

II. States Parties to the 1995 Straddling Fish Stocks Agreement - Etats Parties à l'Accord de 1995 sur les stocks chevauchants

Written Statement of the United States of America

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
(CASE NO. 21)

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

WRITTEN STATEMENT OF
THE UNITED STATES OF AMERICA

27 NOVEMBER 2013

Introduction

1. In March 2013, the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) adopted a resolution in which it decided, pursuant to Article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (MCA Convention of 2012), to authorize the Permanent Secretary of the SRFC to obtain an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS, or Tribunal) on the following questions:
 - (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. In its Order of May 24, 2013, the Tribunal invited States Parties to the United Nations Convention on the Law of the Sea (LOS Convention),¹ the SRFC, and other organizations to present written statements on the questions submitted to the Tribunal.
3. Although not a State Party to the LOS Convention, the United States of America respectfully provides this written statement in its capacity as a Member State of the United Nations and many other organizations referred to in the Annex of the aforementioned Order. In this respect, the United States notes that several of the organizations referred to in the Annex have communicated to the Tribunal that, although they are not providing a written statement to the Tribunal, their individual members States may have views that they may communicate directly to the Tribunal.
4. With this being the first advisory opinion request to the full Tribunal, ITLOS is presented with a unique and important opportunity to consider the scope of its jurisdiction and the exercise of its related discretionary powers.

¹ United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, entered into force 10 Nov. 1994, 1833 U.N.T.S. 397, available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

5. At the outset, the United States wishes to commend the States that are members of the SRFC, and the SRFC itself, for their efforts to combat illegal, unreported and unregulated (IUU) fishing and acknowledge the scope of this challenge, particularly in the face of limited resources. IUU fishing undermines the goal of sustainable fisheries and deprives legitimate fishers and coastal States of the full benefits of their resources. Like many other States, the United States actively supports efforts to address problems of IUU fishing, including through the implementation of the numerous international instruments that have been negotiated and adopted in recent years for this purpose.
6. The United States recognizes, in particular, the challenges that developing States face in dealing with IUU fishing activities by foreign-flagged vessels in waters subject to their fisheries jurisdiction. The United States provides, and encourages other States and international organizations to provide, assistance to developing States in this regard through mechanisms such as capacity building initiatives, information sharing, and cooperative enforcement efforts.
7. While recognizing the legitimacy of the concerns which motivated SRFC's request for an advisory opinion, the United States believes that there are important legal and prudential considerations outlined in this written statement that militate against the Tribunal granting an advisory opinion in response to the SRFC request. **Section I** of this statement addresses jurisdictional considerations and explains why jurisdiction is lacking or, at a minimum, is limited to matters of interpretation or application of any agreement that confers jurisdiction upon ITLOS. **Section II** considers the discretionary authority of the Tribunal, including the concern of the United States that the SRFC's request invites the Tribunal to interpret and apply customary international law and other international agreements under which other States have not consented to advisory jurisdiction. Accordingly, the United States concludes that the request should not be granted, either on legal or prudential grounds.

I. Jurisdictional Considerations

8. Assessing the authority of the full Tribunal to issue advisory opinions requires an examination of relevant provisions of the LOS Convention and its Annexes and, should those be ambiguous, the Convention's negotiating history.² The first subsection below examines whether the full Tribunal has any advisory jurisdiction under the LOS Convention and the ITLOS Statute. The second subsection examines, in the alternative, whether there is advisory opinion jurisdiction with respect to the specific request made by the SRFC in light of the limitations imposed by Article 288 of the LOS Convention.

² Vienna Convention on the Law of Treaties art. 31 and art. 32, 22 May 1969, 1155 U.N.T.S. 331.

