

Written Statement of the Kingdom of Spain

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

(CASE NO. 21)

WRITTEN STATEMENT BY THE KINGDOM OF SPAIN

29 November 2013

<u>CONTENTS</u>	<u>Page</u>	<u>Paragraphs</u>
CHAPTER I: Background	3	1-3
CHAPTER II: Legal aspects	4	4-32
1. Legal Basis for an advisory Jurisdiction	4	4-24
A. The advisory jurisdiction under UNCLOS	4	4-12
B. The scope and limitations of article 138 of the Rules	9	13-23
2. Propriety of the exercise of the Tribunal's judicial functions	12	24-31
CHAPTER III: Merits on the questions submitted	15	32
CHAPTER IV: Conclusions	16	33

CHAPTER I

BACKGROUND

1. On 27 March 2013, the Sub-Regional Fisheries Commission (“SRFC”) requested an advisory opinion from the International Tribunal for the Law of the Sea (“the Tribunal”)¹. The questions submitted to the Tribunal are the following:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?

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

3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?

4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

2. By Order of May 24, 2013, the Tribunal invited the States Parties to the United Nations Convention on the Law of the Sea, the SRFC and other organizations to present written statements on the questions submitted to the Tribunal by the SRFC.

3. The Tribunal has made, since its inception, an invaluable contribution to the determination and development of the International Law of the Sea. The Kingdom of Spain thanks the Tribunal for its long-standing work and dedication and welcomes the opportunity to address this honourable Tribunal in such a relevant question as its advisory jurisdiction.

¹ Letter from the Permanent Secretary of the Sub-Regional Fisheries Commission to the President of the International Tribunal for the Law of the Sea, dated 27 March 2013.

CHAPTER II

LEGAL ASPECTS

1. Legal Basis for an advisory Jurisdiction

A. The advisory jurisdiction under the United Nations Convention on the Law of the Sea and the Statute of the Tribunal

4. The International Tribunal for the Law of the Sea is a judicial institution created by virtue of Annex VI of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”) and its jurisdiction is established in Section 2 of Part XV of the Convention. In this context Spain made a declaration accepting the Tribunal’s jurisdiction on July 19, 2002, when she ratified UNCLOS².

5. According to the principle of conferral of competences, international organizations and institutions have no general competence but the special or functional powers that States have invested in them³. The notion of competences includes implied powers, but this doctrine has a limited application. As the International Court of Justice stated, implied powers of international organizations are “those powers which, [...], are conferred upon it by necessary implication as being essential to the performance of its duties⁴”.

² The Kingdom of Spain made the following declaration under articles 287 and 298 of the Convention: *Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention.*

The Government of Spain declares, pursuant to the provisions of article 298, para. 1(a) of the Convention, that it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.

³ *The Legality of the Threat or Use of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (I.C.J.Reports 1996, 226, at. Par. 25); *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)*, I.C.J. Reports 1962, 152; *Jurisdiction of the European Commission of the Danube (Advisory Opinion)*, P.C.I.J., Series B, No 14, 64 (1927).

⁴ *Reparation for Injuries suffered in the service of the United Nations (Advisory Opinion)*, I.C.J. Rep. 1949, p. 174, at p. 182.

6. We could therefore ascertain that the advisory jurisdiction is not inherent to the functions of a judicial body and thus it has to be transferred expressly to a court or tribunal⁵, as confirmed by the institutional practice. The power to deliver advisory opinions has been laid down expressly in the case of the Permanent Court of International Justice (article 14, para. 3, of the Covenant of the League of Nations⁶) and the International Court of Justice (article 96, para. 2, of the Charter of the United Nations⁷). The same can be said with respect to the specialized regional tribunals on human rights, as the European Court of Human Rights (articles 47⁸ and 48⁹ of the Convention and Protocol 16 to the Convention), the Inter-American Court of Human Rights (article 64 of the San José Convention¹⁰) or the African Court of the Human and Peoples' Rights (article 4 of the Protocol to the African Charter of Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights¹¹).

⁵ Oellers-Frahm, K., "Lawmaking through Advisory Opinions?", *German Law Journal*, 2011, pp. 1033-1056.

⁶ Article 14, para. 3 of the Covenant of the League of Nations:

The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

⁷ Article 96 of the Charter of the United Nations:

a) The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

b) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

⁸ Article 47 of the European Convention on Human Rights:

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

⁹ Article 48 of the European Convention on Human Rights:

Advisory Jurisdiction of the Court.

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

¹⁰ Article 64 of the American Convention on Human Rights, adopted in San José, Costa Rica on November 22, 1969:

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

¹¹ Article 4 of the Protocol to the African Charter of Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights:

Advisory Opinions.

