

**Written Statement of Australia, with Annex A**

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 AUSTRALIA

28 NOVEMBER 2013

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**WRITTEN STATEMENT OF AUSTRALIA****CHAPTER I****REQUEST FOR AN ADVISORY OPINION**

1. On 28 March 2013, the International Tribunal for the Law of the Sea (“the Tribunal”) received a request from the Sub-Regional Fisheries Commission (SRFC) to render an advisory opinion 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. The Conference of Ministers of the SRFC authorised the Permanent Secretary of the SRFC to seize the Tribunal on these matters by way of a Resolution adopted during its Fourteenth Extraordinary Session (25 – 29 March 2013). This Resolution was adopted pursuant to Article 33 of the 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 (“the MCA Convention”),<sup>1</sup> which provides:

*Article 33: Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion*

The Conference of Ministers of the SRFC may authorise 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.

3. On 29 May 2013, the Tribunal invited the States parties to the United Nations Convention on the Law of the Sea (“the 1982 Convention”),<sup>2</sup> the SRFC and certain intergovernmental organisations to present written statements on the questions submitted to

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<sup>1</sup> Available at <[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Convention\\_CMA\\_ENG.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf)> on 28 November 2013.

<sup>2</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (“1982 Convention”).

the Tribunal for an advisory opinion and fixed 29 November 2013 as the date by which written statements may be presented to the Tribunal.<sup>3</sup>

4. At the core of this statement is the question whether the exercise of advisory jurisdiction by the full Tribunal is supported by the 1982 Convention including its Annexes, and, in the alternative, whether the Tribunal should exercise its discretion and decline to respond to the SRFC's request for an advisory opinion. The submissions in this statement should not be taken to suggest that Australia does not appreciate the seriousness of illegal, unreported and unregulated (IUU) fishing activities, and the challenges faced by coastal States, including Australia, in this regard. However, in Australia's submission, it is important that international courts and tribunals exercise jurisdiction within the constraints of their constituent instruments, and in line with their judicial character.

5. This statement of Australia is in three parts. Chapter 2 addresses the question as to whether the Tribunal has the jurisdiction to render an advisory opinion in response to the request from the SRFC. Chapter 3 examines whether the Tribunal should, in any case, exercise its discretion and decline to respond to the request from the SRFC. Chapter 4 examines whether the request made by the SRFC meets the requirements of Article 138 of the Rules of the Tribunal.<sup>4</sup> The latter two matters concerning the discretionary nature of advisory jurisdiction and compliance with Article 138 of the Rules are addressed in the event that the Tribunal determines that it has jurisdiction to render an advisory opinion in response to the SRFC's request.

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<sup>3</sup> Order 2013/2.

<sup>4</sup> International Tribunal for the Law of the Sea Rules of the Tribunal, ITLOS/8 (as amended on 17 March 2009) ("Rules of the Tribunal").

## CHAPTER 2

### JURISDICTION

6. An advisory opinion may be defined as an “opinion issued by an international court or tribunal at the request of a body authorised to request it, with a view to clarifying a legal question for that body’s benefit.”<sup>5</sup> The object of advisory proceedings is not, strictly speaking, the settlement of international disputes. As described by the International Court of Justice (ICJ): “The purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion.”<sup>6</sup>

7. It goes without saying that the exercise of any form of advisory jurisdiction must have a legal source. It cannot arise in a vacuum. In this respect, there is no inherent advisory jurisdiction in international courts and tribunals. As Thirlway notes, “[s]uch power is not inherent in its judicial status, so that a tribunal cannot give an advisory opinion unless the power to do so is conferred on it by its constituent instrument.”<sup>7</sup> That is, any jurisdiction to render advisory opinions must be the subject of an express conferral.<sup>8</sup>

8. Consistent with this principle, in international courts and tribunals established by treaty, jurisdiction to give advisory opinions is expressly accorded to that body by its constituent instrument. For example, Article 96 of the Charter of the United Nations<sup>9</sup> and Articles 65 – 68 of the Statute of the International Court of Justice expressly accord an advisory function on the ICJ. Also, Article 14 of the Covenant of the League of Nations,<sup>10</sup> which provided for the establishment of the Permanent Court of International Justice, specified that “[t]he Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.”<sup>11</sup>

9. Similarly, the advisory jurisdiction of other international judicial institutions has been expressly conferred by the States parties to the treaty establishing that institution. This is the

<sup>5</sup> J Salmon (Ed.), *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 116. English translation: R Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), pp. 1019 – 1020.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 236, para. 15.

<sup>7</sup> 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.

<sup>8</sup> Cf. Judge Jesus who noted that, by adopting Article 138 of the Rules of Court, the Tribunal confirmed the view that the possibility of an advisory jurisdiction “does not seem to be expressly or tacitly excluded” by the 1982 Convention or the Statute of the Tribunal (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. 275).

<sup>9</sup> Charter of the United Nations, San Francisco, 26 June 1945, 1 UNTS XVI.

<sup>10</sup> Covenant of the League of Nations, Paris, 29 April 1919, [1920] ATS 1 (entered into force 10 January 1920).

