INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2014

Public sitting
held on Wednesday, 3 September 2014, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)

(Request for Advisory Opinion submitted to the Tribunal)

Verbatim Record

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Helmut Türk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Registrar	Philippe Gautier

List of delegations:

<u>Sub-Regional Fisheries Commission (SRFC)</u>

H.E. Mr Louséný Camara, Chairman-in-Office of the Conference of Ministers of the SRFC
Mr Hassimiou Tall, Director of Fisheries, Republic of Guinea, Chairman-in-Office of the Coordinating Committee of the SRFC
Mr Sebastiao Pereira, Director-General for Industrial Fisheries, Republic of Guinea-Bissau
Mr Doudou Gueye, Legal Adviser, Ministry of Fisheries and Maritime Affairs, Republic of Senegal
Mr Cheikh Sarr, Director of Fisheries Protection and Surveillance, Republic of Senegal
Ms Marième Diagne Talla, Acting Permanent Secretary of the SRFC
Ms Diénaba Bèye Traoré, Head of the Department for Harmonization of Policies and Legislation of the SRFC
Mr Hamady Diop, Head of the Department of Research and Information Systems of the SRFC
Mr Babacar Ba, Head of the Department for Fisheries Monitoring, Control, Surveillance and Planning of the SRFC
Ms Mame Fatou Toure, Head of the Communication and Public Relations Service of the SRFC
Mr Demba Yeum Kane, Regional Coordinator of the RFMO
Mr Abdou Khadir Diakhate, Programme Assistant, Department for Harmonization of Policies and Legislation of the SRFC
Mr Baïdi Diene, Deputy Secretary-General of the Guinea-Bissau/Senegal Management and Cooperation Agency (AGC)
Mr Sloans Chimatrio, African Union/NEPAD
Mr Racine Kane, Head of Mission, Office of the International Union for the Conservation of Nature (IUCN), Dakar, Senegal
Mr Ahmed Senhoury, Director of the Mobilization and Coordination Unit, Regional Partnership for the Preservation of the Coastal and Marine Zone in Western Africa
Mr Papa Kebe, Expert, Specialist in pelagic resources
Mr Aboubacar Fall, Lawyer, Bar of Dakar, Senegal
Mr Ibrahima Ly, Legal Counsel, Professor at the Université Cheikh Anta Diop de Dakar, Dakar, Senegal
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<u>Germany</u>

Mr Martin Ney, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office
Mr Christian Schulz, Deputy Head of Division Law of the Sea, Space Law, Antarctica, Federal Foreign Office

Argentina

Mr Holger F. Martinsen, Deputy Legal Adviser, Office of the Legal Adviser, Ministry of Foreign Affairs and Worship
Mr Manuel Fernández Salorio, Consul General of the Argentine Republic in Hamburg, Federal Republic of Germany
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Australia

Mr William McFadyen Campbell QC, General Counsel (International Law), Office of International Law, Attorney-Generals' Department
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Sir Michael Wood, member of the International Law Commission, member of the English Bar

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Ms Anastasia Telesetsky, University of Idaho, College of Law, Natural Resources and Environmental Law Program, United States of America

THE PRESIDENT: Good morning. Today we will continue the hearing in Case No. 21 concerning the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

This morning we will hear oral statements from Germany, Argentina, Australia, Chile and Spain.

I now give the floor to Ambassador Ney, the representative of Germany.

MR NEY: Mr President, distinguished Members of the Tribunal, it is an honour for me to appear before this Tribunal today representing the Federal Republic of Germany.

With your permission, I will present to you the comments of the Federal Republic of Germany with regard to the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

Let me begin by underlining the importance of this case for international law, as this is the first request for an advisory opinion outside the Tribunal's Seabed Disputes Chamber.

In Case 17, the Tribunal's Seabed Disputes Chamber rendered an Advisory Opinion that has greatly contributed to strengthening the law of the sea by clarifying, in particular, the obligations and responsibilities of sponsoring States with respect to activities in the area in accordance with the United Nations Convention on the Law of the Sea; henceforth I shall call it "the Convention".

In general, Germany believes that requests for advisory opinions could be used more regularly in State practice. Many provisions of the Convention leave room for interpretation. At the same time, the rule of law at sea has been gaining ever increasing importance and is continuously being challenged in many parts of the world. As we have witnessed in Case 17, the law of the sea can be strengthened not just by contentious procedures entailing binding decisions but also by advisory opinions. The States Parties to the Convention would all benefit from the wisdom and guidance provided by the Tribunal – the specialized judicial organ in the field of the law of the sea.

Mr President, as the request submitted by the Sub-Regional Fisheries Commission is the first occasion on which the full Tribunal has been asked to render an advisory opinion, the Tribunal may wish to carefully examine the legal basis and the scope of its advisory jurisdiction under article 138 of its Rules.

Article 138, paragraph 1, of the Rules reads: "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."

A number of States Parties have expressed doubts as to whether article 138 of the Rules has a sufficient legal basis in the Convention or whether the Tribunal, by framing its Rules, may have overstepped its competence and conferred upon itself a

new type of jurisdiction inconsistent with its powers under the Convention, including its Statute. Germany does not share any of these doubts. According to article 16 of the Statute of the Tribunal (Annex VI of the Convention), the Tribunal clearly has the authority to decide upon its own Rules, albeit bound by the Convention and the Statute that were agreed upon by States Parties.

In this context, article 21 of the Statute confers a broad jurisdiction upon the Tribunal that is not limited to the settlement of disputes.

Article 21 of the Statute 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.”

The wording of article 21 of the Statute makes it clear that the Tribunal’s jurisdiction is broader than the jurisdiction of the other courts or tribunals referred to in articles 287 and 288 of the Convention. In particular, it is not limited to the dispute settlement provisions in Part XV of the Convention but expressly includes all other applications in accordance with the Convention and, in addition, all matters specifically provided for by any other agreement which confers jurisdiction on the Tribunal.

Therefore, in Germany’s view, article 21 of the Statute by itself serves as a sufficient legal basis for the competence of the full Tribunal to accept requests for advisory opinions if these are specifically provided for by a relevant international agreement. There is no reason to assume that the wording “all matters” would not include requests for advisory opinion. In particular, the argument that the wording “all matters” must be read as meaning “all disputes” and that the jurisdiction of the Tribunal is limited by article 288, paragraph 2, of the Convention cannot be followed.

The general rule of treaty interpretation, as established by article 31 of the Vienna Convention on the Law of Treaties – also reflecting customary law – is to interpret treaties objectively, that is “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 their object and purpose.”

Other circumstances, including the negotiating history, may, according to article 32 of the Vienna Convention on the Law of Treaties, serve only as a supplementary means of interpretation “in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 remains ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.” None of these cases apply here.

The ordinary meaning of “all matters” is a wide one. Its wording is not limited to disputes or other contentious proceedings. It is quite clear that the purpose and intention of article 21 of the Statute is to shape the International Tribunal for the Law of the Sea as a living institution and to expressly provide room for states to enter into further bilateral or multilateral agreements conferring jurisdiction on the Tribunal.

1 This understanding of article 21 of the Statute is confirmed when we look at the
2 French and Spanish texts. Both the French and the Spanish wording of article 21 of
3 the Statute are phrased in an equally open manner as “all matters”.
4
5 The French text reads: *“Le Tribunal est compétent pour tous les différends et toutes*
6 *les demandes qui lui sont soumis conformément à la Convention et toutes les fois*
7 *que cela est expressément prévu dans tout autre accord conférant compétence au*
8 *Tribunal.*”
9
10 The phrase “*Toutes les fois que cela est expressément prévu*” literally means that
11 the Tribunal shall have jurisdiction “every time that this is expressly foreseen”.
12
13 In the Spanish text, the jurisdiction of the Tribunal expressly extends to “all questions
14 expressly foreseen” in another agreement (“*todas las cuestiones expresamente*
15 *previstas*”). It is quite clear that this would include an abstract legal question and
16 does not have to be a dispute (which in Spanish would be “*controversia*”).
17
18 To mention just one more, the Russian text too speaks about “all questions” (“*все*
19 *вопрóсы*”).
20
21 As these texts confirm that the objective meaning of article 21 of the Statute is
22 neither ambiguous nor obscure.
23
24 While some States Parties have invoked article 288 of the Convention as a limit of
25 the Tribunal’s jurisdiction under article 21 of the Statute, a closer look at these
26 provisions reveals that there is no such connection between article 288 of the
27 Convention and article 21 of the Statute.
28
29 Article 288 is located in Part XV, Section 2, of the Convention, which deals with the
30 settlement of disputes by compulsory procedures entailing binding decisions and
31 with the corresponding jurisdiction of the various courts and tribunals involved in this
32 context. It is not, however, an exhaustive provision when it comes to the role and
33 competence of the Tribunal under the Convention. Specifically, it does not intend to
34 limit any of the provisions of the Statute. On the contrary, article 288 is
35 complemented by the Statute, including article 21, when it comes to the specific role
36 and jurisdiction of the Tribunal.
37
38 Mr President, summing up so far, it is Germany’s view that article 138 of the Rules of
39 the Tribunal has a sound legal basis in an objective interpretation of articles 21 and
40 16 of the Tribunal’s Statute. Article 138 of the Rules does not create a new type of
41 jurisdiction but only specifies the prerequisites that the Tribunal has established for
42 exercising its jurisdiction.
43
44 I shall now proceed to the subsumption of these prerequisites to the case before us.
45 Three conditions have to be met for the Tribunal to accept a request for an advisory
46 opinion under article 138 of its Rules: first, the request must concern a legal
47 question; second, it shall be transmitted by an authorized body; and, third, an
48 international agreement related to the purposes of the Convention must specifically
49 provide for the submission of such a request to the Tribunal.
50

1 Mr President, regarding the first condition, the nature of the questions submitted, the
2 four questions put forward by the Sub-Regional Fisheries Commission are all legal
3 questions, originating in the law of the sea framework. They touch upon the scope of
4 rights, obligations and liabilities of flag States and coastal States in a fisheries
5 context.
6
7 As for the second condition, transmission by an authorized body, the request was
8 transmitted by the Permanent Secretary of the SRFC, who has been duly authorized
9 by the SRFC's Conference of Ministers in accordance with article 33 of the 2012
10 Convention on the Determination of the Minimal Conditions for Access and
11 Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of
12 the Member States of the SRFC (MCA Convention).
13
14 The request also complies with the third condition, namely that an international
15 agreement related to the purposes of the Convention specifically provides for the
16 submission of such a request to the Tribunal.
17
18 The MCA Convention is a fisheries-related international agreement and basic legal
19 instrument of the Sub-Regional Fisheries Commission.
20
21 It is related to the purposes of the UN Convention on the Law of the Sea, namely to
22 its articles 55-73, addressing the rights and responsibilities of coastal and other
23 States in the exclusive economic zone, to article 94, addressing the duties of flag
24 States, and to the relevant provisions of the Convention addressing the conservation
25 and management of the living resources in the exclusive economic zone and high
26 seas, such as articles 61-67 and 116-119.
27
28 In its article 33, the MCA Convention explicitly provides for the submission of legal
29 matters to the Tribunal for advisory opinions.
30
31 Mr President, in their written submissions to the Tribunal, some States Parties have
32 suggested that the jurisdiction of the Tribunal in any advisory proceedings under
33 article 21 of the Statute and article 138 of the Rules would be limited to clarifying
34 legal questions concerning the interpretation or application of the underlying
35 agreement, which confers the advisory jurisdiction, in this case the MCA Convention.
36
37 Germany does not agree. There is no restriction on requesting parties in either
38 article 21 of the Statute or articles 130-138 of the Rules to pose only legal questions
39 that directly concern the interpretation or application of the underlying international
40 agreement allowing for the request to the Tribunal.
41
42 In particular, such a restriction cannot be derived from article 288, paragraph 2, of
43 the Convention, as this provision only deals with disputes concerning the
44 interpretation or application of international agreements other than the UNCLOS in
45 compulsory procedures entailing binding decisions, not with advisory opinions.
46 Moreover, international agreements do not stand alone. They have to be applied and
47 interpreted within the context of international law surrounding them, as article 31,
48 paragraph 3(b), of the Vienna Convention on the Law of Treaties stipulates.
49

Articles 131 and 138 of the Rules of the Tribunal only require the underlying international agreement to be related to the purposes of the Convention and the request for an advisory opinion to be on a legal question arising within the scope of the activities of the submitting State or body.