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or

Finally, this is again the case in the context of regional economic integration organizations, as the European Court of Justice (article 218, para. 11 TFEU¹²), and the Court of Justice of the Economic Community of West African States (Article 10 of the Protocol of the Community Court of Justice¹³). It should be noted that the scope of advisory jurisdiction of these courts and tribunals differs considerably, as well as the effective use of this power by them. There are differences in the mandate of those tribunals concerning the jurisdiction *ratione materiae*, the capacity and the procedure¹⁴. Each of the instruments which expressly confer advisory jurisdiction to courts and tribunals regulate those questions, which are subject to jurisdictional control¹⁵.

7. The advisory jurisdiction under UNCLOS is now to be considered. The Seabed Disputes Chamber is entitled with a limited advisory jurisdiction expressly conferred to it by articles 159, para.10, and 191. On the basis of that jurisdiction, the Seabed Disputes Chamber has dictated its first advisory opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area*. With this opinion, the Tribunal has greatly contributed to

any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate of dissenting decision.

¹² Article 218, paragraph 11 of the Treaty on the Functioning of the European Union:

A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

¹³ Article 10 of the Protocol on the ECOWAS Community Court of Justice:

Advisory Opinion.

1. The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty.

2. Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question.

3. Upon receipt of the request referred to in paragraph 2 of this Article the Chief Registrar shall immediately inform Member States, notify them of the time limit fixed by the President for receipt of their written observations or for hearing their oral declarations.

4. In the exercise of its advisory functions, the Court shall be governed by the provisions of this Protocol which apply in contentious cases, where the Court recognises them to be applicable.

¹⁴ Wolfrum, R., "Advisory Opinions: Are there a Suitable Alternative for the Settlement of International Disputes?", *International Dispute Settlement: Room for innovations?*, Wolfrum, R.; Gätzschmann (eds.), Springer, pp. 35 and following.

¹⁵ On the questions of jurisdiction: International Seabed Chamber of ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Advisory Opinion)* Case No. 17 of the International Tribunal for the Law of the Sea List of Cases, 1 February 2011, para. 31-45.

the determination and development of International Law, as it has also done in relation to other specific procedures, like the prompt release of vessels and their crews¹⁶.

8. However, neither the Convention nor the Statute confers on the Tribunal an advisory jurisdiction of a general character.

9. As Article 288, para.2 of UNCLOS and article 21 of the Statute have been purported as a possible basis for that general advisory jurisdiction¹⁷, we should consider them under the light of the rules for treaty interpretation contained in articles 31 to 33 of the Convention on the Law of Treaties, adopted in Vienna on May 23, 1969. In regard to the preparatory work, there is no evidence of proposals or discussions on this matter - the advisory general jurisdiction of the Tribunal¹⁸ - by the negotiating States of UNCLOS.

The relevant dispositions read as follow:

Article 288 of the Convention:

1. *A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*
2. *A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.*
3. *The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.*
4. *In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.*

¹⁶ Judge Ndiaye has taken into account the possibility of requesting an advisory opinion by a regional fisheries management organization on issues related to IUU Fishing, when examining the limits of the special procedure of prompt release: Ndiaye, T.M., "Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa", *Chinese Journal of International Law*, 2011, para. 99.

¹⁷ Jesus, J.L., *The Rules of the International Tribunal for the Law of the Sea: A Commentary*. Rao; Ch., Gautier, P. (eds.), Martinus Nijhoff Publishers, 2006, pp. 393 and 394.

¹⁸ There was an initial proposal of a sort of prejudicial functions. By virtue of it domestic courts could request advisory opinions from the Tribunal. *Informal Working Group on dispute settlement in 1974*, (A/CONF.62/L.7 of 27 August 1974).

Article 21 of the Statute of the Tribunal:

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.

10. Taking into account the position of Article 288, in Section 2 of Part XV, which deals with compulsory procedures entailing binding decisions, and the specific-language regarding “disputes” in the article, it is to be concluded, in the same line as Judge Ndiaye and You¹⁹, that article 288 para.2 cannot be relied upon or interpreted as a basis for a general advisory jurisdiction of the Tribunal under UNCLOS.

11. The same conclusions can be reached regarding article 21 of the Statute. In particular, the sentences *all applications submitted in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal* in the text of article 21 of the Statute has to be understood systematically. In accordance with the Convention the applications foreseen in it are, for example, the applications for provisional measures and prompt release of vessels in articles 290.5 and 292.1 of the Convention²⁰. Hence, article 21 of the Statute does not grant an advisory jurisdiction of a general character to the Tribunal.

12. Therefore, we can conclude that there is no general advisory jurisdiction under UNCLOS or the Statute, conferred to the Tribunal by the States Parties to the Convention.