<sup>11</sup> The original Statute of the Permanent Court of International Justice (PCIJ) did not expressly confer advisory jurisdiction on that Court (Statute of the Permanent Court of International Justice, adopted on 16 December 1920, PCIJ Series D, No. 1). However, the PCIJ Statute was amended in 1929 to expressly provide for an advisory function. After the amendment of 1929, Articles 65-58 of the PCIJ Statute contained the provisions concerning the exercise of advisory jurisdiction by the Court.

case, for example, in respect of the Court of Justice of the European Union,<sup>12</sup> the European Court of Human Rights<sup>13</sup>, the Inter-American Court of Human Rights,<sup>14</sup> and the African Court on Human and Peoples' Rights.<sup>15</sup> Relevant provisions of constituent agreements conferring such jurisdiction may be found at **Annex A** to this statement.

10. Accordingly, for the Tribunal sitting as a whole to possess any advisory jurisdiction, such jurisdiction must be conferred in express terms by the 1982 Convention including the Statute of the Tribunal or be otherwise authorised by the Convention.

11. Similarly, the power to give an advisory opinion of the type purportedly conferred by Article 138 of the Rules of the Tribunal must have its basis in the terms of the 1982 Convention. The rule-making power under Article 16 of the Statute cannot be an independent source of power to create jurisdiction that the Tribunal did not otherwise possess.<sup>16</sup>

**I. The 1982 Convention is not a source of advisory jurisdiction other than that conferred on the Seabed Disputes Chamber**

12. The 1982 Convention, including the Statute of the Tribunal, does not expressly confer advisory jurisdiction on the Tribunal in its full composition. Only two provisions of the 1982 Convention explicitly accord a jurisdiction to render advisory opinions. These are:

*Article 159*

*Composition, procedure and voting*

...

(10) Upon a written request addressed to the President [of the International Seabed 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 International Seabed 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.

<sup>12</sup> Treaty establishing the European Economic Community, Rome, 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958), Article 228; Treaty on the Functioning of the European Union (consolidated version 2012), 26 October 2012, OJ C 326, Article 218(11).

<sup>13</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (as amended), Article 47; Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 2 October 2013 (not yet in force), Article 1.

<sup>14</sup> American Convention on Human Rights, San José, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978), Article 64; Statute of the Inter-American Commission on Human Rights, 1 October 1979, OAS Off. Rec. OEA/Ser.P/IX.0.2/80, Vol 1, p. 88 (entered into force 1 November 1979), Article 2.

<sup>15</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 4.

<sup>16</sup> See Chapter 2.III below.

*Article 191*  
*Advisory opinions*

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.

13. The above provisions, contained in Part XI of the 1982 Convention concerning the Area, entrust advisory jurisdiction solely to the Seabed Disputes Chamber of the Tribunal. Such jurisdiction is limited to two specified matters: (1) the conformity of a proposal before the Assembly of the International Seabed Authority with the 1982 Convention, and (2) legal questions arising within the scope of the activities of the Authority's Assembly or Council. By contrast, the Convention's silence as to the advisory jurisdiction of the full Tribunal suggests that the drafters of the 1982 Convention had no intention to confer such jurisdiction.<sup>17</sup> This proposition is confirmed by the authoritative University of Virginia *Commentary* to the 1982 Convention, which states that:

... the Tribunal itself has no advisory jurisdiction, and the advisory jurisdiction of the Chamber is limited to legal questions that may be referred to it only by the Assembly or Council, within the scope of their activities.<sup>18</sup>

14. This would lead to the conclusion that the Tribunal as a whole does not have an advisory jurisdiction unless that jurisdiction can be sourced in more general provisions of the 1982 Convention, including the Statute of the Tribunal, which confer jurisdiction on the Tribunal.

15. In this regard, the provisions that are most frequently identified as possible sources of a Tribunal advisory jurisdiction (and as the basis for Article 138 of the Rules), are Article 288 of the 1982 Convention and Article 21 of the Statute of the Tribunal.<sup>19</sup>

**A. Article 288 of the 1982 Convention**

16. Article 288 of the 1982 Convention provides:

*Article 288*

*Jurisdiction*

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

<sup>17</sup> Judge Wolfrum has noted: "The drafters of the UN Convention on the Law of the Sea were rather reluctant to entrust the Tribunal...with competences to give advisory opinions equivalent to the ones of the ICJ" (R Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R Wolfrum and I Gätzmann (Eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), p. 55).

<sup>18</sup> 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.

<sup>19</sup> R Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R Wolfrum and I Gätzmann (Eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), p. 54.

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.

In Australia's submission, Article 288 cannot provide a basis for the conferral of advisory jurisdiction on the Tribunal, either in the form purportedly conferred by Article 138 of the Rules or in any other form. Leaving aside the particular provisions concerning the Seabed Disputes Chamber (paragraph 3), Article 288 is concerned purely with the conferral of jurisdiction over *disputes* – that is, any *dispute* concerning the interpretation and application of the 1982 Convention or any *dispute* concerning the interpretation or application of an international agreement related to the purposes of the 1982 Convention (emphasis added).<sup>20</sup>

17. This limitation of the jurisdiction of the courts or tribunals referred to in Article 287, including the Tribunal, to *disputes* is confirmed by the fact that Part XV of the 1982 Convention, of which Article 288 forms part, is entitled "Settlement of Disputes". Moreover, Article 288 is contained within Section 2 of Part XV which is itself subtitled "Compulsory Procedures Entailing Binding Decisions". It is universally accepted that advisory opinions are just that – "advisory" and do not "entail binding decisions".