Both of these conditions are satisfied in the present request. The MCA Convention is related to the purposes of UNCLOS and the four questions submitted to the Tribunal for an advisory opinion are legal questions arising within the scope of the SRFC's activities. The SRFC is looking to install a comprehensive system to combat IUU fishing and protect the marine living resources of its member States. It wishes to obtain a thorough assessment of certain rights, obligations and liabilities of coastal and flag States in order to help it to properly perform its functions as a fisheries cooperation organization in accordance with international law.

Mr President, the fact that the Tribunal, in order to answer the request submitted by the SRFC, may have to apply or interpret international instruments other than the MCA Convention or customary international law does not in itself affect the principle of State consent to any kind of peaceful dispute settlement, as some States Parties have argued.

States cannot be compelled to submit their disputes to any kind of peaceful settlement without their consent. This important principle is also reflected in article 20, paragraph 2, of the Statute of the Tribunal, which explicitly requires that the agreement conferring jurisdiction on the Tribunal must be accepted "by all the parties to that case".

However, it is important to note that this provision applies only to contentious proceedings. Advisory opinions, by their very nature, are delivered only to the requesting party; they do not involve any other parties, nor are they binding on any party. Rather, their purpose is to provide legal advice to the requesting party so as to assist it in the performance of its functions.

Relevant case law seems to support this finding. It is true that in the 1923 *Status of Eastern Carelia* case the Permanent Court of International Justice declined to issue an advisory opinion on questions involving a pending dispute without the consent of all parties to the dispute. However, the Court did not rule that, as a matter of law, it could not interpret international conventions without the prior consent of all parties to these conventions.

This distinction is important because the four abstract questions submitted by the SRFC do not seem to be connected to any pending dispute between States. So far, there seems to be only an abstract possibility that any advisory opinion on these questions might – or might not – gain relevance in possible future disputes between members and non-members of the SRFC.

Moreover, the *Eastern Carelia* case or doctrine has undergone considerable changes in more recent case law. In its 1950 *Peace Treaties* and 1975 *Western Sahara* advisory opinions, the International Court of Justice has established "that the absence of an interested State's consent to the exercise of the Court's advisory

1 jurisdiction does not concern the competence of the Court, but the propriety of the
2 exercise" of its advisory jurisdiction.
3
4 As a result, Germany finds that the questions submitted by the SRFC fall within the
5 jurisdiction of the Tribunal.
6
7 Mr President, distinguished Members of the Tribunal, those are my essential points.
8 They certainly do not cover all aspects of this case, nor are they exhaustive. In
9 particular, I shall refrain from extending my statement to the substantive matter of the
10 questions submitted to the Tribunal. I hope that my observations may assist the
11 Tribunal in determining the scope of its jurisdiction in the present case.
12
13 To conclude, I would like to reiterate that Germany firmly believes that the law of the
14 sea is strengthened not just by judicial decisions in contentious procedures but also
15 by advisory opinions.
16
17 Advisory proceedings have the great advantage that they do not end with one party
18 prevailing and the other one losing. They also allow third parties to voice their
19 opinions regarding the interpretation of the Convention and other instruments.
20 Germany therefore believes that they could be used more regularly in State practice.
21
22 Germany trusts that the Tribunal will handle its advisory jurisdiction with utmost
23 responsibility.
24
25 Thank you very much.
26
27 **THE PRESIDENT:** I thank Mr Ney for his statement. I now give the floor to the
28 representative of Argentina, Mr Martinsen.
29
30 **MR MARTINSEN:** Mr President, Mr Vice-President, honourable Members of the
31 Tribunal, it is indeed a great honour for me to appear before this distinguished
32 Tribunal representing the Argentine Republic. There is no need for me to underscore
33 the great importance that my country attaches to the work of this Tribunal, which is
34 considered to be one of the pillars of contemporary international law, and that is the
35 reason for Argentina to act in support of the Tribunal in every relevant international
36 forum dealing with the activities of the Tribunal.
37
38 Mr President, by letter dated 27 March 2013, this International Tribunal for the Law
39 of the Sea received a request from the Permanent Secretary of the Sub-Regional
40 Fisheries Commission to render an advisory opinion on four questions concerning
41 the regulation of fisheries, citing article 33 of the Convention on the Determination of
42 the Minimal Conditions for Access and Exploitation of Marine Resources within the
43 Maritime Areas under National Jurisdiction of the Member States of the
44 Sub-Regional Fisheries Commission 2012 as the legal basis for its request. As the
45 Tribunal is aware, Argentina has already participated in the written stage of this
46 procedure.
47
48 Mr President, before sharing our views on the procedural aspects of this case, we
49 would like to make some remarks of a general nature. Argentina is a developing
50 country as well as a coastal State with large maritime areas to take care of. As any

other State sharing the same features, Argentina is concerned by the challenges arising from the need to conserve the natural resources existing in those maritime areas and prevent their depredation with the limited resources it has available to that end. Therefore Argentina has learned a lot in this field and has shared its findings and experience with other developing nations facing the same or similar challenges. Illegal fishing in our national maritime areas by foreign vessels must come to an end as soon as possible. Argentina not only understands the situation leading the Member States of the SRFC to request this advisory opinion, it also shares their concerns, their needs and their challenges.

Argentina is of the view that the answers to these challenges need to be addressed by strengthening international cooperation, in particular among developing countries sharing similar problems, limitations and concerns. Argentina strongly believes that those problems may be solved by the ways and means provided for in Part XIV of UNCLOS regarding the development and transfer of marine technology. Effective implementation of the relevant clauses of the Convention would enable developing States to acquire the technology they need for proper monitoring, control and surveillance of fishing activities in the areas within their national jurisdiction. Argentina stresses its willingness to engage in consultations with all other developing States, especially with the members of the Sub-Regional Fisheries Commission, regarding the issues raised in the request made to the Tribunal. South-South cooperation has proven to be an excellent tool to deal with problems faced equally by most developing countries in this field.

In any event, Argentina considers that the sovereign and exclusive rights that the Convention recognizes to coastal States regarding every aspect of fishing activities are a fundamental pillar of the law of the sea. In no way could these rights be jeopardized by any attempt by flag States to exercise any sort of jurisdiction regarding fisheries in maritime areas of coastal States.

Regarding the jurisdiction of this Tribunal to deal with the request for an advisory opinion as the one submitted by the SRFC, Argentina reiterates, in general, the considerations put forward in its written statement of November 28, 2013, which I would summarize as follows, together with some further remarks on the issues involved.

The Statute of the Tribunal does not provide for an advisory jurisdiction of a general scope for ITLOS as a full court. No clause in the Convention or in the Statute of the Tribunal provides expressly for such a jurisdiction. Advisory opinions are only mentioned in the Convention as procedures that may take place in accordance with the relevant provisions of Part XI of UNCLOS under the competence of the Seabed Disputes Chamber. Besides, article 21 relates to Part XV of the Convention dealing specifically with “Settlement of Disputes”.

The rule specifically allowing for the possibility of an advisory opinion is article 138 of the Rules of the Tribunal. According to this clause, an international agreement related to the purposes of UNCLOS may specifically provide for the submission to the Tribunal of a request for an advisory opinion. If article 138 of the Rules were to

1 be considered as "a legitimate interpretation of article 21 of the Statute",[1] then the
2 request must necessarily relate to "matters specifically provided for in any other
3 agreement which confers jurisdiction on the Tribunal".
4
5 Even according to a broad interpretation of article 21 of the Statute, there is an
6 essential condition that does not seem to have been fulfilled in the request since
7 none of the questions posed to the Tribunal or the explanatory documents submitted
8 by the SRFC identifies which are those "matters specifically provided for" in the
9 SRFC Convention that are requested to be interpreted by the Tribunal in its advisory
10 opinion. No indications are given in the request as to which are the relevant clauses
11 of that Convention to be applied or interpreted in this case.
12
13 Mr President, Argentina also reiterates the considerations it put forward in its written
14 submission that might lead the Tribunal to consider that its advisory jurisdiction
15 should be declined in this particular case.
16
17 The first of those considerations relates to the purpose of the request. As expressed
18 in the first paragraph under title V, "Justification...", in the Technical Note submitted
19 by the SRFC, the request expresses:
20
21 There now exist many new economic and scientific uses of the seas whose
22 legal status is open to argument. New developments call for new legal
23 responses which the Tribunal can give through its advisory opinions. The
24 advisory function of the Tribunal can make a great contribution to sound
25 governance of the seas and oceans.[2]
26
27 As recognized by the International Court of Justice in the case *Legality of the Threat*
28 *or Use of Nuclear Weapons*, "It is clear that the Court cannot legislate […] Rather its
29 task is to engage in its normal judicial function of ascertaining the existence or
30 otherwise of legal principles and rules".[3]
31
32 Therefore, since the Tribunal may not legislate, neither may it create the "new
33 responses" asked for in the Request. We also fail to see what the concept of
34 governance in this context might be, not being a concept considered or
35 contemplated in the Convention.
36
37 Moreover, in addition to the request for "new responses", the instruments upon which
38 those responses are asked to be found are not creating mandatory rules in spite of
39 the assumption made in the Technical Paper that these instruments "bring major
40 innovations to classic international law".[4] Those instruments referred to in the
41 Technical Paper are the International Plan of Action to Prevent, Deter and Eliminate

[1] P. Chandrasekhara Rao and Philippe Gautier, *The Rules of the International Tribunal for the Law of the Sea*, Martinus Nijhoff Publishers, p. 394.
[2] "Technical Note" dated March 2013 submitted by the Permanent Secretariat of the Sub-Regional Fisheries Commission, p. 6, under the title "Justification for the Request to the International Tribunal for the Law of the Sea (ITLOS) for an Advisory Opinion".
[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 18.
[4] Ibid. Note 2.

1 Illegal, Unreported and Unregulated Fishing[5] (IUU IPOA) developed by the FAO "as
2 a voluntary instrument, within the framework of the Code of Conduct for Responsible
3 Fisheries". The other instrument is the Agreement on Port State Measures to
4 Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing that has
5 not yet received even half the consents required for its entry into force.
6
7 Mr President, we are grateful to the SRFC for the information provided in the second
8 revision of the document they submitted in March this year and for the further
9 clarifications brought by their officers yesterday in this room. Nevertheless, we still
10 fail to see how the Convention could be interpreted as a tool to combat IUU fishing,
11 which is a category created 20 years after the Convention was adopted.
12
13 Moreover, we should remember that, according to paragraph 3.4 of the International
14 Plan of Action to Prevent IUU Fishing, not all the categories of activities belonging to
15 the IUU definition are necessarily contrary to international law, something that we
16 should keep in mind in order to adopt the proper tools to combat IUU fishing.
17
18 Neither the IPOA on IUU fishing nor the FAO Port States Measures Agreement
19 belong to the "agreement" that attributes consultative jurisdiction to this Court.
20 Hence, the condition established under article 21 of the Statute of the Tribunal does
21 not seem to have been met since no "matters specifically provided for in any other
22 agreement which confers jurisdiction on the Tribunal" are invoked in the request as
23 the object of the advisory opinion.
24
25 Another consideration that could lead the Tribunal to consider that its advisory
26 jurisdiction might be declined in this particular case is the way in which the questions
27 posed to it have been framed. Some of those questions lack essential information of
28 a legal nature. Others do not indicate factual elements that are equally important in
29 order to elaborate an appropriate legal answer. We will refer later on to this issue.
30
31 Mr President, Members of the Tribunal, Argentina is grateful for the contribution
32 made by the international organization submitting this Request as well as to its
33 Member States. We are having this extremely useful and interesting debate thanks
34 to their initiative. We also strongly appreciate the degree of commitment evidenced
35 by so many States Parties to the Convention participating in this procedure, in
36 particular the ideas put forward by States expressing views opposite to ours that
37 have enriched this discussion and reminded us that struggling for consensus is an
38 attitude that made the Convention possible, and since then has inspired the work in
39 all the organs it has established. We think that these procedures should be infused
40 by the same constructive attitude.
41
42 The views wisely expressed by Germany and Japan, as well as by other States, in
43 support of the exercise of an advisory jurisdiction by the full Tribunal led us to
44 consider in which ways a common ground among the different positions expressed
45 in this case could be somehow harmonized in order to help the Tribunal reach a wise
46 decision.
47

[5] Developed by the Food and Agriculture Organization of the United Nations (FAO) within the framework of the Code of Conduct for Responsible Fisheries" and adopted at the Twenty-fourth Session of it Committee on Fisheries (COFI) on 2 March 2001.