1. Advisory Jurisdiction of the Full Tribunal

9. The LOS Convention contains only two provisions that refer to the advisory jurisdiction of ITLOS: Article 159(10)³ and Article 191.⁴ These provisions appear in Part XI of the Convention and expressly establish advisory opinion jurisdiction with respect to the Seabed Disputes Chamber of the Tribunal on matters relating to deep seabed mining. The Statute of ITLOS, contained in Annex VI of the Convention, contains just one provision referencing advisory opinions.⁵ This provision, like those in Part XI of the Convention, refers only to the Seabed Disputes Chamber.
10. Article 21 of the ITLOS Statute also contains a more general description of the Tribunal's jurisdiction. While not referring to advisory jurisdiction expressly, Article 21 states: "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.*" (Emphasis added.)
11. Article 138 of the Tribunal's Rules of Procedure (Rules) partially tracks the second part of Article 21 of the Statute and addresses the issue of advisory opinions. Specifically, Article 138 of the Rules states: "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." Thus, according to the Tribunal's Rules, the *full Tribunal* has advisory jurisdiction, under the circumstances described in Article 138. Because the Rules cannot confer broader jurisdiction upon the Tribunal than does the Convention, the validity of Article 138 depends on whether it is consistent with the powers conferred upon the Tribunal by the Convention, including the ITLOS Statute.
12. In deciding how broadly to interpret and apply Article 21 of the Tribunal's Statute, the Tribunal should consider the overall content and purpose of the Convention's dispute settlement provisions as well as the intent of the Convention's drafters. It may likewise be helpful to consider the governing legal documents of other international courts and tribunals. When these factors are considered, the United States believes that the best

³ Article 159(10) states: "Upon a written request addressed to the President [of the International Seabed Authority ("Authority")] and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly [of the Authority] on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal."

⁴ Article 191, entitled "Advisory Opinions," states: "The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency."

⁵ Specifically, Article 40(2) of the ITLOS Statute, which appears in the Section of the Statute titled "Seabed Disputes Chamber," states: "In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable."

reading of Article 21 of the ITLOS Statute is that this provision does not provide for an advisory opinion function for the full Tribunal pursuant to other international agreements. As the Tribunal considers this issue, it may wish to bear in mind the considerations set forth below.

13. First, the fact that the Convention and the Tribunal's Statute provide for explicit advisory opinion jurisdiction *for the Seabed Disputes Chamber* and no other kind of explicit advisory opinion jurisdiction suggests that no other kind of advisory jurisdiction has been established. The express inclusion of an advisory function for one chamber of the Tribunal on a specified subject matter implies the absence of a broader advisory function for the entire Tribunal.
14. Second, it appears that all major international courts and tribunals that have rendered advisory opinions have done so pursuant to express authority found in a statute or other governing legal document.⁶ The International Court of Justice (ICJ), for instance, exercises advisory jurisdiction pursuant to express provisions of the UN Charter (Article 96) and its Statute (Articles 65-68). For ITLOS, the analogous instruments—the Convention and the ITLOS Statute—contain no mention of advisory jurisdiction for the full Tribunal. The United States is not aware of any international courts or tribunals that grant advisory opinions where there is no express authority provided for in a statute or other governing document. In at least one instance, a court initially did not have explicit advisory opinion authority, but its jurisdictional grant was amended to provide this power.⁷
15. Many of the courts and tribunals for which advisory functions were established also predate the LOS Convention, including the ICJ, the Permanent Court of International Justice (PCIJ), the Inter-American Court of Human Rights, and the European Court of Human Rights. This, along with the Convention's express grant of advisory functions to the Seabed Disputes Chamber, indicates that the international community, and the LOS Convention framers in particular, would have been aware of how to establish advisory

⁶ See, e.g., with respect to (1) the Permanent Court of International Justice, League of Nations Covenant art. 14; (2) the International Court of Justice, U.N. Charter art. 96 and Statute of the ICJ ch. IV; (3) the European Court of Human Rights, Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, 6 May 1963, E.T.S. No. 44 and Convention for the Protection of Human Rights and Fundamental Freedoms art. 47, 4 Nov. 1950 (as amended on 1 June 2010), E.T.S. No. 5; (4) the European Court of Justice, Treaty establishing the European Economic Community art. 228, 25 Mar. 1957, 298 U.N.T.S. 11 and Treaty on the Functioning of the European Union art. 218, para. 11, 9 May 2008, 2008 O.J. (C 115) 47; (5) the Inter-American Court of Human Rights, American Convention on Human Rights art. 64, 22 Nov. 1969, 1144 U.N.T.S. 123 (1969) and Statute of the Inter-American Court of Human Rights art. 2, 31 Oct. 1979, O.A.S. Res. 448, 9th Sess.; (6) the ECOWAS Court of Justice, Protocol on the Community Court of Justice art. 10, 6 July 1991; and (7) the Arbitration Commission on the Former Yugoslavia, Composition and Terms of Reference of the Arbitration Commission art. 3, 27 Jan. 1993, 32 I.L.M. 1572 (1993).