18. That is not to say that some form of difference of opinion, including what may be termed a dispute, might not be a catalyst for the seeking of an advisory opinion. In this respect, the written pleading of the United Kingdom in the ICJ Advisory Opinion case concerning the *Legality of the Threat or Use of Nuclear Weapons* divided advisory opinions into four categories, one of which was "cases where the legal question involved the interpretation of a constitutional provision which had become the subject of dispute in the organ making the request".<sup>21</sup> Although a dispute may be a catalyst for a request from an international organisation for an advisory opinion, it remains the case that it is a request for an advisory opinion before the relevant court or tribunal and not a legal dispute. Part XV and in particular Article 288 of the Convention does not authorise advisory opinions even if the catalyst for seeking such an opinion in a particular instance is a difference of opinion between relevant States.<sup>22</sup>

<sup>20</sup> 1982 Convention, Articles 288.1 and 288.2.

<sup>21</sup> *Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly) – Statement of the United Kingdom* dated 16 June 1995, para. 2.28. The UK Statement noted that the request in the *Nuclear Weapons Advisory Opinion Case* did not fall within that particular category and "[m]oreover, to answer the question posed by the Assembly would involve more than an examination of those provisions of the Charter, for the Court would be obliged also to consider the whole body of international law applicable to the use of weapons in armed conflicts" – the implication being that it should not do so. Similar considerations apply in relation to the current request to the Tribunal.

<sup>22</sup> In the same vein, Judge Ndiaye refers to the Rules of the Tribunal, Article 130.2, which enables the appointment of judges *ad hoc* where the Seabed Disputes Chamber considers that the request for an advisory opinion "relates to a legal question pending between two or more parties". He notes that "[t]hese provisions suggest that an advisory opinion can be sought on a dispute since the Rules authorise the parties to choose a judge *ad hoc* when there is no member of their nationality on the Bench". T Ndiaye, "The Advisory Function of



19. Also, if Article 288.2 of the 1982 Convention did provide a legal basis for the Tribunal to give advisory opinions, it would follow that the other dispute settlement bodies referred to in Article 287.1 of the 1982 Convention would have the same basis for doing so.<sup>23</sup> This would include the ICJ which already has an advisory jurisdiction conferred upon it by Chapter XIV of the Charter of the United Nations<sup>24</sup> and the Statute of the ICJ. Those negotiating the 1982 Convention could not have intended that the 1982 Convention could confer an expanded advisory jurisdiction on the ICJ beyond that authorised by the Charter of the United Nations and the Statute of the ICJ. Nor could it have been contemplated that an Annex VII or Annex VIII arbitral tribunal would give an advisory opinion. Both Annex VII and Annex VIII are clearly confined to “disputes” between “parties”.<sup>25</sup> Any jurisdiction conferred by Article 288.2 is conferred on all courts and tribunals referred to in Article 287.1. Since Article 288.2 does not confer advisory jurisdiction on the ICJ or Annex VII or Annex VIII tribunals, it follows Article 288.2 has not conferred, or provided a basis for conferring, such a jurisdiction on the Tribunal.

20. It is also noteworthy that at least a dozen multilateral agreements related to the purposes of the 1982 Agreement presently confer jurisdiction on the Tribunal under Article 288.2 in respect of disputes concerning the interpretation and application of their provisions.<sup>26</sup> By contrast, with the exception of Article 33 of the MCA Agreement, Australia is not aware of any international agreement that purports to confer advisory jurisdiction on the Tribunal.

## B. Article 21 of the Statute of ITLOS

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the International Tribunal for the Law of the Sea”, 9 *Chinese Journal of International Law* (2010), p. 565 at p. 573. Again, this is no more than dealing with the situation where a difference of opinion between two or more parties to a convention is the catalyst for a request for an advisory opinion. However, that, in itself, does not provide a legal source of power to give an advisory opinion.

<sup>23</sup> Paragraphs 1 and 2 of Article 288 refer collectively to “A court or tribunal referred to in Article 287...” The courts and tribunals listed in Article 287.1 are ITLOS, the ICJ and Annex VII and VIII tribunals.

<sup>24</sup> And, in particular, Article 96.

<sup>25</sup> 1982 Convention, Annex VII, Article 1 and Annex VIII, Article 1.

<sup>26</sup> MCA Convention, Article 34; Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing, Rome, 22 November 2009, at <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/2\\_037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf)> on 26 November 2013 (not yet in force) (“Port State Measures Agreement”), Article 22; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993, 2221 UNTS 93 (entered into force 24 April 2003) (“Compliance Agreement”), Article IX; 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, New York, 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001) (“Fish Stocks Agreement”), Articles 31-3; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matters, London, 7 November 1996, 36 ILM 7 (1997) (entered into force 25 March 2006), Article 16; Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific, 14 August 2000, *Law of the Sea Bulletin No. 45*, DOALOS, United Nations (2001), pp. 70-78 (not yet in force), Article 14; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Windhoek, 20 April 2001, 41 ILM 257 (2002) (entered into force 13 April 2003), Article 24; Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001, 41 ILM 40 (2002) (entered into force 2 January 2009), Article 25; Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, London, 18 November 1980, 1285 UNTS 129 (amended 2004) (the parties agreed to apply the amendments pending ratification); Southern Indian Ocean Fisheries Agreement, Rome, 7 July 2006 at <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/035t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/035t-e.pdf)> on 28 November 2013 (entered into force 21 June 2012); Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007, IMO document LEG/CONF.16/19 of 23 May 2007 (not yet in force), Article 15.