With such a consensus approach in mind, Argentina would not object to the application of article 138 of the Rules, provided that the essential requirements stemming from article 21 of the Statute are met, nor would it oppose the exercise of the advisory jurisdiction of this Tribunal if appropriate measures are taken by the Tribunal and the requesting organization to solve the issues regarding the admissibility of the case.

In order to fulfil the requirements of article 21 of the Statute, the Argentine Republic notes that if in this case "an international agreement" confers upon the Tribunal a certain advisory function regarding "matters specifically provided for" in that agreement, the jurisdiction stemming from these circumstances is necessarily restricted *rationae materia* to the matters regulated by that particular agreement and *rationae personae* to the requesting international organization and possibly to the States parties to such "international agreement".

Since the SRFC Convention is "*res inter alios acta"* concerning Argentina and many other States Parties to the Convention, any possible effect of a procedure set forth by such instrument, as well as participation in such procedure, should be confined to the international organization requesting it and as it may be provided for by the rules in force in such organization and its member States.

Consequently, Argentina is of the view that the Tribunal should, as a preliminary stage of this procedure, make a decision on whether it has or has not advisory jurisdiction to deal with Case 21. Should it arrive at a positive answer, then the advisory procedure should continue but, in Argentina's view, restricted to the requesting organization and possibly its Member States.

Mr President, certain other issues should be addressed, from our perspective, in order to facilitate the exercise of the advisory jurisdiction in the present case. Those issues may be dealt with by either the requesting party or by the Tribunal itself, given the broad powers given to it by articles 16 and 27 of the Statute to decide on procedural matters and on the conduct of the cases.

A matter that requires particular attention is the one related to the need to identify which are the "matters specifically provided for" in the SRFC Convention that need to be interpreted by the Tribunal. Since no indications are given in the request and in the rest of the documents submitted to the Tribunal on this point as to which are the relevant clauses of that Convention to be applied or interpreted in this case, we think that the requesting organization should provide further clarity on this issue.

The other matter that would require to be addressed is the need for more accuracy, either in legal and factual grounds, of the questions posed by the requesting organization. Regarding this topic, Argentina reiterates the comments made in its written submission on each of the questions contained in the request. That may be also done either by the organization or by the Tribunal itself.

Mr President, since until now in this case the main disagreement among the participants has been the existence of a general advisory jurisdiction of the Tribunal that has not been expressly provided for in the Convention or the Statute, the

1 decision of the Tribunal to invite all UNCLOS States Parties to participate in this
2 procedure has been a very wise one.
3
4 Apart from that general consideration, as it may be inferred from what was stated in
5 writing and now orally, Argentina does not not consider it has to participate in a
6 procedure stemming from a treaty which Argentina is not a party to. Nevertheless,
7 we would like to take this opportunity to contribute with some of its views to the
8 discussion of certain issues of substance that might be of interest in this case.
9
10 First, the questions posed by the requesting organization as well as by some of the
11 written statements submitted to the Tribunal do not seem to give due consideration
12 to the fact that not all States are parties to the same treaties. Then they might
13 wrongly assume that the rights and duties of flag States may be analyzed without
14 previously identifying the particular instruments applicable to each specific State. In
15 this vein, it would be a mistake, for instance, to assume that the provisions of a
16 certain treaty such as the United Nations Fish Stocks Agreement could be applicable
17 to States not having expressed their consent to be bound by it.
18
19 Second, the sovereign rights of the coastal States are of an exclusive nature,
20 including those recognized regarding fisheries. Therefore, the determination of the
21 possible unlawfulness of fishing activities in national maritime areas is an exclusive
22 competence of the coastal State in the exercise of such sovereign rights. Since the
23 laws and regulations applicable to fishing activities in maritime areas within national
24 jurisdiction need to be those established by the coastal State, no State other than the
25 coastal State is entitled to determine whether or not a vessel complied with those
26 laws and regulations. Article 73 of the Convention dealing with enforcement of laws
27 and regulations of the coastal State leaves no room for doubt on this issue.
28
29 Third, efforts by flag States to prevent the vessels flying their flag from fishing
30 illegally in maritime areas of other States must not interfere in any way in the
31 exercise of the exclusive jurisdiction by the coastal State.
32
33 Fourth, the rights and duties of the flag States are, in general, considered under
34 article 94 of the Convention. It was not by coincidence that such provision was
35 included under Part VIII of the Convention since those rights and duties are
36 particularly relevant in the high seas. In no way may those rights and duties be
37 construed in a detrimental manner regarding the sovereign rights of coastal States.
38
39 That is the reason why the Voluntary Guidelines for Flag State Performance,
40 adopted by the 31st Session of the Committee of Fisheries of the Food and
41 Agriculture Organization, specify in paragraph 3 that:
42
43 These Guidelines apply to fishing and fishing related activities in maritime
44 areas beyond national jurisdiction… **Where a vessel operates in maritime
45 areas under the jurisdiction of a State other than the flag State the
46 application of these Guidelines is subject to the sovereign rights of the
47 coastal State**.[6]

[6] Document COFI/2014/4.2/Rev.1, “Voluntary Guidelines for Flag State Performance”, adopted by the 31st Session of the Committee of Fisheries of the Food and Agriculture Organization. Emphasis added.

In conclusion, Mr President and distinguished Members of the Tribunal, Argentina is of the view that the possibility of rendering an advisory opinion, as requested by the SRFC, should be assessed in the light of the following considerations.

First, the Tribunal, in our view, should consider as a preliminary matter whether it has advisory jurisdiction in the present case, and if it arrives at a positive conclusion on that matter, then it might decide on the conditions under which such jurisdiction should be exercised. Again, in our view, those conditions would restrict the continuation of the procedure to the requesting Parties.

In the case that the Tribunal should decide to exercise advisory jurisdiction, the questions posed to the Tribunal should include all legal information and factual references of an essential nature in order to allow for a proper legal response. Those references should include, at least, the identification of the clauses of the instrument conferring advisory jurisdiction that are to be interpreted by the Tribunal. Also as a condition for an accurate legal answer, information should be provided on which other treaties are applicable to the flag States whose rights and duties are to be interpreted by the Tribunal. Factual information regarding the maritime areas which the questions refer to is also essential to allow the Tribunal to perform its judicial function.

Mr President, distinguished Members of the Tribunal, Argentina is grateful for having had the possibility of addressing the Tribunal in this case. I thank you all very much for your attention.

THE PRESIDENT: Thank you, Mr Martinsen, for your statement.

I now give the floor to the delegation of Australia, which has requested a speaking time of 45 minutes. Mr Campbell, you have the floor.

MR CAMPBELL: Mr President, Members of the Tribunal, it has been some time since I have appeared before the Tribunal, the last time being the *"Volga"* case, and before that in the *Southern Bluefin Tuna Cases*. For me, it is a distinct honour to appear before you again. I should say that Australia is an original party to the 1982 Convention and is committed to its proper implementation, including through the important role played by this Tribunal.

As a coastal State Party, we appreciate also the serious consequences of illegal, unreported and unregulated fishing activities and the challenges faced by coastal States, including Member States of the Sub-Regional Fisheries Commission, as outlined by Mr Papa Kebe yesterday. That said, the importance of the subject matter of these proceedings is not, of itself, a legal justification underpinning the ability of this Tribunal to give an advisory opinion on this matter.

Mr President, I will be addressing the Tribunal on matters of jurisdiction and submitting that the Tribunal, as fully constituted, lacks the jurisdiction to render an advisory opinion in this case or indeed any other case. Australia will not be addressing the merits of the request.

1 First, I will deal with a number of what I would call less than convincing justifications
2 that have been put forward to support such an advisory jurisdiction, more often than
3 not as a secondary form of support for other arguments purportedly based on the
4 1982 Convention. Then, I will analyze and respond to the arguments based upon the
5 text of the 1982 Convention and, in particular, article 288 of the Convention and
6 articles 16 and 21 of the Tribunal's Statute.
7
8 My colleague Ms Ierino will then argue that even if the Tribunal does find that it has
9 an advisory jurisdiction, it should exercise its discretion not to render an opinion in
10 this case for a number of cogent reasons.
11
12 Mr President, Members of the Tribunal, it will not have escaped your notice that
13 Australia is not alone in its view that the Tribunal does not have jurisdiction to hear
14 this case, and in that regard we respectfully adopt much of what is contained in the
15 written statements of Ireland, the People's Republic of China, Thailand and the
16 United Kingdom.
17
18 Mr President, let me begin with two general points concerning the jurisdiction of
19 international courts and tribunals. First, it is trite to say that such jurisdiction is not to
20 be presumed. It is incumbent upon those requesting the advisory opinion to establish
21 beyond doubt that the Tribunal does have jurisdiction to render such an opinion.
22 Also, it is incumbent on the Tribunal to be satisfied beyond doubt that it has such
23 jurisdiction.[1] No burden of disproof lies with those countries, including Australia,
24 which question the existence of such jurisdiction.
25
26 Second, it is a *sine qua non* of adjudication by international courts and tribunals that
27 it is based upon the consent of States.[2] This applies as much to advisory opinion
28 competence as it does to contentious cases. Jurisdiction to adjudicate is always the
29 subject of express conferral.[3] It is not to be implied. That principle flows from the
30 sovereignty of States. There is no express conferral of an advisory jurisdiction on the
31 Tribunal as a whole by the States Parties to the 1982 Convention and,
32 parenthetically, there was no conferral upon the Tribunal of a power to accord itself
33 an advisory jurisdiction. To do so would have been unprecedented.[4]
34

[1] R. Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), p. 1057. *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinions*, *I.C.J Reports 1996* ("*Threat or Use of Nuclear Weapons*"), p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 ("Construction of a Wall*"), p. 144, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010* ("*Unilateral Declaration of Independence in Respect of Kosovo*"), p. 412, para. 17.
[2] H. Thirlway, "Law and Procedure, Part Nine", *1969 BYIL 69*, pp. 1,4.
[3] H. Thirlway, "Advisory Opinions", *Max Planck Encyclopedia of Public International Law* (OUP), para. 4. See also S. Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume II: Jurisdiction*, (Martinus Nijhoff, Leiden, 2006), pp. 94–95. C. Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff, 2002), p. 503. Written Statement of Australia, para. 7; First Written Statement of the United Kingdom, para. 9, Second Written Statement of the United Kingdom, para. 6; Written Statement of Portugal, paras. 13–14.
[4] Written Statement of Australia, paras. 8–9 and Annex A; Written Statement of the United Kingdom, paras. 29–33; Written Statement of the United States, paras. 14- 15; Written Statement of the People's Republic of China, paras. 9–14; Written Statement of Spain, para. 6.

