set out in question 4 in the Opinion. However, I think the statement of Mr Papa Kebe, the specialist in pelagic species, is important and the gist of it should be reflected. Mr Kebe spoke of the migratory nature of small and large pelagic species and their range of movement along the coast of West Africa and towards the American coast and from the Gulf of Guinea to the Brazilian coast. In other words, the migratory nature of these species could lead to movement from the EEZ of a coastal State in West Africa to the EEZ of neighbouring States as well as into adjacent waters. His testimony fortifies the view that coastal States are obliged to ensure the sustainable management of shared stocks and stocks of common interest.

(signed) A. Lucky