21. Article 21 of the Statute of the Tribunal forming Annex VI to the 1982 Convention also deals with the jurisdiction of the Tribunal. It provides:

Article 21

Jurisdiction

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.

In describing the jurisdiction of the Tribunal, Article 21 of the Statute makes reference to three categories which are subject to that jurisdiction: “disputes”, “applications” and “matters”.

“Disputes”

22. For the reasons stated above, the term “disputes” does not encompass an advisory jurisdiction.<sup>27</sup>

“All applications”

23. Judge Jesus has concluded that “Article 21 of the Statute confers a broad jurisdiction on the Tribunal which also includes an advisory function”. In reaching that conclusion, he placed particular emphasis on the term “all applications” in Article 21.<sup>28</sup> However, the category of “applications” in Article 21 is qualified by the words “submitted to it in accordance with this Convention”. As so qualified, it was intended to encompass requests for provisional measures to the Tribunal under Article 290.5 of the 1982 Convention and applications for the prompt release of a vessel made under Article 292 of the 1982 Convention.<sup>29</sup> It does not cover a request to the Tribunal as a whole for an advisory opinion,<sup>30</sup> not the least because an advisory opinion request would not be “submitted to [the Tribunal] in accordance with the Convention”.

“Matters”

24. The first point to be made in relation to the third category of “matters” is that it is confined to those “matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”. It is not referring to jurisdiction accorded by the 1982 Convention itself.

25. The question then is whether the term “matters” within those confines is capable of forming the basis for an advisory function to be conferred on the Tribunal through an agreement other than the 1982 Convention. In this respect, commentators have implied that

<sup>27</sup> Cf. M Nordquist *et al* (Eds.), *Commentary*, Volume V, p. 381, which suggests that “it was understood at the conference that agreements made under Article 22 could request an advisory opinion of the Tribunal.” Article 22 of the Statute concerns reference of “disputes subject to other agreements”. However, this statement is inconsistent with other passages in the *Commentary* that expressly confirm that the full Tribunal has no advisory jurisdiction: see, for example, Volume V, p. 416; Volume VI, p. 644.

<sup>28</sup> 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.

<sup>29</sup> M Nordquist *et al* (Eds.), *Commentary*, Volume V, pp. 360 and 378.

<sup>30</sup> Cf. a request to the Seabed Disputes Chamber under Articles 159.1 or 191 of the 1982 Convention.

the word “matters” encompasses a broader competence than the word “disputes” as used in Article 21 of the Statute and as used in Article 288.2 of the 1982 Convention.<sup>31</sup>

26. It is true that, read in isolation, the term “matters” does appear to be capable of encompassing a broader range of jurisdiction than the term “disputes”. That said, in accordance with accepted principles of interpretation, Article 21 must be read in its context,<sup>32</sup> particularly the main text of the 1982 Convention. The phrase “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” clearly is not intended to have a broader application than the relevant conferral of jurisdiction in Article 288.2 of the 1982 Convention. That is:

...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 (emphasis added).

The wording of Article 21 of the Statute of the Tribunal was not, and cannot have been intended to confer a broader jurisdictional basis than that provided for under Article 288.2 of the 1982 Convention.<sup>33</sup> There is also no suggestion in the *University of Virginia Commentary* that the drafters of the 1982 Convention contemplated that Article 21 conferred advisory jurisdiction on the Tribunal in its full bench.<sup>34</sup>

27. If the Tribunal decides nevertheless that the term “matters” as used in Article 21 of the Statute of the Tribunal does confer, or does provide a basis for a Rule conferring, an advisory jurisdiction on the Tribunal by an “other agreement” then, as a matter of law that advisory jurisdiction must be limited to matters concerning the interpretation or application of that other agreement as between parties to the agreement. This conclusion in part flows from the jurisdictional provision in Article 288.2 of the main text of the Convention,<sup>35</sup> and also from the more general law concerning the *inter se* rights and responsibilities of States parties to treaties. For example, it would not be consistent with *inter se* rights and responsibilities of States parties to the 1982 Convention if, pursuant to an agreement other than the 1982 Convention, certain States parties to the 1982 Convention could ask for an advisory opinion from the Tribunal which touches upon the provisions of the 1982 Convention with the likely consequence of having an effect upon the interpretation of the treaty obligations of all States parties to the 1982 Convention.

28. This is particularly so given that the Convention itself does not confer a general advisory jurisdiction on the Tribunal in relation to the interpretation and application of obligations under the 1982 Convention. It would be very odd if, pursuant to an agreement other than the 1982 Convention, the parties to a regional agreement could ask for an advisory opinion from the Tribunal touching on the provisions of the 1982 Convention, when the meetings of the States parties to the 1982 Convention cannot request such an opinion.