1 That said, the Third United Nations Convention on the Law of the Sea did turn its
2 collective mind to the matter and conferred in express terms an advisory opinion
3 capacity only on the Seabed Disputes Chamber of this Tribunal in the circumstances
4 set out in articles 159, paragraph 10, and 191 of the 1982 Convention. That fact
5 alone, together with the absence of an express conferral of an advisory jurisdiction
6 on the Tribunal as a whole, should be the end of the matter. As you, Judge Wolfrum,
7 noted in 2013: "The drafters of the UN Convention on the Law of the Sea were rather
8 reluctant to entrust the Tribunal…with competences to give advisory opinions
9 equivalent to the ones of the ICJ."[5]
10
11 Australia agrees with that conclusion, though we would replace the words "were
12 rather reluctant to entrust" with the words "did not entrust". The correct position, we
13 would submit, is neatly summarized in the Virginia Commentary: "The Tribunal itself
14 has no advisory jurisdiction, and the advisory jurisdiction of the Chamber is limited to
15 legal questions that may be referred to it only by the Assembly or Council, within the
16 scope of their activities."[6]
17
18 I will now, Mr President, with your indulgence, move to what I have termed
19 "subsidiary justifications". The diversity of the arguments put forward to support such
20 an advisory capacity on the Tribunal as a whole we believe betray the fact that, in
21 the absence of an express conferral, no such capacity exists. Let me turn to some of
22 those arguments, mainly for the purposes of dismissing them.
23
24 I will start with one which has, I think, an air of desperation about it. That is "neither
25 the Convention nor the Statute explicitly indicate that such jurisdiction shall be
26 excluded".[7] To be fair, this is usually put forward as a secondary argument, which I
27 mentioned earlier.
28
29 At least two responses come to mind. This point might have had some relevance if
30 other treaties founding the jurisdiction of international courts and tribunals contained
31 such an explicit exclusion of advisory jurisdiction; however no such precedent exists
32 and nothing can be drawn from the absence of such a clause. Second, as noted
33 earlier, the advisory jurisdiction of international courts and tribunals should always be
34 the subject of an express conferral. The absence of a clause excluding such
35 jurisdiction is, in our submission, of no relevance.
36
37 The second alleged underpinning which is reflected in the written statement of
38 Germany[8] appears to be based upon a melting pot of factors. It combines the notion
39 that the 1982 Convention and the Statute of the Tribunal are living instruments, with
40 rules of treaty interpretation and an alleged general movement amongst States in
41 favour of the Tribunal's jurisdiction to issue advisory opinions. A combination of
42 these factors is relied upon to support the conclusion that jurisdiction would seem to

[5] R. Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R. Wolfrum and I. Gätzschmann (eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), p. 55.
[6] M. Nordquist *et al* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI, (Martinus Nijhoff, Dordrecht, 1991) ("*Commentary*"), p. 644. See also *Commentary*, Volume V, p. 416.
[7] Written Statement by the Federal Republic of Germany, para. 8; see also Written Statement of New Zealand, para. 8.
[8] Written Statement by the Federal Republic of Germany, para. 8.

1 find its legal basis in an objective interpretation of article 21 of the Statute. That is,
2 that article 21 of the Statute of the Tribunal "by itself already provides an implicit
3 legal basis" for the Tribunal having advisory competence. (I must say that this
4 morning Germany has expressed the view that it somehow has an express basis.)
5 Apparently, by reason of all these factors, the negotiating history of the Convention
6 so clearly favouring, as it does, the view that the full Tribunal does not have an
7 advisory jurisdiction, is described as "superseded".[9]
8
9 This alleged underpinning of advisory jurisdiction, we would submit, is more in the
10 nature of assertion. Also, as noted earlier, an express grant of jurisdiction is required
11 – as with the Seabed Disputes Chamber – and it is not something that is "implicit" or
12 "implied".
13
14 The third subsidiary form of justification for an advisory capacity is that it forms part
15 of "a consensual solution" as established by article 138 of the Rules. This has been
16 described in the following terms: "If the jurisdiction of international courts and
17 tribunals is based upon the consensus of the parties concerned there is no reason to
18 deny them to establish an additional jurisdiction."[10]
19
20 For the sake of brevity, by way of response, we adopt that given in the first written
21 statement of the United Kingdom at paragraphs 25 to 27. Leaving aside the
22 speculative tone in which this idea is raised, its application in this case would require
23 the consensus of all Parties to the 1982 Convention and not just the Members of the
24 SRFC if an advisory opinion is to be given on the interpretation and application of
25 aspects of the 1982 Convention.
26
27 The fourth subsidiary argument is one raised by the SRFC yesterday. The SRFC
28 noted that the issue of competence to give advisory opinions has been raised on a
29 number of occasions within relevant UN fora with no objections.[11] However, any
30 such lack of objection is of no legal consequence whatsoever. It does not amount to
31 consent, and any application of the legal principle of acquiescence would, we submit,
32 be bizarre. This is the first occasion on which article 138 of the Rules has in fact
33 been relied upon, and this Tribunal is the correct forum in which to challenge such
34 reliance.
35
36 The fifth, and final, subsidiary argument also arises out of the SRFC's submissions
37 yesterday. I mention this just to clarify what was being said. The statement was
38 made: "Article 288, paragraph 4, gives the Tribunal the possibility to itself decide on
39 its jurisdiction in the case of a request for advisory opinion."[12]
40
41 Obviously, these words do not reflect fully article 288, paragraph 4, which requires a
42 dispute over jurisdiction as a pre-condition of its application. To be fair, it was later

[9] *Ibid.*
[10] R. Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R. Wolfrum and I. Gätzschmann (eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), 55.
[11] ITLOS/PV.14/C21/1, pp. 9–10 (Bèye Traoré).
[12] ITLOS/PV.14/C21/1, p. 9 (Bèye Traoré).

1 conceded by the SRFC that a dispute is required and that it must be settled in
2 accordance with the 1982 Convention.[13]
3
4 And it is to other aspects of the 1982 Convention that I will now move. I noted earlier
5 that the provisions most frequently cited as possible sources of the Tribunal's
6 advisory jurisdiction are article 288 of the Convention and article 21 of the Statute of
7 the Tribunal.
8
9 Moving to article 288, in Australia's submission, article 288 does not provide a basis
10 for the conferral of advisory jurisdiction on the Tribunal as a whole.[14] Leaving aside
11 the particular provisions concerning the Seabed Disputes Chamber (para. 3), article
12 288 is concerned solely with the conferral of jurisdiction on the courts and tribunals
13 referred to in article 287 of the 1982 Convention jurisdiction over "disputes". This is
14 confirmed by its placement in Part XV, which is entitled "Settlement of Disputes" and
15 in Section 2 of Part XV, which is subtitled "Compulsory Procedures Entailing Binding
16 Decisions".[15]
17
18 Also, if article 288, paragraph 2, of the 1982 Convention did provide a legal basis for
19 the Tribunal to give advisory opinions, it would follow that the other dispute
20 settlement bodies referred to in article 287, paragraph 1 – that is the ICJ and Annex
21 VII and VIII tribunals – could also have advisory jurisdiction. Such a result was not
22 intended and is unsustainable.
23
24 Moving to article 21 of the Statute, article 21 of the Statute of the Tribunal, forming
25 Annex VI to the 1982 Convention, also deals with the jurisdiction of the Tribunal.
26 Article 21 refers to three categories over which the Tribunal has jurisdictional
27 competence. The first category is "disputes" and, as I noted earlier, that term does
28 not encompass an advisory jurisdiction.
29
30 The second category referred to in article 21 is that of "all applications submitted to
31 the Tribunal in accordance with the Convention".[16] This category was the subject of
32 some analysis yesterday by the SRFC, focusing on differences in meaning between
33 the words "*différends*" and "*demandes*" in the French language text. The first word
34 was said to apply to "contentious" situations and the second to "non-contentious"
35 situations. Solely on the basis of this difference in meaning, the conclusion is
36 reached that "the advisory jurisdiction of the Tribunal is thus expressed" and that this
37 "shows clearly the Tribunal's jurisdiction to give an advisory opinion."[17]

38 To ascribe an advisory competence to the Tribunal based solely on a nuance of
39 wording in the French text of one article of the Tribunal's Statute is, with all due
40 respect, far-fetched. That it is far-fetched is demonstrated by at least two factors.
41 The first is that a more modest advisory jurisdiction is expressly conferred on the
42 Seabed Disputes Chamber by the 1982 Convention. That being so, it could have

[13] *Ibid.*
[14] Written Statement of Australia, paras. 16–20; First Written Statement of the United Kingdom, para. 19; Written Statement of Portugal, para. 8; Written Statement of Spain, paras. 9–10; Written Statement of Ireland, para. 2.2; Written Statement of the People's Republic of China, paras. 29–30.
[15] Written Statement of Portugal, para. 8.
[16] P. Chandrasekhara Rao and P. Gautier, *The Rules of the International Tribunal for the Law of the Sea; A Commentary* (Martinus Nijhoff, Leiden, 2006), p. 394.
[17] ITLOS/PV.14/C21/1, p. 7 (Bèye Traoré).

1 been expected that at least the same express basis would have been used to confer
2 a broader advisory jurisdiction for the Tribunal as a whole. Secondly, the word
3 "*demande*" (and "application" in the English text) is followed by the words "submitted
4 to it in accordance with the Convention". This indicates that any conferral of advisory
5 jurisdiction cannot be based solely on a nuance of language in article 21 but would
6 need to be sourced elsewhere in the Convention, which it is not. In fact, the words
7 "*demande*" and "application", as so qualified, were intended to encompass requests
8 for provisional measures and applications for the prompt release of a vessel made
9 under the 1982 Convention.[18] The *Virginia Commentary* supports that view.
10
11 The third category referred to in article 21 is that of "matters specifically provided for
12 in any other agreement which confers jurisdiction on the Tribunal"; that is, any
13 agreement other than the 1982 Convention. Could the word "matters" encompass an
14 advisory jurisdiction? The answer to that question, in our view, is "no". This aspect of
15 article 21 is based upon article 36, paragraph 1, of the Statute of the International
16 Court of Justice,[19] where the word "matters" is clearly referring to disputes and not
17 "advisory opinions".[20] Also, in accordance with the accepted principles of
18 interpretation referred to by Germany this morning, article 21 must be read in its
19 context.[21] Indeed, this is the difficulty that Australia has with the position put forward
20 by Ambassador Ney on behalf of Germany this morning. Germany read article 21 in
21 complete isolation from the main text of the Convention. There is undoubtedly a
22 hierarchy under which the Statute gives effect to the jurisdictional provisions of the
23 Convention. It cannot have a broader application than the relevant conferral of
24 jurisdiction in article 288, paragraph 2, of the main body of the 1982 Convention
25 which, as I mentioned earlier, is confined to *disputes*.[22] This clear link between
26 article 288 of the 1982 Convention and article 21 of the Statute is supported by the
27 *travaux préparatoirs*.[23]
28
29 Nevertheless, assume for the moment that the Tribunal decides that article 21 by
30 implication confers, or provides a basis for a rule conferring an advisory jurisdiction
31 on the Tribunal by an "other agreement". In that case, such an advisory jurisdiction
32 necessarily would be limited to matters concerning the interpretation or application of
33 that other agreement as between parties to the agreement. It would not extend to the
34 interpretation and application of the 1982 Convention.[24] That conclusion in part flows
35 from the express terms of article 288, paragraph 2, of the main text of the
36 Convention and also from the more general law concerning the *inter se* rights and
37 responsibilities of States parties to treaties. It would be very odd if the parties to a
38 regional or even bilateral agreement could ask for an advisory opinion from the

[18] M. Nordquist *et al* (eds.), *Commentary*, Volume V, pp. 360 and 378.
[19] M. Nordquist, Volume V, p. 378.
[20] Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds), *The Statute of the International Court of Justice – A Commentary* 2nd ed. (OUP, 2012), p. 641 (Tomuschat).
[21] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31.
[22] Written Statement of Australia, para. 26; Written Statement of Ireland para. 2.6; Written Statement of Portugal, para. 9; Second Written Statement of Thailand, para. 8.
[23] M. Nordquist *et al*, *Commentary*, Volume V, p. 378.
[24] Written Statement of Australia para. 27; Written Statement of Ireland, para. 2.11; Written Statement of the Argentine Republic, paras. 17–18; First Written Statement of the United Kingdom, para.46; Written Statement of the Netherlands, paras. 2 and 3; Written Statement of the United States, para. 24.