⁷ See Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions art. 1, 6 May 1963, E.T.S. No. 44, available at <http://www.conventions.coe.int/Treaty/en/Treaties/Html/044.htm> (amending the Convention to grant the European Court of Human Rights the jurisdiction to issue advisory opinions).

jurisdiction clearly for the full Tribunal, had they so intended. Indeed, for the drafters of the LOS Convention, the granting of an advisory function for the full Tribunal on matters related to the international law of the sea would have been a momentous decision. Had the drafters intended for such a significant function, it seems likely that they would have expressly stated it in the Tribunal's Statute rather than provide for such jurisdiction in an implicit manner.

16. Authorizing advisory opinions through express provisions in a governing legal document is the accepted international practice because such provisions give important guidance for courts and tribunals when considering a request for an advisory opinion. For instance, the above-referenced provisions of the UN Charter and the ICJ Statute specify, *inter alia*, (1) the entities that may request an advisory opinion (e.g., the General Assembly), (2) the procedure by which a request is to be made, (3) the scope of the legal questions on which a request may be based, (4) whether the granting of the request is mandatory or discretionary, and (5) the manner in which the opinion is delivered. Accordingly, when the ICJ receives and responds to an advisory opinion request, it has legal standards with which it can evaluate its jurisdiction and the admissibility of the request.
17. Unlike the courts and tribunals referred to above, there are no express provisions in the ITLOS Statute or in the LOS Convention to guide the treatment of a request for an advisory opinion to the full Tribunal. While it may be tempting to look to the advisory practice of the ICJ (or other courts) to inform ITLOS's handling of the present request, that practice is of questionable relevance here because it is based on the Court's interpretation and application of the advisory provisions in the UN Charter and its Statute, none of which are applicable here.⁸
18. A third factor that weighs against finding advisory opinion jurisdiction for the full Tribunal is that the negotiating history and commentary thereon also indicate that ITLOS's advisory function does not extend to the full Tribunal. According to the University of Virginia's *Commentary*, the Third UN Conference on the Law of the Sea made an effort to shape the advisory jurisdiction of the Seabed Disputes Chamber "in line with general United Nations practice, where only the General Assembly or the Security

⁸ For instance, the ICJ has had a number of occasions to consider whether an advisory opinion request made by an organ or specialized agency of the United Nations is "within the scope of their [i.e., the requesting body's] activities." See, e.g., *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, p. 74-81. Such an inquiry is not germane here for two reasons. First, there is no provision in the LOS Convention or the ITLOS Statute that establishes such a criterion. Second, the provisions the LOS Convention (Article 288(2)), the ITLOS Statute (Article 21), and the ITLOS Rules (Article 138) indicate that any request for an advisory opinion from the full Tribunal must be brought pursuant to *another international agreement*, which may not even have a requesting body that has any "activities" with which the Tribunal could evaluate the question of scope. Although Article 131 of the ITLOS Rules of Procedure refers to the need for an advisory opinion request "arising within the scope of the activities of the Assembly or the Council of the Authority," this has no applicability with respect to other international agreements which, as noted, may have no such plenary or executive bodies with a legally established "scope of activities" amenable to evaluation.

Council may request advisory opinions [of the ICJ].”⁹ For this reason, Article 190 was drafted in a manner that limits the source of advisory opinion requests to “the Assembly or the Council” of the Authority.