<sup>31</sup> L Sohn, “Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber” in Nordquist and Moore (Eds.), *Oceans Policy – New Institutions, Challenges and Policy* (Martinus Nijhoff, The Hague, 1999), p. 69.

<sup>32</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31.

<sup>33</sup> The clear link between Article 288 of the 1982 Convention and Article 21 of the Statute is referred to in the commentary on Article 21: see M Nordquist *et al*, *Commentary*, Volume V, p. 378.

<sup>34</sup> M Nordquist *et al*, *Commentary*, Volume V, p. 378.

<sup>35</sup> I.e. “... concerning the interpretation or application of an international agreement related to the purposes of this Convention.”

29. The invitation from the Tribunal to States parties to the 1982 Convention and to international and regional organisations to present statements to the Tribunal on a request for an advisory opinion would not overcome the fact that the body of States parties to the 1982 Convention has not consented to the Tribunal giving an advisory opinion touching on obligations of States under the 1982 Convention.<sup>36</sup>

30. Nor could have it been intended that pursuant to Article 21 of the Statute, a group of countries could ask the Tribunal questions by way of advisory opinion which call for the interpretation of the obligations of States parties to other international agreements. Simply put, any form of jurisdiction to be exercised by an international court or tribunal must be based upon the consent of the relevant parties. The giving of an advisory opinion at the request of a limited number of States which will focus primarily on the interpretation and application of the provisions of other treaties without the consent of the States parties to those other treaties would be inconsistent with this principle.<sup>37</sup>

31. Therefore it is the submission of Australia that if the Tribunal does find that it has an advisory jurisdiction under Article 21 of the Tribunal's Statute, that advisory jurisdiction must be limited to the interpretation and application of the "any other agreement" referred to in Article 21 as between the parties to that agreement.

32. The SRFC's request, submitted under Article 33 of the MCA Convention, does not deal with the proper interpretation and application of the MCA Agreement as between the parties to that Agreement. Indeed, the four questions asked of the Tribunal are very broad; they cover the obligations of flag States and coastal States generally, including under several other treaties, and make no mention of the MCA Convention. Accordingly, the request falls outside the scope of the advisory jurisdiction, if any, that might be conferred on the Tribunal under Article 21 of its Statute.

## **II. Advisory jurisdiction cannot be conferred by another treaty independently of the 1982 Convention**

33. It is not open to the Tribunal to exercise an advisory jurisdiction which has been purportedly conferred on the Tribunal by a treaty or agreement independently of the 1982 Convention. Such a conferral of jurisdiction by another treaty or agreement would have been possible had the 1982 Convention itself authorised the Tribunal to exercise advisory jurisdiction pursuant to such a conferral by another treaty or agreement. As established above, the 1982 Convention does not do so.

<sup>36</sup> It might be argued that the decision of the Tribunal in a dispute between two parties to the 1982 Convention also has consequences for the interpretation and application of the relevant obligations of all other parties to the Convention and that it is no different in relation to an advisory opinion. However, this ignores the fact that such a decision would only be binding on the parties to the case and that the decision would be limited by the factual circumstances of the case.

<sup>37</sup> Judge Wolfrum has suggested that the conformity of jurisdiction purportedly conferred by Article 138 of the Rules of the Tribunal with the 1982 Convention is best justified as a "consensual solution". He stated: "If the jurisdiction of the international courts or tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction" (R Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R Wolfrum and I Gätzschnmann (Eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), p. 54). This argument is unconvincing. How could it be "consensual" for a small grouping of parties to a treaty by a separate agreement between them to ask for an advisory opinion on certain provisions of that treaty? That opinion, if given, has the capacity to affect all States parties to that treaty even if they have not requested or consented to it.

**III. The rule-making power in Article 16 of the Statute of the Tribunal cannot be an independent source of power to confer jurisdiction that the Tribunal does not otherwise possess**

34. Assuming neither the 1982 Convention, including the Statute of the Tribunal, nor any other source confer, or provide a basis for conferring, an advisory jurisdiction on the Tribunal, it follows that the rule-making power in Article 16 of the Statute cannot and does not provide an independent source of power to make a rule conferring such jurisdiction on the Tribunal such as Article 138 of the Rules of the Tribunal.

35. Article 16 of the Statute provides:

*Article 16*

*Rules of the Tribunal*

The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

36. Article 138 of the Rules of the Tribunal provides:

*Article 138*

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.

37. Article 16 of the Rules of the Tribunal is in identical terms to the rule-making power in Article 30 of the Statute of the ICJ. In relation to Article 30, the respected commentator Thirlway notes:

If it is accepted as axiomatic that the Statute prevails over the Rules, *i.e.* that no valid rule can be made that is in conflict with the Statute, the question still remains how it is to be determined whether there is a conflict between the rule and the Statute.<sup>38</sup>

In the course of answering that question, Thirlway states:

It is recognised that the rule-making power may be exercised to fill *lacunae* in the Statute; but the concept of a *lacuna*, of what is missing from the Statute must be defined by reference to what is present in the Statute. The rule-making power cannot, on this basis, be exercised at large. It would not be possible, for example, for the Court, by enacting a rule, to confer upon

<sup>38</sup> Zimmerman, Tomuschat, Oellers-Frahm (eds), *The Statute of the International Court of Justice – A Commentary* (OUP, 2006), p. 488.

itself a jurisdiction which it did not otherwise possess, under the Statute or on some other basis. This may be an extreme example...<sup>39</sup>

Similarly, it would not be possible for the Tribunal, by making a rule, to confer upon itself a jurisdiction to give an advisory opinion it did not otherwise possess.