1 Tribunal concerning the interpretation or application of the provisions of the 1982
2 Convention when meetings of the States Parties to the 1982 Convention cannot
3 request such an opinion.
4
5 Therefore, it is the submission of Australia that article 21 of the Statute does not
6 accord or provide a basis for according advisory competence in the Tribunal. Even if
7 it did (and it does not), that advisory jurisdiction would be limited to the interpretation
8 and application of the "any other agreement" referred to in article 21 as between the
9 parties to that agreement. On either basis, the request of the SRFC would lie outside
10 the competence of the Tribunal.
11
12 Finally, I move to article 16 of the Statute, the rule-making power. That power does
13 not provide an independent source of power to make a rule, such as article 138,
14 conferring an advisory jurisdiction on the Tribunal.[25]
15
16 Article 16 of the Statute is in identical terms to the rule-making power in article 30 of
17 the Statute of the ICJ. In relation to article 30, the respected commentator Thirlway
18 notes:
19
20 It is recognised that the rule-making power may be exercised to fill *lacunae*
21 in the Statute; but the concept of a *lacuna*, of what is missing from the Statute
22 must be defined by reference to what is present in the Statute. The rule-
23 making power cannot, on this basis, be exercised at large. It would not be
24 possible, e.g., for the Court, by enacting a rule, to confer upon itself a
25 jurisdiction which it did not otherwise possess, under the Statute or on some
26 other basis. This may be an extreme example …[26]
27
28 Similarly, it would not be possible for the Tribunal, by making a rule, to confer upon
29 itself a jurisdiction to give an advisory opinion that it did not otherwise possess under
30 the 1982 Convention, or the Statute of the Tribunal. To do so would, in the words of
31 Sir Hersch Lauterpacht, amount to "an excess of zeal".[27]
32
33 Article 138 of the Rules, purportedly made pursuant to article 16 of the Statute, is
34 framed squarely in terms of a conferral of power upon the Tribunal to give an
35 advisory opinion. It stands in stark contrast to the other provisions of the Rules which
36 do not purport to confer jurisdiction on the Tribunal. Rather, those other provisions of
37 the Rules rely upon the jurisdiction that has been conferred expressly by the 1982
38 Convention, and they are framed for carrying out that jurisdiction.
39
40 The purported conferral of a power to give an advisory opinion on the Tribunal by
41 article 138 of the Rules, both in its terminology and in its effect, is the conferral of a
42 new and substantive function; it is not a rule for carrying out an already existing

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[25] Written Statement of Australia, paras. 11, 34–39; First Written Statement of the United Kingdom, paras. 16–18 and 31–33; Second Written Statement of Thailand, para. 5.
[26] Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds), *The Statute of the International Court of Justice – A Commentary* 2nd ed. (OUP, 2012), p. 518. See also Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), 2013, p. 101, footnote 64, and *Land, Island and Maritime Frontier Dispute* case, Diss. Op. Shahabudeen, *I.C.J. Reports 1990*, p. 48.
[27] H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1982), p. 91.

"function" or a "rule of procedure" within the meaning of article 16. As such, article 138 is beyond the rule-making power of the Tribunal.

Mr President, Members of the Tribunal, it is for those reasons that Australia submits that this court is without jurisdiction to entertain this request for an advisory opinion.

Mr President, Members of the Tribunal, I thank you for your attention once again and ask that you call upon Ms Ierino to continue the oral submissions of Australia.

THE PRESIDENT: Thank you, Mr Campbell, for your statement. I now invite Ms Ierino to continue the presentation of Australia.

MS IERINO: Mr President, Members of the Tribunal, it is an honour to appear before you in these proceedings, and to do so on behalf of Australia.

As you have heard from Mr Campbell, it is Australia's primary submission that the Tribunal is without jurisdiction to give the requested opinion. If the Tribunal lacks jurisdiction, the question of exercising your discretionary power does not arise.[1]

However, should you determine that the Tribunal does possess an advisory jurisdiction, we respectfully submit that the Tribunal should decline to exercise any such jurisdiction in the present case. This submission is without prejudice to Australia's primary submission, delivered by Mr Campbell.

Mr President, before turning to the address the cogent reasons that underpin this submission, I will first make a few preliminary remarks concerning the Tribunal's discretion in the case before you.

It was uncontested in the written statements submitted in this case that article 138 of the Rules of the Tribunal establishes a power of a discretionary character: "the Tribunal **may** give an advisory opinion…". Indeed, it is clear that the Rules of the Tribunal governing the exercise of advisory jurisdiction are modelled on relevant provisions of the Statute and the Rules of the International Court;[2] that is to say, like article 65 of the ICJ Statute, article 138 confers on the Tribunal "the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request."[3]

As the International Court stated in *Western Sahara*, "[a]s a judicial body, the Court is bound to remain faithful to the requirements of its judicial character, even in giving advisory opinions".[4] That statement applies equally to this Tribunal in the exercise of any advisory jurisdiction.

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[1] *Threat or Use of Nuclear Weapons*, p. 232, para. 10; *Construction of a Wall*, p. 144, para. 13; *Unilateral Declaration of Independence in Respect of Kosovo*, p. 412, para. 17; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion*, *I.C.J. Reports 1996*, p. 73, para. 14.

[2] Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds), *Statute of the International Court: A Commentary* 2nd ed. (OUP, 2012), p. 1657.

[3] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950 ("Interpretation of Peace Treaties"),* p. 72.

[4] *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975* ("*Western Sahara*"), p. 21, para. 23.

1 In light of the potentially wide-ranging nature of the jurisdiction conferred under
2 article 138, this Tribunal must have some discretion as to whether it should respond
3 to a request for an advisory opinion if it is to be in a position to protect the integrity of
4 its judicial role.[5] Accordingly, it should be satisfied that that integrity remains intact.[6]
5
6 Australia respectfully submits that there are compelling reasons[7] that should lead the
7 Tribunal, in the exercise of its discretion, to decline to respond to the present
8 request, as to do otherwise would be inconsistent with its judicial function. Indeed,
9 even amongst those States that are of the view that the Tribunal does possess an
10 advisory jurisdiction, there is hesitation as to whether it would be appropriate for the
11 Tribunal to respond to the questions referred for its opinion in the present case.[8]
12
13 With your indulgence, Mr President, I will now move to deal with each of these
14 compelling reasons for declining jurisdiction in turn.
15
16 The first such reason is that any opinion rendered by the Tribunal in response to the
17 questions referred by the SRFC would not have the character merely of advice given
18 to the SRFC for its own internal purposes. Any such opinion would touch on a range
19 of bilateral and multilateral agreements and affect the position of third States,
20 including Australia, which have not sought the exercise of advisory jurisdiction by the
21 Tribunal.
22
23 That this is so is confirmed by Chapter II of the SRFC's written statement, in which it
24 set out a long list of international agreements and non-binding instruments as the
25 "applicable law" for the present case. Yet, yesterday we heard from the SRFC that it
26 seeks an advisory opinion from this Tribunal on the interpretation and application of
27 the MCA Convention and the 1982 Convention alone, and *not* regarding any other
28 bilateral or multilateral instruments.[9]
29
30 With all due respect, the wide-ranging questions posed by the SRFC extend well
31 beyond the interpretation and application of the MCA Convention and the 1982
32 Convention. Indeed, in its oral submissions yesterday, the SRFC expressly invoked
33 relevant provisions of the Fish Stocks Agreement, the Compliance Agreement and
34 the Port State Measures Agreement.[10] The Commission noted, for example, that it
35 was vital for the Tribunal to give its opinion on the effect of certain articles in the Fish
36 Stocks Agreement,[11] and welcomed "any and all clarification that the Tribunal may
37 provide of the key provisions of the Convention *and the other international legal*

[5] *Status of Eastern Carelia*, *Advisory Opinion*, *1923, P.C.I.J, Series B, No. 5*, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982,* p. 334, para. 22; *Construction of a Wall*, pp. 156-157, paras. 44–45; *Unilateral Declaration of Independence in Respect of Kosovo*, p.416, para. 29.
[6] See, e.g., *Unilateral Declaration of Independence in Respect of Kosovo*, p. 416, para. 31.
[7] *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, *I.C.J. Reports 1956*, p. 86; *Construction of a Wall*, p. 156, para. 44; *Unilateral Declaration of Independence in Respect of Kosovo*, p. 416, para. 30.
[8] Written Statement of New Zealand, para. 20; First Written Statement of the European Union, paras. 5-17; Written Statement of Japan, para. 18.
[9] ITLOS/PV.14/C21/1, p. 11 (Bèye Traoré).
[10] ITLOS/PV.14/C21/1, p. 16 (Bèye Traoré).
[11] ITLOS/PV.14/C21/1, p. 25 (Bèye Traoré).

instruments pertaining to the rights and duties of flag States in cases of IUU fishing as well as clarification of the rights and duties of coastal States in an effort to achieve sustainable management of shared stocks."[12]

THE PRESIDENT: I am sorry to interrupt you, Ms Ierino, but would you speak more slowly so that our interpreters can follow?

MS IERINO: Yes, Mr President.

THE PRESIDENT: Thank you.

MS IERINO: In short, despite its protestations to the contrary, the Commission is asking the Tribunal to clarify the rights and duties of States under a range of conventions and to fill what it sees as existing gaps in the law.

On its face, article 33 of the MCA Convention seeks to define the scope of the questions upon which an advisory opinion may be requested in a very broad manner. However, it does not follow that the SRFC may properly ask questions of the Tribunal which extend well beyond the scope of that Convention and which concern its rights and obligations in relation to States parties to other conventions that have not consented to the Tribunal's exercise of jurisdiction.

If this were permissible, as Ireland has noted,

> any two or more States parties to [the 1982 Convention] could conclude an agreement between them solely for the purpose of obtaining from the Tribunal an advisory opinion on the interpretation or application of specific provisions of the 1982 Convention where such an advisory opinion could not be requested pursuant to any provision of [the 1982 Convention] itself.[13]

In this respect, the current request has been submitted to the Tribunal by seven States Parties to the 1982 Convention – the SRFC Member States. However, any opinion rendered in response to these far-reaching questions would equally affect all 166 States Parties to that Convention, as explicitly recognized yesterday by the SRFC,[14] and others.[15]

Further, as you have heard from a number of States,[16] the Fish Stocks Agreement, the Compliance Agreement and the Port State Measures Agreement contain their own dispute resolution mechanisms, which do not confer advisory jurisdiction on the Tribunal.[17] The States Parties to those Agreements have not consented to the

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[12] ITLOS/PV.14/C21/1, p. 26 (Bèye Traoré).
[13] Written Statement of Ireland, para. 2.11
[14] ITLOS/PV.14/C21/1, pp. 10 and 26 (Bèye Traoré).
[15] Written Statement of Australia, para. 43,
[16] Written Statement of Australia, paras. 43–47; Written Statement of Thailand, para. 20; First Written Statement of the United Kingdom, para. 47; Written Statement of the United States, para. 36.
[17] Written Statement of the United States, paras. 35–37. See also First Written Statement of the United Kingdom, para. 27.

granting of an advisory jurisdiction to the Tribunal relating to their interpretation and application.[18]

Although, as Germany noted earlier this morning, the International Court of Justice has set aside the principle of consent as a jurisdictional issue in advisory opinions,[19] it has left the principle untouched as a question of judicial propriety. As the Court stated in its Advisory Opinion on *Western Sahara*, "the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion".[20]

In this respect, Australia agrees with the European Union that

> advisory opinions cannot be used to undermine or circumvent the applicable dispute settlement provisions of the bilateral or multilateral instruments in place … nor be used to replace or extend the law-making powers that the parties to such agreements confer.[21]

For these reasons, Australia shares the view expressed by other States that any request for an advisory opinion submitted under the MCA Convention may only properly relate to matters internal to the SRFC, and the interpretation or application of the rights or obligations of the SRFC Member States *inter se* under that Convention.[22] The Tribunal may touch upon other rules of international law, including the 1982 Convention, incidentally and only insofar as it is necessary to interpret or apply the provisions of the MCA Convention.[23]

In discussing the principle of consent in relation to the International Court's advisory jurisdiction, Sir Hersch Lauterpacht described that Court's "attitude of restraint in subjecting, however indirectly, sovereign States to its jurisdiction."[24] Australia respectfully invites this Tribunal to adopt a similar attitude of restraint in approaching the present request.