19. This effort of the Convention’s drafters would be undermined if any two or more countries, by operation of an international agreement, could confer advisory jurisdiction on the Tribunal on any “legal question if an international agreement related to the purposes of the Convention specifically provides for [it],” as stated in Article 138 of the Tribunal’s Rules.
20. The *Commentary* also states that “the Tribunal itself has no advisory jurisdiction, and the advisory jurisdiction of the [Seabed Disputes] Chamber is limited to legal questions that may be referred to it only by the Assembly or Council, within the scope of their activities.”¹⁰ The *Commentary*’s treatment of Article 21 of the ITLOS Statute is also noteworthy. There does not appear to be any evidence suggesting that the drafters considered Article 21 to confer advisory jurisdiction to the full Tribunal by operation of other international agreements.¹¹

2. Jurisdictional Limitations of Article 288

21. If ITLOS decides that the LOS Convention and its Statute authorize the full Tribunal to issue an advisory opinion pursuant to another agreement, that jurisdiction is nevertheless limited by Article 288 of the Convention, which requires the jurisdiction conferred must concern the interpretation or application of the international agreement that is conferring the advisory jurisdiction upon the Tribunal. In this instance, the request made by the SRFC does not call for an interpretation or application of the MCA Convention, which would be the instrument conferring advisory jurisdiction upon the Tribunal in this case. Accordingly, there is no advisory jurisdiction with respect to this specific request.
22. Requests to ITLOS for advisory opinions are authorized by Article 33 of the MCA Convention, as follows: “The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion.”¹² The record before the Tribunal

⁹ *United Nations Convention on the Law of the Sea, 1982: A Commentary* (hereinafter “*Commentary*”). University of Virginia School of Law, Center for Oceans Law and Policy. Vol. 6 at 643, quoting from the Chairman of the Group of Legal Experts on the settlement of disputes.

¹⁰ *Id.* at 644 and Vol. 5 at 416.

¹¹ Instead, the *Commentary* links Article 21 of the ITLOS Statute to articles within Part XV of the LOS Convention (“Settlement of Disputes”). *E.g.*, “Like article 288, paragraph 1, article 21 [of the Statute] comes into play only when the dispute-prevention provisions of articles 279 to 285 have not led to a settlement.” *Commentary*, Vol. 5 at 378. Articles 279 to 285 are general dispute settlement provisions, such as conciliation, that do not involve compulsory procedures entailing binding decisions. Neither these provisions nor any others in Part XV of the LOS Convention refer to advisory opinions.

¹² Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries

indicates that the Conference of Ministers adopted a resolution during its fourteenth session in March 2013 authorizing the SRFC Permanent Secretary to “seize” ITLOS to obtain an advisory opinion on the questions reproduced in paragraph I of this written statement.¹³

23. The questions submitted by the SRFC, however, do not call for an interpretation or application of the MCA Convention. Instead, the request invites the Tribunal to interpret and apply other international agreements and customary international law.¹⁴ This goes beyond what is contemplated in the LOS Convention and the ITLOS Statute.
24. Although Article 21 of the ITLOS Statute is worded broadly (referring to “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”), to the extent it is read to encompass advisory jurisdiction, it should still be read in light of Article 288 of the LOS Convention, which provides that the jurisdiction conferred upon ITLOS by another agreement must pertain to that agreement. Specifically, Article 288(2) of the LOS Convention provides that ITLOS (as well as other relevant courts and tribunals) 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*” (emphases added). Thus, the jurisdiction conferred upon ITLOS must “concern the interpretation or application” of the *agreement conferring jurisdiction*.
25. A contrary reading of Article 21 of the ITLOS Statute, under which international agreements can establish ITLOS’s jurisdiction over *any matter* provided for in such agreements, could lead to results that are manifestly absurd or unreasonable and should thus be avoided. If Article 21 were interpreted literally, the Tribunal could have jurisdiction over “*all matters* specifically provided for in *any other agreement*,” including matters of and agreements on human rights, armed conflict, criminal law, or other matters unrelated to the international law of the sea if that agreement provided for the Tribunal to have jurisdiction.¹⁵ Provided the jurisdiction is conferred by an “agreement” other than the Convention, there would seemingly be no limit whatsoever to the Tribunal’s competence under Article 21.

Commission (SRFC) (hereinafter “MCA Convention”), available at:

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf.

¹³ See Order 2013/2 of the Tribunal, 24 May 2013. The United States has no reason to believe that the request to ITLOS was made in a procedurally improper manner under the MCA Convention. The United States notes, however, that even if the resolution was properly adopted procedurally, it is nevertheless appropriate for the Tribunal to separately consider the appropriateness of granting the request. See, e.g., *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, p. 82 (“The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting ultra vires, with which the resolution might be afflicted.”).