38. Article 138 of the Rules purportedly made pursuant to Article 16 of the Statute is framed squarely in terms of a conferral of power upon the Tribunal to give an advisory opinion. It stands in stark contrast to the other provisions of the Rules which do not purport to confer jurisdiction on the Tribunal. Rather, those other provisions of the Rules rely upon the jurisdiction that has been conferred expressly by the 1982 Convention (as given further effect in the Statute of the Tribunal) and they are framed for carrying out that jurisdiction. In so doing those other provisions fall within Article 16 of the Statute.

39. However, the purported conferral of a power to give an advisory opinion on the Tribunal by Article 138 of the Rules, both in its terminology and in its effect, is the conferral of a new and substantive matter or function – it is not a “rule for carrying out an already existing ‘function’”. Nor is it a “rule of procedure” within the meaning of Article 16. As such, Article 138 is beyond the rule-making power of the Tribunal.

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<sup>39</sup> *Ibid*, p. 483. Kolb states that Thirlway’s analysis of Article 30 in the *Commentary* on the question of subordination of the Rules to the Statute is an “excellent commentary” (Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), 2013, p. 101, footnote 64). See also, *Land, Island and Maritime Frontier Dispute* case, Diss. Op. Shahabudeen, *I.C.J. Reports 1990*, p. 48: ‘To sum up, the field of operation of the rule-making power of the Court, as defined by Article 30 of the Statute, is wide but not unlimited. The Court, it may be said, has a certain autonomy in the exercise of its rule-making competence; but autonomy is not omnipotence, and that competence is not unbounded. Rules of Court could only be made in exercise of powers granted by the Statute whether expressly or impliedly.’”

## CHAPTER 3

## THE GIVING OF AN ADVISORY OPINION IS DISCRETIONARY

40. Even if the Tribunal were to find that it has jurisdiction in respect of the request for an advisory opinion received from the SRFC, the possession of such jurisdiction does not imply that the Tribunal is under an obligation to give such an opinion. Indeed, the opening words of Article 138 of the Rules of the Tribunal, “[t]he Tribunal *may* give an advisory opinion...” (emphasis added), confirm the discretionary nature of the advisory function purportedly conferred upon the Tribunal by this provision.

41. The opening words of Article 138 are drafted in almost identical terms to Article 65(1) of the ICJ Statute, which also commences with the words “[t]he Court *may* give an advisory opinion...” (emphasis added). The jurisprudence of the International Court has affirmed consistently that these words confer a discretionary power. For example, in its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

[Article 65(1)] is more than an enabling provision. As the Court has repeatedly emphasised, the Statute leaves it discretion whether it will give an advisory opinion requested of it, once it has established its competence to do so.<sup>40</sup>

The permissive language of Article 138 may also be contrasted with the mandatory language of Article 191 of the 1982 Convention, which requires that “[t]he Seabed Disputes Chamber *shall* give advisory opinions...” at the request of the Assembly of Council of the International Seabed Authority.

42. Accordingly, in the alternative, and without prejudice to the submissions contained in Chapter 2 of this written statement, Australia submits for the reasons stated below that the Tribunal should exercise its discretion, and decline the request for an advisory opinion conveyed by the SRFC.

**The questions posed by the SRFC raise the interpretation and application of the rights and obligations of third party States**

43. As noted in Chapter 2, the questions submitted by the SRFC do not expressly relate to, or seek guidance on, the proper interpretation or application of rights or obligations arising under the MCA Convention as between the States parties to that Convention. Indeed, the broad nature of the questions posed by the SRFC as to the rights and obligations of flag States and coastal States at international law concerning IUU fishing and the sustainable management of shared stocks and stocks of common interest raise squarely the interpretation and application of provisions contained in at least three major multilateral international agreements – the 1982 Convention (166 States parties), the Agreement for the

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<sup>40</sup> *I.C.J. Reports 1996*, p. 235, para. 14. See also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 27, para. 41; *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, at p. 21 para. 23; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (“The Wall Advisory Opinion”)*, *I. C. J. Reports 2004*, p. 136, at p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, *I.C.J. Reports 2010*, p. 403, at pp. 415 – 417, para. 29.

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 Fish Stocks Agreement”, 81 States parties) and the Agreement to Promote Compliance with international Conservation and Management Measures by Fishing Vessels on the High Seas (“the Compliance Agreement”, 39 States parties).