Let me turn to the second compelling reason for declining to respond to the present request, which is that the SRFC is improperly seeking a legislative solution from the Tribunal to the questions it asks.

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[18] Written Statement of the United States, paras. 35–37. See also First Written Statement of the United Kingdom, para. 27

[19] *Interpretation of Peace Treaties*, p. 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, *I.C.J. Reports 1951* ("*Reservations to the Genocide Convention*"), p. 19; *Construction of a Wall*, p. 157, para. 47; *Western Sahara*, p. 24, paras. 31-32.

[20] *Western Sahara*, p. 25, para. 32, discussing *Interpretation of Peace Treaties,* p.71. See also *Western Sahara*, p. 20, para. 21; *Construction of a Wall*, p. 157, para. 47.

[21] First Written Statement of the European Union, para. 12.

[22] Written Statement of Australia, para. 50; First Written Statement of the United Kingdom, paras. 46-47; Second Written Statement of the United Kingdom, para. 8; First Written Statement of the Netherlands, paras. 2.7 and 2.8; Written Statement of the Argentine Republic, para. 18; First Written Statement of Thailand, p. 5; Written Statement of Ireland, para. 2.11.

[23] Written Statement of the Netherlands, para. 2.9.

[24] H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1982), p. 358.

1 In its recent statement the SRFC identified numerous perceived “shortcomings” of
2 international law that informed the formulation of the questions submitted to the
3 Tribunal.[25] In particular, it pinpointed a number of matters that are “not specified by
4 international law”[26] or in respect of which “international law is silent”.[27] These
5 shortcomings were further amplified yesterday during the oral submissions of the
6 SRFC, and described as “gaps” in international law, which it has asked the Tribunal
7 to fill.[28]
8
9 Australia is sympathetic to the SRFC’s desire to ensure that the challenges faced by
10 coastal States in respect of IUU fishing are addressed. However, we respectfully
11 submit that it is not this Tribunal’s role effectively to legislate to fill any gaps or
12 silences in the international law pertaining to IUU fishing and management of shared
13 stocks. Indeed, Australia agrees with Argentina that it would be incompatible with
14 this Tribunal’s judicial character to do so.[29] The judicial function is to state the
15 existing law, not to legislate.[30] Any “legislative” solutions must be pursued by States
16 as part of the future codification and progressive development of international law,
17 be it through the development of new treaties or institutions or improvements to
18 those that already exist.
19
20 A third compelling reason for declining jurisdiction arises from the impossibility of
21 providing a clear legal answer to the questions posed by the SRFC, which, on their
22 terms, apply indiscriminately to all flag States and all coastal States. Australia agrees
23 with the European Union and others[31] that the answer to each of the four questions
24 referred to the Tribunal will inevitably differ for each State, including as between the
25 member States of the SRFC, depending on that State’s individual bilateral and
26 multilateral treaty obligations.
27
28 A number of States, including Australia, also have identified other, more particular
29 concerns, in respect of the formulation of the questions referred to the Tribunal by
30 the SRFC.[32] We adopt these submissions, and need say nothing further on this
31 point.
32
33 Mr President, let me conclude Australia’s submissions. For the reasons stated, both
34 orally and in our written statement, Australia submits that the Tribunal should hold
35 that the SRFC’s request does not fall within its jurisdiction or, in the alternative, that
36 the Tribunal should exercise its discretion and decline the request for an advisory
37 opinion.
38
39 Mr President, Members of the Tribunal, thank you for your attention. That concludes
40 the oral statement of Australia in these proceedings.
41

[25] Written Statement of the SRFC, pp. 18–21, 23–25, 51–53.
[26] Written Statement of the SRFC, p. 18.
[27] Written Statement of the SRFC, p. 23.
[28] ITLOS/PV.14/C21/1, pp. 13–19, 24-26 (Bèye Traoré).
[29] Written Statement of the Argentine Republic, para. 22.
[30] *Threat or Use of Nuclear Weapons*, p. 237, para. 18.
[31] First Written Statement of the United Kingdom, paras. 44–45; First Written Statement of the European Union, paras. 6–8.
[32] Written Statement of Australia, paras. 55–61; Written Statement of the People’s Republic of China, para. 90; First Written Statement of the United Kingdom, paras. 51-52.

1 **THE PRESIDENT:** Thank you, Ms Ierino, for your statement. The Tribunal will now
2 withdraw for a break until noon. The meeting is now suspended.
3
4 *(Break)*
5
6 **THE PRESIDENT:** I now give the floor to the representative of Chile, Mr Schott.
7
8 **MR SCHOTT:** Mr President, I am greatly honoured to appear before this Tribunal on
9 behalf of the Chilean Government to convey our position on this important issue that
10 constitutes Case No. 21, referred to the consideration of this high instance. We are
11 trying to reply to the questions raised in the scope of this advisory opinion, as
12 requested by the Sub-Regional Fisheries Commission of Africa.
13
14 Chile appears in this hearing as a member State of the UNCLOS and particularly
15 reaffirming a fundamental purpose, *inter alia* its fight against illegal, unreported,
16 unregulated (IUU) fishing. Our country attaches great importance to this matter from
17 three different viewpoints deriving from its triple status as a coastal State, as a port
18 State, and as a flag State. It also reflects the efforts we are currently making towards
19 implementation of a new national policy intended to reinforce Chile's actions to
20 prevent, deter and eliminate illegal fishing.
21
22 Specifically as regards the request for an advisory opinion, our country understands
23 that the jurisdiction of this Tribunal is conferred by the Convention and by the
24 respective rules of its Statutes. As this is an advisory instance, we must highlight two
25 essential items relating to the jurisdiction of the Tribunal to hear and adjudge on the
26 matter referred to its consideration.
27
28 Chile is of the opinion that the jurisdiction of this Tribunal to try this request stems
29 from article 138 of the regulations, provided that certain requirements are met,
30 namely, that it be a question made in legal terms, by a qualified entity, under an
31 international agreement that provides for this consultation with the Tribunal and on a
32 matter contained in the Convention. These requirements are met in the instant case.
33 The jurisdiction is in line with the provision of article 21 of the Statute of the Tribunal,
34 according to which "[t]he jurisdiction of the Tribunal comprises all disputes and all
35 applications that are referred to it in accordance with this Convention and all matters
36 specifically provided for in any other agreement which confers jurisdiction on the
37 Tribunal."
38
39 As this is an advisory opinion requested by a specific international agency of regional
40 reach and which Chile is not a party to, the reply given by Chile is not intended to
41 establish rules for that agency without having jurisdiction to do so or take part in a
42 contentious matter without having authorization to do so. That is, it only intends to
43 provide elements of analysis for the Tribunal to reply to a regional agency duly
44 authorized by the regulations, bearing in mind that this opinion is not an international
45 judgment and does not have a binding effect.
46
47 On the other hand, as the jurisdiction of the Tribunal on this matter stems from a
48 specific sub-regional convention, the parties to that treaty are indeed entitled to the
49 interpretation and implementation of agreements, and under no circumstance should
50 it be considered that either the duty of the Tribunal on the matter or the positions

expressed by countries towards the consultation imply a possible involvement in issues dealing with disputes or issues in question between third parties or proper to the regional organization that submits the consultation.

Mr President, the United Nations Convention on the Law of the Sea contains fundamental rules on conservation and use of marine living resources in the exclusive economic zone, in addition to establishing specific rules on the conservation and management of living resources on the high seas, which give rise to important legal consequences for any State in respect of its nationals fishing on the high seas. Such obligations have been implemented and developed in important instruments relating to the status of the flag State. Part XII of the Convention, which refers to the protection and preservation of the marine environment, consistently harmonizes these goals with the sovereign right of States to exploit their natural resources and establish policies to protect and preserve such marine environment.[1] Section 9 of Part XII, abovementioned, establishes the responsibility of States according to international law, in compliance with their international obligations relating to the preservation and protection of the marine environment.[2]

As it will not escape the attention of this Court, although the concept of illegal, unreported and unregulated (IUU) fishing is not contained in those terms in the UNCLOS, the same can be inferred from it. Indeed, it so transpires from the abovementioned article 61 on conservation of living resources, in addition to the provision of article 73 of that Convention which indicates that a coastal State, in the exercise of its sovereign rights for the exploitation, conservation and management of resources should take such measures, including boarding, inspection, arrest, and judicial proceedings against foreign flag merchant vessels as are necessary to ensure compliance with coastal nation rules and regulations adopted in conformity with the Convention.

Further, the 1995 New York Convention[3] on Straddling Fish Stocks and Highly Migratory Fish Stocks, which Chile will soon adhere to, contains some guiding principles on fisheries that may help understand the concept of illegal, unreported and unregulated (IUU) fishing. Indeed, the preamble refers to unregulated fishing and to the problems it generates.

The concept of illegal, unreported and unregulated (IUU) fishing as such has been recalled since 1999 in the annual resolutions of the UN General Assembly on Sustainable Fisheries,[4] mainly because it is one of the most serious problems affecting fish stocks, including straddling and highly migratory, which are overfished or subject to intensive and poorly regulated fishing efforts.

The Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing approved by the United Nations Food and Agriculture Organization, 2001,[5] first defined IUU fishing from a legal point of view and established the need for

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[1] Article 193 of the UNCLOS.
[2] Article 233 of the UNCLOS.
[3] 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.
[4] A/RES/54/32, 19 January 2000.
[5] FAO Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. http://www.fao.org/docrep/003/y1224s/y1224s00.HTM.

national legislation to effectively address all aspects of IUU fishing. It also contains a catalogue of measures to be taken by coastal, port and flag States.

Mr President, by virtue of the foregoing, our country believes that the concept of illegal, unreported and unregulated (IUU) fishing is a sufficiently rooted concept. It can be held that the concept of illegal, unreported and unregulated (IUU) fishing in terms established in the abovementioned Action Plan is part of customary international law. The above is confirmed by the definition of article 1(e) of the said Agreement on Measures of the Port State, which conceptualizes it by referring it to the activities described in paragraph 3 of FAO International Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2001.

Now I will refer to the questions. On question 1, the UN Convention regulates the maritime spaces, including the exclusive economic zone over which coastal States have sovereign rights for exploration and exploitation, natural resources conservation and management, as well as jurisdiction for the protection and preservation of the marine environment.

In this regard, both the UN Convention on the Law of the Sea and the 1995 New York Agreement establish that foreign flagged ships are bound not to conduct fishing activities in a foreign EEZ unless they are granted consent thereto and, in such a case, always observing the internal regulations of the coastal State.

This obligation entails the flag State making sure its flag vessels – the vessels which have been granted its nationality – do not perform fishing activities within the economic exclusive zone of third party States unless they have the relevant consent.

Article 62 of the Convention provides that where the coastal State does not have the capacity to harvest the entire allowable catch determined by it, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch. It also prescribes that nationals of the States that have been given said rights shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.

On the other hand, flag States must ensure that every vessel flying its flag conducting operations in the exclusive economic zone of third parties exercises its activities in a manner not to undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, sub-regional, regional or global levels. States should also ensure that vessels flying their flags fulfill their obligations on the collection and provision of data relating to their fishing activities.

In the line of the above, mention should be made of the 1995 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which sets out legally binding principles and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, of a non-binding nature.

The Agreement on Compliance specifically envisions the flag State responsibility in this respect.

Accordingly, there are duties upon flag States to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal State's powers to enforce sanctions and measures which cannot be undermined by the flag State.

Question 2 concerns to what extent the flag State shall be held liable for IUU fishing activities conducted by vessels sailing under its flag.