¹⁴ See also *infra*, para. 33 *et seq.*

¹⁵ Emphasis added. Article 138 of the Rules appears to at least partially acknowledge this seemingly problematic breadth by narrowing Article 21 of the Statute in at least some respects. For instance, Article 138 refers to “international agreements” that are “related to the purposes of the Convention” rather than “any other agreement.”

26. The Convention's negotiating history and commentary thereon disfavors such a reading of Article 21 and supports the view that Article 21 is to be understood in connection with Article 288.¹⁶ This interpretation of ITLOS jurisdiction has also been accepted in academic scholarship.¹⁷ Furthermore, the practice of States in constructing international agreements related to the purposes of the LOS Convention—such as the Fish Stocks Agreement¹⁸ and the Port State Measures Agreement¹⁹—recognize this limitation.²⁰
27. The questions posed in the March 2013 advisory opinion request by the Permanent Secretary of the SRFC, in fact, do not call for the interpretation or application of the MCA Convention. The questions presented to ITLOS in the SRFC's request contain no reference to any provision of the MCA Convention. Importantly, the request does *not* ask ITLOS to render an opinion on the rights or obligations of the MCA Convention Parties under particular provisions of the MCA Convention.²¹ Rather, the questions pertain to

¹⁶ See *Commentary*, Vol. 5 at 378 (“Article [21], reflecting the approach of Article 36, paragraph 1, of the Statute of the International Court of Justice, sets out in broad terms the jurisdiction of the Tribunal *ratione materiae*. Its use of ‘disputes’ in lieu of ‘cases’ in the ICJ Statute is the link with article 288 of the Convention. Like article 288, paragraph 1, article 21 comes into play only when the dispute-prevention provisions of articles 279 to 285 have not led to a settlement.”). The *Commentary* also indicates that Article 14 of the ITLOS Statute, which establishes the Seabed Disputes Chamber, is also to be read in conjunction with the relevant articles of the Convention. Vol. 6 at 595. As discussed in the preceding subsection at note 11 and accompanying text, the lack of any reference to advisory jurisdiction in Part XV favors an interpretation of Article 21 that the full Tribunal lacks advisory jurisdiction, even pursuant to other international agreements.

¹⁷ See, e.g., John E. Noyes, *Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf*, 42 Vand. J. Transnat'l L. 1211 (2009) (“Advisory opinion requests to the ITLOS based on an international agreement between states would *probably have to relate to the particular substantive matter that is the subject of the agreement* rather than solely to the Convention.” (Emphasis added.)); Yann-Huei Song, *The International Tribunal for the Law of the Sea and the Possibility of Judicial Settlement of Disputes Involving the Fishing Entity of Taiwan – Taking CCSBT as an Example*, 8 San Diego Int'l L.J. 37, at 53-54 (2006) (noting ITLOS has jurisdiction over “any disputes which are referred to the Tribunal according to the international agreements which are relevant to the purpose of the [LOS Convention], *over the interpretation and application of the agreements concerned*.” (Emphasis added.))

¹⁸ 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 (hereinafter “Fish Stocks Agreement”) art. 30, 4 Aug. 1995, 2167 U.N.T.S. 3 (“The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement *concerning the interpretation or application of this Agreement*.” (Emphasis added.))

¹⁹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter “PSM Agreement”) art. 22, 22 Nov. 2009 (providing that the dispute in question must be “*with regard to the interpretation or application of the provisions of this [i.e., the Port State Measures] Agreement*.” (Emphasis added.))

²⁰ Under the MCA Convention, the advisory function conferred upon ITLOS in Article 33 of the MCA Convention pertains is seemingly without limitation, as it simply refers to “a given legal matter.” The fact that the MCA Convention diverges from the practice of States under the Fish Stocks Agreement and the Port State Measures Agreement cannot overcome the requirement in Article 288 that jurisdiction be limited to interpretation or application of the instrument conferring jurisdiction.