44. While the seven member States of the SFRC<sup>41</sup> are all States parties to the 1982 Convention, only two members are States parties to the Fish Stocks Agreement (Guinea and Senegal)<sup>42</sup> and the Compliance Agreement (Cape Verde and Senegal)<sup>43</sup> respectively. The other States parties to these agreements have not consented to conferral of an advisory jurisdiction on the Tribunal in respect of the interpretation and application of their provisions. Indeed, these agreements contain their own dispute resolution mechanisms, agreed by the States parties, which do not confer advisory jurisdiction on the Tribunal.<sup>44</sup>

45. In its Technical Note to the Tribunal, the Permanent Secretariat to the SFRC particularly emphasised also the 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (“IPOA-IUU”)<sup>45</sup> and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing (“the Port State Measures Agreement”). It noted that “[t]hese legal instruments, especially the 2009 Agreement, are binding on the SRFC Member States, and are helpful to these countries, whose fragile economies suffer serious damage from IUU fishing... Accordingly, it is particularly useful for the SRFC Member States to know precisely what their rights and obligations are in this connection...”<sup>46</sup>

46. The Preamble to the MCA Convention records the will of SRFC member States to implement the IPOA-IUU, and their awareness of the need to incorporate the provisions of the Port State Measures Agreement in their national legislation. Part IV of the MCA Convention also broadly reflects some of the principles laid down in this Agreement. However, none of the SRFC member States has ratified the Port State Measures Agreement.<sup>47</sup> Nor is this Agreement yet in force.<sup>48</sup>

47. Regardless of the current status of the Port State Measures Agreement, non-State parties can have no basis to seek judicial clarification of the rights and obligations of States parties under that Agreement. The Port State Measures Agreement has its own mechanisms for the peaceful settlement of disputes with regard to the interpretation and application of that Agreement, which will apply upon its entry into force.<sup>49</sup> These mechanisms do not include recourse to the Tribunal for an advisory opinion, which, in any case, would be subject to the

<sup>41</sup> Cape Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone.

<sup>42</sup> Guinea acceded to the Fish Stocks Agreement on 16 September 2005; Senegal ratified the Fish Stocks Agreement on 30 January 1997.

<sup>43</sup> Cape Verde accepted the Compliance Agreement on 27 January 2006; Senegal accepted the Compliance Agreement on 8 September 2009.

<sup>44</sup> 1982 Convention, Part XV; Fish Stocks Agreement, Articles 30 - 32; Compliance Agreement, Article IX.

<sup>45</sup> International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing, Rome, FAO, 2001. Endorsed by the 120<sup>th</sup> Session of the FAO Council on 23 June 2001.

<sup>46</sup> Technical Note, p. 6.

<sup>47</sup> Sierra Leone signed the agreement on 23 November 2009, but has not ratified it.

<sup>48</sup> Article 29(1) of the Port State Measures Agreement provides that it will enter into force thirty days after the date of deposit of the twenty-fifth instrument of ratification, acceptance, approval or accession.

<sup>49</sup> Port State Measures Agreement, Article 22.



same constraints set out earlier in this statement. Nor does the IPOA-IUU, a voluntary instrument adopted in the context of the Food and Agriculture Organisation's 1995 Code of Conduct for Responsible Fisheries, purport to confer any advisory jurisdiction.

48. An analogy may be drawn in this context with certain requests for advisory opinions made of the ICJ, where it has been argued that where a question submitted for advisory opinion is, or is closely related to a question in dispute between certain States, the Court should take into account the existence or lack of consent of those States in deciding whether or not to exercise its advisory jurisdiction.<sup>50</sup>

49. In the *Western Sahara* case, for example, the Court made it clear that "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..."<sup>51</sup>

50. Similarly, to render an opinion in response to the SRFC's request would require the Tribunal to interpret and apply rights and obligations arising under treaties other than the MCA Convention, without the consent of the States parties to those agreements.<sup>52</sup> This would be incompatible with the Tribunal's judicial character. Any request for an advisory opinion submitted by the SRFC under the MCA Convention may only properly relate to the interpretation and application of the rights and obligations of the SRFC member States arising under that Convention. Accordingly, it is Australia's submission that the Tribunal should exercise its discretion to decline the SRFC's request for an advisory opinion.

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<sup>50</sup> H Thirlway, "Advisory Opinions", *Max Planck Encyclopaedia of Public International Law* (OUP), para. 13.

<sup>51</sup> *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, at pp. 24 – 25, paras. 32 – 33.

<sup>52</sup> In circumstances where either not all, or none, of the States constituting the SRFC are parties to the relevant treaties.

## CHAPTER 4

### THE CONDITIONS OF ARTICLE 138 ARE NOT SATISFIED

51. Without prejudice to the submissions contained in Chapter 2 of this written statement, and assuming that Article 138 is within the rule-making power of the Tribunal conferred under Article 16 of its Statute, Article 138 specifies a number of strict conditions that a request for an advisory opinion must satisfy. Australia submits that the request by the SRFC fails to satisfy these requirements in three respects.