¹⁹Ndiaye, T.M., “The Advisory Function of the International Tribunal for the Law of the Sea”, *Chinese Journal of International Law*, 2010, pp. 565 – 587; You K-J, “Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited”, *Ocean Development & International Law*, 2008, 39, pp. 360-371.

²⁰ *United Nations Convention on the Law of the Sea 1982. A Commentary*, Nordquist, M.H., (ed.), 1989, Volume V (Volume Editors, Rosenne, S.; Sohn L.), p. 47.

B. The scope and limitations of article 138 of the Rules

13. The Tribunal's advisory jurisdiction, in this case, is based upon article 138 of the Rules of the Tribunal, which states:

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

2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

3. The Tribunal shall apply mutatis mutandis articles 130 to 137.

14. This rule was introduced by the Tribunal in the first redaction of its Rules in 1997, and it has no precedent in the Rules of the P.C.I.J. or in the Rules of the I.C.J.²¹ In no way does it presuppose a general advisory jurisdiction of the Tribunal under the Convention or the Statute, nor could it be considered as a new legal basis for that general power. In article 138, the Tribunal is considering the express conferral of a special²² advisory jurisdiction under other international agreements related to the purposes of the Convention, in an analogous manner as article 288 para. 2 of the Convention and article 21 of the Statute state an express conferral of contentious jurisdiction by virtue of such international agreements.

15. In conclusion, neither the Convention nor the Statute confers a general advisory jurisdiction to the Tribunal. The Tribunal implicitly admits it when including article 138 in its Rules. According to the terms of article 138 those other international agreements related to the purposes of the Convention would be the basis of the special advisory jurisdiction for the Tribunal.

²¹ Jesus, J.L., *op.cit.* p. 393.

²² *United Nations Convention on the Law of the Sea 1982. A Commentary*, Nordquist, M.H., (ed.), 1989, Volume V (Volume Editors, Rosenne, S.; Sohn L.), p. 47.

16. Article 138 of the Rules states three formal conditions:

- A specific conferral of advisory jurisdiction by an international agreement related to the purposes of the Convention.
- The request for an advisory opinion has to be transmitted by whatever body is authorized by or in accordance with that agreement.
- On this basis, the Tribunal may give an advisory opinion on a legal question²³.

17. Additionally, it could be said that the reference in article 138, para. 3 to the application *mutatis mutandis* of articles 130 to 137 of the Rules leaves many questions open, as the practical aspects of this kind of procedure are not regulated.

18. The first condition confirms the awareness of the Tribunal and the authors of the Rules about the necessity of a specific conferral of jurisdiction by an international agreement related to the purposes of the Convention. In this case, that international agreement is the *Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC* (the “MCA Convention”) and the relevant provision is its article 33.

19. The second one seems to adopt the general principle of legitimacy to submit a request by an organ of an international organization; however, the concept is not precisely delimited and has given rise to differing interpretations²⁴.

²³ The Tribunal had the opportunity to deal with this issue in its advisory opinion of February 1, 2011. It stated that “[t]he questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice [...] has stated that “questions ‘framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law’” (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion*, I.C.J. Report 1975, p. 12, at paragraph 15)” International Seabed Chamber, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Advisory Opinion)*, Case No. 17 of the International Tribunal for the Law of the Sea List of Cases, 1 February 2011, para. 39).

²⁴ Ndiaye, T.M., *op. cit.* and Jesus, J.L., *op. cit.*

20. The third condition is related to the delimitation *ratione materiae* of the Tribunal's special advisory jurisdiction. The functions of the Tribunal in these cases would consist in interpreting or clarifying legal question concerning the interpretation or application of the international agreement conferring the special advisory jurisdiction. Such functions could not reach beyond the scope of that agreement.

21. Taking into account the above mentioned considerations, the finding that the Tribunal has jurisdiction to answer the questions posed by the SRFC would expand the narrow scope of the jurisdiction conferred by the MCA Convention. Following Wolfrum's consensual approach²⁵, it is brought to the Tribunal's attention that the Parties in the agreement conferring jurisdiction (a reduced number of West African states) are not the same as the Parties concerned by the legal questions submitted to the Tribunal.

22. In relation to the legal questions posed in the request for an advisory opinion made by the SRFC, they are framed in general terms, in relation with UNCLOS and with the General International Law alike. In particular, they touch upon aspects of international responsibility of states.

23. Under the light of these considerations, it has to be remembered that any international judicial organ, when exercising an expressly conferred jurisdiction, has to perform its judicial functions with due propriety. Therefore, the same propriety could be expected from the International Tribunal for the Law of the Sea in such a complex situation as it is foreseen in the article 138 of the Rules.