In respect of duties of the flag State under international law, article 94 of the UN Convention sets forth the duties of the flag State, which rules are applicable in the exclusive economic zone to the extent that they do not derogate from, or impinge upon the sovereign rights of the coastal State. By definition, a flag State is entitled to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Likewise, in exercising their rights and performing their duties in the exclusive economic zone, States – including the flag State – shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UN Convention and other rules of international law. It means that no enforcing jurisdiction may be exercised in foreign exclusive economic zones.

The foregoing involves a duty of due diligence upon the flag State in that it must ensure that its vessels comply with its own laws and regulations as well as with those of the coastal State. For that purpose, it has jurisdiction and control over the vessels under its flag, through the adoption of appropriate measures.

Laws and regulations that must be respected include those relating to fishing and, quite particularly, those under article 61, paragraph 1, of the UN Convention related to allowable catch of the living resources of the exclusive economic zone determined by the coastal State.

Article 18 of the New York Agreement also reflects that the duties of the flag State comprise the adoption of such measures as may be necessary to ensure that vessels on the high seas flying its flag comply with sub-regional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures. According to this, a flag State may bear responsibility and liability as a consequence of its own conduct.

Furthermore, the obligation for a State to "ensure" that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States is clearly set out in the New York 1995 Agreement.

This Tribunal, in its Advisory Opinion in respect of the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, in 2011,[6] stated that the sponsoring State's obligation "to ensure" is not an

[6] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion*, para. 110.

1 obligation to achieve, in each and every case, the result that the sponsored
2 contractor complies with the aforementioned obligations. Rather, it is an obligation to
3 deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain
4 this result. To utilize the terminology current in international law, this obligation may
5 be characterized as an obligation "of conduct" and not "of result", and is an obligation
6 of "due diligence".
7
8 Question 3: as previously indicated, according to the law of the sea, especially
9 reflected in the UN Convention, supplemented by the 1995 New York Agreement,
10 and in agreements establishing regional fisheries organizations, such as the South
11 Pacific Regional Fisheries Management Organization, in conjunction with the Plan of
12 Action, the flag State is subject to certain obligations, particularly to exercise
13 effective control and jurisdiction on subjects authorized to fly its flag. This is a
14 consequence of basic principles of international law.
15
16 As regards fishing regulations, article 62 of the UN Convention provides that where a
17 coastal State has determined the total allowable catch (TAC) of its exclusive
18 economic zone and that its capacity to harvest living resources there is not sufficient,
19 it shall, through agreements or other arrangements, give the States access to the
20 surplus of the allowable catch. This figure means that a fishing license issued by the
21 coastal State amounts to a permit to conduct fishing activities in the exclusive
22 economic zone.
23
24 In this regard, whether this permit is issued in conformity with an international
25 agreement or on the basis of a bilateral agreement, the effect should be the same as
26 to the responsibility and liability of a flag State that is party to said agreements.
27
28 As a general conclusion, a breach of the rules of the fisheries legislation of the
29 coastal State by nationals of other States, whether or not there is an international
30 agreement between these States, will not constitute a violation of international law by
31 the flag State or the international agency. On the other hand, a flag State or an
32 international agency may be held responsible for misconduct of flagged vessels
33 fishing in the exclusive economic zone of a coastal State, whenever the flag State
34 and the international agency have failed to comply with their own duties under
35 international law. The liability of the flag State will only arise in the event that the flag
36 vessel of that State conducts IUU fishing operations due to the failure by the first
37 State to observe its own obligations towards that vessel. The same conclusion
38 applies in respect of an international agency.
39
40 Question 4: "What are the rights and obligations of the coastal State in ensuring the
41 sustainable management of shared stocks and stocks of common interest, especially
42 the small pelagic species and tuna?"
43
44 As previously stated, a coastal State has exclusive sovereign rights for the purpose
45 of exploration, exploitation, conservation and management of natural resources in its
46 EEZ. It has competence also to promote the objective of optimal use of living
47 resources. The State, within its powers, will determine the maximum allowable catch
48 thereof, and adopt the conservation and management stock measures that permit
49 their conservation in order to avoid over-exploitation. Such measures must take into
50 account the most accurate scientific data available to it for the sake of sustainability,

and be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

In respect of specific rights and duties, under articles 63 and 64, the UN Convention regulates the situation of straddling species present in the EEZ of two or more coastal States or in the high seas and of highly migratory species. In the first case, coastal States, directly or through proper regional or sub-regional organizations, shall agree on the necessary measures to coordinate and ensure the conservation and development of such stocks. If the said species transits through the EEZ of a State and the adjacent high seas, States involved in the fisheries shall endeavour, directly or through proper regional or sub-regional organizations, to directly agree upon the necessary steps for the conservation of those species in the adjacent area.

Additionally, the New York Agreement asserts the criterion of compatibility of measures (article 7) as an important tool for conservation and management of marine living resources, by projecting the efforts in that regard in the different marine areas. The 1995 Agreement states: "Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible…" and it adds "coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks."

To that end, among other aspects, account should be taken of previously agreed measures and applied for waters under national jurisdiction and ensure that the establishment of measures for the high seas does not undermine the effectiveness thereof. In the event that those measures previously adopted for the high seas are different from those adopted for the EEZ of a coastal State, like care should be taken not to undermine the effectiveness of the former.

It is also worth mentioning that cooperation for conservation and management (article 8) is a fundamental principle that permits an answer to the question made, as it aims at ensuring an effective conservation and management of these stocks.

Therefore, an effective international law on the matter demands that ORP mechanisms be in force so that conservation and management rules and practices around the rights and obligations of flag States and fishing vessels authorized to fly them are generated.

In conclusion, to summarize, it is the view of Chile that a distinction between the various actors is necessary to ascertain the rights and obligations according to the powers of flag States, port States and coastal States.

At the same time, the illegal, unreported, unregulated fishing concept is sufficiently rooted in the law, and there is an *opinio juris* which has been modelled through a series of international agreements, resolutions and domestic laws.

It is the duty upon flag States to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal State's powers to enforce sanctions and measures which cannot be undermined by the flag State.

Flag States' duties are not to be equated with the obligations of a flagged vessel. A State obligation is not only different from that which is borne by a vessel, but it is also subject to international principles in which a flag State cannot guarantee – unless with its consent – that any vessel flying its flag does not conduct IUU fishing.

With these conclusions, I complete the presentation of the Republic of Chile. I thank you for your attention.

THE PRESIDENT: Thank you, Mr Schott, for your statement. We will now hear the representative for Spain, Mr Martín y Pérez de Nanclares. You have the floor.

MR MARTIN Y PEREZ DE NANCLARES: Mr President, distinguished Members of the Tribunal, it is a great honour for me to appear before you on behalf of the Kingdom of Spain. Spain recognizes and deeply appreciates your invaluable work in interpreting and developing the law of the sea, as we well know from our recent experience in the *"Louisa"* case.

Today, the questions before us deal with very important issues for international law, and Spain is acutely aware of the important problems created by illegal, unregulated and unreported fishing off West Africa. However, due to the division of powers between the European Union and its member States, our oral statement will not address the merits of the questions submitted to this honourable Tribunal by the Sub-Regional Fisheries Commission. I am also fully aware that it is late and that we are all tired; and since I am the last speaker I will try to speak for no longer than 20 or 25 minutes.

Therefore, I re-assert the content of our written statement, and I will address three main questions in my oral statement.

First of all, I will address the contentious issue of the sources of the Tribunal's advisory jurisdiction. In that regard, I will consider the doctrine of inherent functions of international courts and tribunals, and other possible sources of advisory jurisdiction.

Second, and more specifically, I will set forth the interpretation proposed by the Kingdom of Spain for article 138 of the Rules of the Tribunal.

Third, I will finish my remarks by addressing the propriety of the exercise of the Tribunal's advisory jurisdiction. In that sense, Spain considers that the principle of consent of the States should be safeguarded when exercising those functions.

Mr President, I will now begin by analyzing the sources of the advisory jurisdiction of the International Tribunal for the Law of the Sea.

In our opinion, the exercise of advisory jurisdiction is not one of the inherent functions of international judicial bodies. This can be inferred from international case law and international practice, supported by the most respected doctrine.

In fact, we have to bear in mind the distinction in practice between the doctrine of implied powers of international organizations and the theory of inherent functions of international judicial bodies. The former was affirmed by the International Court of Justice (ICJ) in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations.* Very seldom have international courts or tribunals referred to the theory of inherent powers of international organizations when determining their own powers and functions. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) mentioned this in its decision in the *Blaskic Subpoena* case of 18 July 1997. However, this holding was reversed by the Appeals Chamber in its decision of 29 October 1997, in which the ICTY preferred to speak of inherent functions of judicial organs, rather than the more general implied powers of international organizations.

Actually the doctrine of inherent functions of judicial bodies has a more specific meaning. It was also formulated by the ICTY in the *Tadic* case. There, the inherent functions were described as follows: "It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents… although this is often done."

The *Blaskic Subpoena Appeal Decision*, the *Tadic* case and the earlier ICJ *Nuclear Tests* case all set forth the doctrine of inherent functions of judicial bodies. They confirm that international courts and tribunals have inherent functions; however, these are limited to ensuring that the exercise of the jurisdiction given expressly to a tribunal or court by its statute is not frustrated, and that its basic judicial functions are safeguarded.

Exceptionally, the notion of inherent functions of judicial organs has been based on a general principle of both domestic and international procedural law. Nevertheless, in the majority of these cases international courts and tribunals have adopted a functional approach.

Indeed, such an approach was used by the ICJ in the *Nuclear Tests* case. According to that approach, some judicial functions have an inherent nature because they are aimed either at ensuring the proper administration of justice or guaranteeing the effectiveness of the courts' jurisdiction.[1]

In a manner consistent with that approach, authors such as Oeller-Frahm and Thirlway[2] have stated that the advisory jurisdiction does not belong to those inherent functions which ensure the proper administration of justice. Thus, it has to be conferred expressly to a court or tribunal. As Amerasinghe has stated:

> In the international legal system a judicial tribunal does not have inherent advisory jurisdiction unless its constitutive instruments expressly give it that jurisdiction. Equally the advisory jurisdiction, if expressly attributed to a

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[1] Gaeta, Paola, "Inherent Powers of international courts and tribunals", in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassesse*, Kluwer Law International, 2003, cites Blaskic subpoena case and Rio Grande Irrigation and Land Company (UK-US arbitral tribunal, 1923).
[2] Oellers-Frahm, K., "Lawmaking through Advisory Opinions?", *German Law Journal,* 2011, pp. 1033-1056 (p.1); Hugh Thirlway, "Advisory Opinions", in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, online edition (section B.1, para. 4).

> tribunal, will be confined to the express grant of jurisdiction and only to the extent and within the limits expressly established in such grant.[3]

Likewise, international practice confirms this idea. An analysis of international tribunals and courts shows that the advisory jurisdiction is subject to an express conferral by the constituent instruments. This is the case of both the established international courts and the more specialized courts and tribunals in the area of human rights or regional integration. The constituent instruments of those international courts and tribunals contain provisions regarding the organs entitled to request an advisory opinion, the rules of procedure and the limits *ratione materiae*.

However, Mr President, there is no such conferral of jurisdiction in UNCLOS or in the Statute of this Tribunal. Detailed provisions regulating the procedure are also absent from those instruments.

Furthermore, the necessity of an express conferral of the advisory jurisdiction of a general nature stands out in comparison with articles 159, paragraph 10, and 191 of UNCLOS, which expressly set forth the advisory jurisdiction of the Seabed Disputes Chamber. Article 40, paragraph 2, of the Statute establishes the authority of the Chamber regarding the procedure.

Therefore, Mr President, how could the absence of those specific dispositions in UNCLOS be interpreted? I would like to underline the fact that in the preparatory works for the Convention no evidence can be found of proposals regarding a true advisory jurisdiction of a general nature.

From our point of view, only recourse to the interpretation of some further dispositions is left.

Mr President, article 288, paragraph 2, of UNCLOS and article 21 of the Statute have been mentioned as constituting a conferral of jurisdiction. Both norms should be read together and interpreted systematically.