²¹ It may be said that the questions presented “aris[e] within the scope of the activities” of the SRFC or within the “scope of the activities” covered by the MCA Convention, which indeed deals with IUU fishing. See art. 131 and 138(3) of the Tribunal's Rules, which appear to require this. However, meeting this requirement would not obviate the need for the request itself to arise under the MCA Convention as opposed to calling for the interpretation or application of other international agreements or customary international law.

the rights, obligations, and liability of flag and coastal States on various matters relating to IUU fishing and the sustainable management of shared stocks and stocks of common interest. Accordingly, there is no jurisdiction with respect to this request.

28. As discussed further in Section II, below, the fact that other relevant coastal and flag States have not consented to the Tribunal's exercise of advisory jurisdiction under the international instruments that the Tribunal would apparently need to interpret and apply in fashioning a response to the SRFC request counsels against taking up the request as a prudential matter.

II. Discretionary Considerations

29. If the Tribunal nevertheless decides that the LOS Convention and its Statute authorize it to issue an advisory opinion pursuant to another agreement, and that the Tribunal has jurisdiction in this specific instance, the United States believes that the Tribunal should exercise its discretionary powers to decline the request.²² The ICJ, the PCIJ, and other courts and tribunals have emphasized that, even where they have jurisdiction to render an advisory opinion, they will consider the judicial propriety of doing so.²³ Without prejudice to the considerations discussed in Section I, the United States suggests that several considerations weigh in favor of not taking up the request. Most notably, relevant coastal and flag States have not consented to the Tribunal's exercise of advisory jurisdiction under the international instruments that the Tribunal would apparently need to interpret and apply in fashioning a response to the SRFC request. This and several other considerations are discussed below.

1. The Principle of Consent

30. The jurisprudence of the ICJ and its predecessor, the PCIJ, indicates the importance of State consent in the context of advisory as well as contentious proceedings. In the *Western Sahara* proceeding, the ICJ stated:

In certain circumstances . . . 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

²² Article 138 of the Tribunal's Rules states that the Tribunal "may" give an advisory opinion under the circumstances described therein. For the purposes of this Section, Article 138 is assumed to be a valid interpretation of Article 21 of the Tribunal's Statute, discussed in Section I, *supra*. In contrast, Article 191 of the LOS Convention provides that the Seabed Disputes Chamber "shall" give an advisory opinion in the circumstances described therein.

²³ See, e.g., cases cited, *infra*, notes 24 and 25.

such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph I, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.²⁴

31. In *Status of the Eastern Carelia*, the PCIJ highlighted the importance of State consent in determining advisory as well as contentious jurisdiction.²⁵ In declining to issue an advisory opinion, the court placed great weight on the fact that the question involved the obligations and rights of Russia, which was not a party to the League of Nations and had not otherwise consented to the jurisdiction of the court.
32. The examples from the ICJ and PCIJ noted above are somewhat different from the circumstances presented by the SRFC request. In those instances, the court considered the importance of maintaining the distinction between advisory and contentious proceedings whereas here the matter of contentious proceedings is not particularly germane. In *Western Sahara*, the court noted that while the consent of States is the basis for the court's jurisdiction in contentious cases, this is not the case for advisory jurisdiction, where the outcome is advisory in nature and without binding force.²⁶ Nevertheless, the principle of State consent remains important here, albeit in a different context. States negotiating and concluding an international agreement must be able to exercise their sovereign discretion to permit, or not permit, a court or tribunal to render advisory judgments concerning the interpretation or application of that agreement. Where States decide to not establish an advisory function under a particular agreement, that decision is deserving of respect.
33. As discussed in Section I, the questions posed in the March 2013 advisory opinion request of the SRFC do not call for the interpretation or application of the MCA Convention. Indeed, it may be worth noting that the MCA Convention itself, according to the SRFC Permanent Secretariat, is intended to "strengthen cooperation in fisheries matters among Member States for the purpose of harmonizing their positions in negotiations on fisheries agreements and within international bodies."²⁷ The Convention "incorporates the main principles laid down by international law, including in particular the Code of Conduct for Responsible Fisheries, the Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement, and the Port State Measures Agreement."²⁸

²⁴ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25. See also *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191.

²⁵ *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5* (23 July), available at: http://www.worldcourts.com/pcij/eng/decisions/1923.07.23_eastern_carelia.htm.