²⁵ "The probably most convincing answer to this question is that Art. 138 of the Rules establishes a consensual solution. If the jurisdiction of international courts and tribunals is based upon consensus of the parties concerned there is no reason to deny then to established and additional jurisdiction" (Wolfrum, R. *op. cit.* p. 54).

2. Propriety of the exercise of the Tribunal's judicial functions

24. The relevant provisions have to be understood under the light of existing jurisprudence relating to the advisory jurisdiction of international Tribunals.

25. Due to the lack of precedents in the Tribunal of the Law of the Sea, the advisory opinions of the International Court of Justice are one of the main guides to analyze questions relating to the jurisdiction to give an advisory opinion and the propriety of the exercise of a Tribunal's judicial functions.

26. It is essential for a Tribunal not to circumvent the provisions regarding the acceptance of its jurisdiction by the States when involved in controversies, i.e the contentious jurisdiction. The International Court of Justice, in its Advisory Opinion of 1950 stated that

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's opinion is given not to the States but to the organ which is entitled to request it²⁶.

27. Commenting the 1950 decision, the I.C.J. explained in 1975 that:

The Court, it is true, affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case then under consideration from the Status of Eastern Carelia case and explained the particular grounds which led it to conclude that there was no reason requiring the court to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in

²⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase (Advisory Opinion)*, I.C.J. Reports 1950, p. 71. Cited also in *Legal Consequences of the Construction of a Wall in Occupied Territory (Advisory Opinion)*, I.C.J. Reports 2004, p. 136, at para. 47.

the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, 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.

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the court under the discretion given to it by Article 65, paragraph 1 of the Statute would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction²⁷.

28. According to this reasoning, it has to be analyzed whether issuing an advisory opinion in the present case would be compatible with the propriety of the exercise of the Tribunal's judicial functions.

29. There has been claimed²⁸ that such controversial issues as, for example, the status of islands and rocks and the subsequent interpretation of article 121, paragraph 3 of UNCLOS could become the object of advisory opinions. That issue (as are many others) is central to some legal controversies, which could only be heard by the Tribunal by virtue of the concerned States' consent.

30. Therefore, it is Spain's position that any legal question which is or can become the object of a dispute between States (and thus would require the consent of the States to be substantiated before the Tribunal) would compromise the Tribunal's judicial functions and extend beyond the special advisory jurisdiction expressly conferred on it by an international agreement related to the purposes of the Convention (and which, by virtue of that international agreement, is limited to its substance and can only affect rights and duties of States parties to the agreement).

31. In the request for an advisory opinion made by the SRFC, the nature of the questions posed is of a wide enough nature as to give rise to controversies between

²⁷ *Western Sahara (Advisory Opinion)*, I.C.J. Reports 1975, p.12 at para. 32-33.

²⁸ Ndiaye, T. M., *op. cit.* Judge Türk has also dealt with the advisory jurisdiction as a useful tool for states seeking to reconcile differences relating thereto without wishing to engage in a contentious procedure. Türk, H., "Advisory Opinions and the Law of the Sea", *The Challenges of Contemporary International Law and International Relations*, Liber Amicorum Dr. Ernest Etric, M.P. Pogadni et al. (eds.), European Law Faculty of Nova Guinea, 2013.

States, or between a State and an international organisation. In the view of the Kingdom of Spain, that very nature makes the questions inadequate to be answered by the Tribunal.

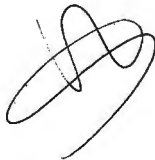
CHAPTER III**MERITS OF THE QUESTIONS SUBMITTED**

32. The Kingdom of Spain does not submit any considerations to the Tribunal regarding the substance of the questions asked to it in the request for its advisory opinion.

CHAPTER IV**CONCLUSIONS**

33. It is thus the view of the Kingdom of Spain that:

- Article 138 of the Rules of the Tribunal is a novelty. It has no basis in the Convention or the Statute of the Tribunal. Article 138 of the Rules foresees a special advisory jurisdiction expressly conferred to it by other international agreements. Those international agreements limit the scope of the advisory jurisdiction of the Tribunal.
- When considering a request for an advisory opinion, the Tribunal has to grant due protection to the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.
- Both *ratione materiae* and regarding the States concerned by them, the questions posed by the SRFC to the Tribunal fall outside the limits of the MCA Convention.
- Alternatively, if the Tribunal finds that it has jurisdiction to consider the request for an advisory opinion, it should decline to answer the questions contained therein by compelling reasons related to the propriety of the exercise of the Tribunal's judicial functions.



Prof. José Martín y Pérez de Nanclares
Director of the International Law Department
Ministry of Foreign Affairs and Cooperation
Government of the Kingdom of Spain