It should be stressed that article 288 is located in section 2 of Part XV, dedicated to the binding resolution of disputes, and its wording refers clearly to disputes between parties to a contentious process. It also relates to applications, for example, for provisional measures and the prompt release of vessels.

Let us now turn to article 21 of the Statute. The use of the expression “all matters” has given rise to different interpretations. It reflects the approach of article 36, paragraph 1, of the Statute of the ICJ; and the most respected doctrine does not find evidence that the use of the term “all matters” in this article should encompass anything but disputes.[4]

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[3] Chattharanjan Felix Amerasinghe, *Jurisdiction of specific international tribunals*, Martinus Nijhoff Publishers, 2009, p. 199

[4] Tomuschat (Article 36), *The Statute of the ICJ: A commentary*, Oxford University Press, 2006; Shabtai Rosenne, *The Law and Practice of the International Court*, Martinus Nijhoff Publishers, 2006, p. 641.

1 In any case, a broader interpretation of the word "matters" would be more
2 reasonable in article 36, paragraph 1, of the ICJ's Statute than in article 21 of the
3 Statute of ITLOS, because the ICJ's advisory jurisdiction is expressly recognized in
4 article 96, paragraph 2, of the UN Charter. However, UNCLOS does not recognize
5 an advisory jurisdiction of a general nature to the Tribunal.
6
7 Finally, if article 21 of the Statute could somehow be construed as accepting the
8 Tribunal's advisory jurisdiction through the use of the word "matters", this jurisdiction
9 would be restrictive *per se*. It would be confined, *ratione materiae* and *ratione*
10 *personae,* to the scope of "any other agreement", as stated in article 21, which
11 specifically provides for the jurisdiction of the Tribunal.
12
13 Therefore, it would not appear as an advisory jurisdiction of a general nature but as a
14 more limited and specific advisory jurisdiction, in the sense given in article 138 of the
15 Rules of the Tribunal. Following Judge Wolfrum's "consensual" approach, it would
16 emerge as an additionally established jurisdiction based upon the consensus of the
17 parties.[5]
18
19 Mr President, I shall now deal with the second issue of this oral statement, namely
20 the specific problems posed by article 138 of the Rules of the Tribunal, its
21 interpretation, and the limits which should be read into it.
22
23 In that respect, article 138 of the Rules of the Tribunal is seen as the basis for the
24 request for an advisory opinion submitted by the SRFC to the Tribunal.
25
26 May I point out that article 288, paragraph 2, of UNCLOS states that by virtue of an
27 international agreement related to the purposes of the Convention, a group of States
28 or other subjects of international law may grant the Tribunal jurisdiction over disputes
29 between the parties concerning the interpretation and application of that international
30 agreement.
31
32 An analogous reading of article 138 of the Rules would allow the parties to an
33 international agreement related to the purposes of the Convention to grant an
34 advisory jurisdiction to the Tribunal. That jurisdiction would then extend over legal
35 questions related to the interpretation of that international agreement and its
36 application to the parties.
37
38 Likewise, the Kingdom of Spain considers that the request for an advisory opinion
39 made by the SRFC offers the Tribunal a valuable opportunity to interpret article 138
40 of the Rules in the light of international law.
41
42 In this regard, I would like to stress that article 138 was introduced by the Tribunal in
43 the first version of its Rules in 1997 and has no precedent in the Rules of the
44 Permanent Court of International Justice or the Rules of the ICJ. In our view, this
45 article is in clear need of interpretation. In article 138 we miss not only more precise
46 terms but also the determination of certain prerequisites subject to judicial control,
47 such as those set out in article 96, paragraph 2, of the UN Charter related to the

[5] Wolfrum, R., "Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?", *International Dispute Settlement: Room for innovations?,* Wolfrum, R.; Gätzschmann (eds.), p. 54.

1 ICJ's advisory jurisdiction. These prerequisites also appear in article 191 of
2 UNCLOS, concerning the advisory jurisdiction of the Seabed Disputes Chamber.
3 Incidentally, the written statements of some other countries – for example Japan[6]
4 and China[7] – have also taken note of the need for careful interpretation of article 138
5 of the Rules.
6
7 In this respect, it is worth recalling that in the wording of article 138 there are no clear
8 limits on the scope of the "legal questions" submitted to the Tribunal. For the
9 Kingdom of Spain, it is clear that those "legal questions" should have been confined
10 to those concerning the interpretation or application of the international agreement
11 conferring advisory jurisdiction on the Tribunal.
12
13 Consequently, the questions posed to the Tribunal in the framework of a request for
14 an advisory opinion should not reach beyond the extent *ratione materiae* and *ratione*
15 *personae* of the international agreement conferring advisory jurisdiction. In our
16 opinion, this requirement is not fulfilled by the request by the SRFC for an advisory
17 opinion.
18
19 In addition, this requirement is reinforced by a second one, namely that the legal
20 questions submitted to the Tribunal should arise within the scope of the
21 competences of the organ requesting the advisory opinion. This requirement was
22 subject to judicial control by the Seabed Disputes Chamber, which found that the
23 questions contained in the request for an advisory opinion in Case 17 arose within
24 the scope of the activities of the Council of the International Seabed Authority. On
25 the other hand, the ICJ examined that requirement in its landmark 1996 advisory
26 opinion on the *Legality of Use of Nuclear Weapons in an Armed Conflict*. There, the
27 ICJ, making a restrictive interpretation of the words "arising within the scope of its
28 activities", found that there was no sufficient connection between the activities of the
29 World Health Organization and the legal question contained in the request for an
30 advisory opinion. As the written statement of Japan declares, "the entities which are
31 allowed to request an advisory opinion of an international court or tribunal have been
32 strictly limited."[8]
33
34 In this case, essentially the Tribunal is not being asked to make a judicial
35 pronouncement over legal questions arising on the basis of the MCA Convention but
36 to address very general questions pertaining to other instruments of international
37 law.
38
39 In our view, an international agreement among a group of States cannot entitle them
40 to submit to the Tribunal legal questions within the scope of agreements other than
41 the one granting advisory jurisdiction. This would entail a way to circumvent or divert
42 the will of the parties to those other instruments.

[6] Japan WS, para. 11: "The fact that the legal bases for requesting an advisory opinion of the ICJ and the Seabed Disputes Chamber of the Tribunal are only given by the Charter and the Convention respectively suggests that the scope of 'an international agreement' as provided in Article 138, paragraph 1, of the Rules of the Tribunal should also require a careful interpretation."
[7] China WS, para. 63: "Thus, adopted by the Tribunal, Article 138 of the *Rules of the Tribunal* might arguably amount to a case of the exercise of inherent jurisdiction by the Tribunal. Caution is certainly called for in this respect."
[8] Japan WS, para. 10

Moreover, the judicial pronouncement requested from the Tribunal would, in the end, exceed the obligations and rights of the parties to that international agreement.

In that context, it must be taken into account that none of those instruments foresees an advisory jurisdiction of the Tribunal. The parties' consent is required in order to submit any dispute over the interpretation or application of those instruments to judicial settlement. Furthermore, the Tribunal is being asked to interpret international agreements which do not apply to some parties to the SRFC.[9]

Mr President, let me focus now on the final arguments of the Kingdom of Spain, regarding our concerns about the propriety of the exercise of the Tribunal's judicial functions.

Even in the limited scope of the special advisory jurisdiction conferred by an international agreement, due attention must be given to the propriety of the exercise of judicial functions by the Tribunal.

Therefore, when carrying out its advisory functions, the ICJ must satisfy itself as to the propriety of the exercise of its judicial functions. In our view, there is no reason for this honourable Tribunal not to give the same careful considerations to this matter. In that respect, the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent is of great importance.

Mr President, we ask ourselves whether the giving of an advisory opinion in this case would be incompatible with the Tribunal's judicial nature.

Controversies between States cannot be subject to judicial settlement without the consent of the States involved.

In the case of advisory proceedings, obviously the situation is certainly different. First of all, an advisory opinion is not binding, although it carries great authority. In addition, an advisory opinion is given not to States but to the organ entitled to request it.

It follows that no State can prevent the giving of an advisory opinion requested according to international law. However, as mentioned earlier, the consent of States still plays a role if the issuing of an advisory opinion has the effect of submitting a dispute to judicial settlement. This has been affirmed by the ICJ in the *Western Sahara* and *Peace Treaties* opinions and by the PCIJ in the *Eastern Carelia* opinion. Moreover, in the recent advisory opinions about *Construction of a Wall in Occupied Territory* or the *Declaration of Independence of Kosovo*, the ICJ also examined this possible effect.

Taking these considerations into account, let us go back to the request for an advisory opinion by the SRFC. The questions submitted to the Tribunal are not

[9] Only Guinea and Senegal are parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The ILO 2006 Convention does not apply to any of them.

framed in such controversial terms as might be, for example, questions regarding the status of islands and rocks or the requirements for a bay to qualify as historic. Nevertheless, these general questions submitted to the Tribunal by the SRFC may give rise to controversies between States, or between States and international organizations.

The Kingdom of Spain holds that any legal question which could entail a dispute between States would compromise the Tribunal's judicial functions and extend beyond the limits of the special advisory jurisdiction contained in article 138 of the Rules. In this case, the legal questions posed to the Tribunal reach beyond that special jurisdiction and, in our view, the Tribunal should decline the exercise of its jurisdiction.

Moreover, for the Kingdom of Spain it is evident that the questions posed to the Tribunal, by virtue of its general character, are of interest to all States.

Hence, the lack of broad consensus legitimizing the request for an advisory opinion should compel the Tribunal to decline the exercise of its jurisdiction. This lack of consensus is evidenced by a large number of written statements within the framework of this process.

For example, the United States, Argentina, the United Kingdom and the Netherlands[10] have expressed doubts about the legitimacy to request an advisory opinion from the Tribunal.

Mr President, allow me to finish this oral statement by respectfully recording our conclusions.

First, in UNCLOS there are no provisions granting the Tribunal an advisory jurisdiction of a general nature.

Second, neither can article 21 of the Statute of the Tribunal be construed as a basis for that advisory jurisdiction. Even if some advisory functions could be read into that article, the advisory jurisdiction of the Tribunal should be of a specific and restricted nature.

Third, in our opinion, article 138, paragraph 1, of the Rules of the Tribunal should be interpreted by the Tribunal as limited *ratione materiae* and *ratione personae* to the scope of the international agreement conferring advisory jurisdiction. In this particular case, article 138 of the Rules cannot be the legal basis for the request for an advisory opinion.

In conclusion, there are compelling reasons for the Tribunal to decline the exercise of these judicial functions. On the one hand, they are linked to the guarantee of the

[10] United States WS, para. 38, regarding *Additional Discretionary Considerations*: "Finally, responding substantively to the questions posed might encourage States to enter into new international agreements, the sole purpose of which is to confer advisory jurisdiction to the tribunal over a matter under another agreement that does not confer such jurisdiction."
More generally, regarding the sources and scope of the Tribunal's advisory jurisdiction, Argentina WS, paras. 13-17, UK First WS, para. 25 to 27, Netherlands First WS, par. 2.3.

1 principle of consent by States for their disputes to be submitted to judicial settlement.
2 On the other hand, they emanate from a lack of broad consensus legitimizing the
3 request for an advisory opinion.
4
5 Mr President, distinguished Members of the Tribunal, I trust that this statement has
6 helped to clarify the issues at stake. Let me once more reiterate the gratitude of the
7 Kingdom of Spain to this Tribunal and the great honour that it has been for me to
8 address Your Excellencies.
9
10 I thank you for your attention.
11
12 **THE PRESIDENT:** Thank you, Mr Merino de Mena, for your statement.
13
14 That concludes the oral statements for today.
15
16 The hearing will resume tomorrow morning at 10 a.m. to hear the statements of
17 Micronesia, New Zealand, the United Kingdom, Thailand and the European Union.
18
19 I wish you a pleasant afternoon.
20
21 (*The sitting closed at 12.57 p.m.*)