²⁶ *Western Sahara*, p. 24, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

²⁷ Technical Note, at p. 5.

²⁸ *Id.*

34. In line with the nature of the MCA Convention, the advisory opinion requested by the SRFC is aimed at the admittedly admirable goal of “supporting the SRFC Member States to enable them . . . to derive the greatest benefit from the effective implementation of the relevant international legal instruments and at ensuring that the challenges they are facing from IUU fishing are better met.”²⁹ The Technical Note accompanying the request identifies such relevant instruments to include the 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU) and the 2009 Port State Measures Agreement.³⁰ The SRFC explains that “it is particularly useful for the SRFC Member States to know precisely what their rights and obligations are in this connection [to IUU fishing], especially the newly created rights and obligations.”³¹
35. The 2001 IPOA-IUU does not, however, provide for any advisory jurisdiction. Rather, this is a voluntary instrument that, according to the FAO, “is to be interpreted and applied in a manner that is consistent with . . . the 1982 UN [Law of the Sea] Convention, the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.”³² Thus, implementing the IPOA-IUU involves implementing other legally binding instruments such as those above, none of which grant advisory jurisdiction to ITLOS. The Parties to the 1995 Fish Stocks Agreement conferred jurisdiction upon ITLOS (and other courts and tribunals), but *not* with respect to an advisory function.³³ The same is the case with respect to the 1993 FAO Compliance Agreement.³⁴ The United States and other Parties to these agreements have not consented to the granting of an advisory opinion relating to their implementation and it would be anomalous to allow this lack of consent to be circumvented through the use of another instrument.
36. The other agreement mentioned in the Technical Note accompanying the request is the 2009 Port State Measures Agreement. Like the Fish Stocks Agreement and the FAO Compliance Agreement, the Port State Measures Agreement provides for the submission of disputes over its interpretation or application to ITLOS or other courts or tribunals.³⁵ However, as with the aforementioned agreements, it does not provide ITLOS with advisory jurisdiction. States that have expressed their consent to be bound by the Port State Measures Agreement have not consented to the issuance of an advisory opinion relating to its implementation.

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ *Id.*

³² International Plan of Action to Prevent, Deter and Eliminate IUU Fishing IPOA-IUU text, 2001, *available at*: <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>. Para. 4. *See also* Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing, FAO, *available at*: <http://www.fao.org/docrep/005/y3536e/y3536e04.htm>. §1.2 Elements of the IPOA-IUU (discussing “relationship to the Code of Conduct and to other instruments”).

³³ Fish Stocks Agreement, art. 30.

³⁴ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, *available at*: <http://www.fao.org/docrep/mceting/003/x3130m/X3130E00.HTM>. Article IX, “Settlement of Disputes,” confers certain jurisdiction upon ITLOS (among others), but not with respect to an advisory function.

³⁵ PSM Agreement, art. 22.

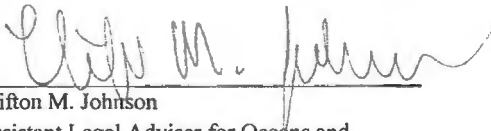
37. Permitting States Parties of one treaty to ask for an advisory opinion about questions under another treaty violates the consent of the States Parties to the other treaty. It imposes on those other States Parties a dispute resolution mechanism to which they did not agree and impermissibly allows other States, even States that may not be a party to an agreement, to raise questions about the interpretation of that agreement.

2. Additional Discretionary Considerations

38. Finally, the United States requests that the Tribunal consider several additional prudential reasons for refraining from exercising jurisdiction in this instance even if it finds the legal authority to do so. Exercising jurisdiction in this case might invite controversy and confusion about the ability of States Parties to control the interpretation and application of the agreements they negotiate. Likewise, a response to the questions posed to the Tribunal could prejudice the positions of the Parties to the instruments referred to above with respect to existing State-to-State disputes that may exist, but that have not yet been submitted to the jurisdiction of an international court or tribunal. 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.

Conclusion

39. In conclusion, for the reasons outlined in this written statement, the United States believes that the Tribunal should not grant the SRFC's request for an advisory opinion.



Clifton M. Johnson

Assistant Legal Adviser for Oceans and
International Environmental and Scientific Affairs
Department of State