52. First, Article 138 requires that the Tribunal may only give an advisory opinion *on a legal question*. A “legal question” includes all those which concern the existence, determination, interpretation or application of a rule of law.<sup>53</sup> That is, the advisory function is a means of giving guidance on the existing law; it is not a means of law-making. As stated by the former President of the International Court, the late Sir Robert Jennings, advisory opinions are requested in order to hear the court’s advice on the existing state of the law. When the court finds a gap in the law, it is not its task to fill the gap, as it only has the function of stating the law in existence at that moment in time.<sup>54</sup>

53. In this regard, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>55</sup> the ICJ explicitly confirmed that it does not consider itself as empowered to make law. That case would have been a prime opportunity for the ICJ to make law. Instead, it held that “...in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstances of self-defence, in which the very survival of a State would be at stake.”<sup>56</sup> In his Separate Opinion appended to that Advisory Opinion, Judge Guillaume also took the opportunity to “... solemnly to reaffirm that it is not the role of the judge to take the place of the legislator ... The Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign states.”<sup>57</sup>

54. Accordingly, to constitute “legal questions” to which the Tribunal may properly provide “legal answers”, the questions posed by the SRFC must only seek guidance as to the determination of relevant international law rights and obligations (including the existence of such obligations), and their proper interpretation and application. However, the questions submitted to the Tribunal by the SRFC go well beyond clarification of existing rules of international law. The questions posed are so broad and wide-ranging that they would effectively place the Tribunal in the role of international legislator in respect of the rights and obligations of flag States and coastal States at international law concerning IUU fishing and the sustainable management of shared stocks and stocks of common interest. That is, if the Tribunal were to provide an answer to the questions posed by the SRFC it would risk impinging upon the traditional role of States as the “lawmakers” of international law.

<sup>53</sup> R Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), p. 1062.

<sup>54</sup> R Jennings, “Advisory Opinions of the International Court of Justice” in B Boutros-Ghali, *Amicorum Discipulorumque Liber*, Vol. 1, (Brussels, Bruylant, 1998), pp. 531 – 532.

<sup>55</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 237, para. 18.

<sup>56</sup> *Ibid*, p. 266, para. 105.

<sup>57</sup> *Ibid*, p. 293, para. 14.

55. Secondly, the Rules of the Tribunal require that a request for an advisory opinion “shall contain a precise statement of the question[s]” posed.<sup>58</sup> Australia submits that the SRFC’s request does not comply with this requirement. The questions posed by the SRFC are phrased in such general terms that they are incapable of a clear legal answer by the Tribunal.<sup>59</sup> The questions do not sufficiently define the relevant international law rights and obligations on which clarification or guidance is sought. Nor are the questions clear as to their intended scope of factual application.

56. For example, in the first question, it is not entirely clear whether the term “flag State” is intended to encompass all flag States. If it is so intended, then it is not a question to which the Tribunal can provide a clear legal answer of general application. This is because the relevant rights and obligations of flag States will vary significantly, depending on their respective bilateral and multilateral treaty rights and obligations. This difficulty equally applies to formulating a clear legal answer to questions two, three and four.

57. In respect of the second question, it is also unclear whether the SRFC’s query relates to liability for breach of the obligations in the circumstances outlined in question one, or whether the question is intentionally phrased more broadly. In addition, in seeking advice on liability for violation of the domestic fisheries legislation of the coastal State, the third question posed by the SRFC imports considerations of domestic law and policy. It is not the role of the Tribunal to advise upon liability of States and international agencies for breaches of domestic law.

58. Australia notes that the ICJ has emphasised that lack of clarity in the drafting of questions seeking an advisory opinion “does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.”<sup>60</sup> However, Australia submits that the difficulties identified above in respect of the questions contained in the SRFC’s request cannot be remedied by interpretation or reformulation by the Tribunal.

59. Thirdly, the Rules require that a request for an advisory opinion shall be accompanied by all documents likely to throw light upon the question.<sup>61</sup> These documents should be transmitted to the Tribunal at the same time as the request for an advisory opinion, or as soon as possible thereafter.<sup>62</sup>

60. On 9 April 2013, the Permanent Secretary of the SRFC transmitted six additional documents to the Tribunal, following an invitation from the Registrar of the Tribunal to submit to the Tribunal all documents likely to throw light upon the questions contained in its

<sup>58</sup> Articles 131(1) and Article 138(3), Rules of the Tribunal.

<sup>59</sup> As noted by Berman:

“...however much a question may be written in legal categories and solicit the application of legal rules, it is still not a ‘legal question’ (for the purposes of the advisory jurisdiction) unless it is susceptible of a legal answer – in the form which the Court has always regarded such an answer should take”.

F Berman, *The Uses and Abuses of Advisory Opinions*, in Ando, McWhinney and Wolfrum (Eds.), *Liber Amicorum Judge Shigeru Oda* (Kluwer, The Hague, 2002) Volume 2, p. 823. See also S Rosenne, *The Law and Practice of the International Court, 1920 – 1996*, (Martinus Nijhoff, Leiden, 1997), p. 1000.

<sup>60</sup> *The Wall Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 153 – 155, para. 38.

<sup>61</sup> Articles 131(1) and Article 138(3), Rules of the Tribunal.

<sup>62</sup> Article 131(2) ad Article 138(3), Rules of the Tribunal.

request for an advisory opinion, in accordance with the above requirement. These documents were:

- (1) the MCA Convention,
- (2) a Technical Note from the Permanent Secretariat to the SRFC dated March 2013,
- (3) the Convention on Sub-Regional Cooperation in the Exercise of Maritime Hot Pursuit,<sup>63</sup>
- (4) the Protocol regarding the Practical Modalities for the Co-ordination of Surveillance Activities in the Member States of the SRFC,<sup>64</sup>
- (5) the Agreement Establishing a Sub-Regional Fisheries Commission,<sup>65</sup> and
- (6) the Amendment to the Convention of 29th March 1985 Establishing the Sub-Regional Fisheries Commission.<sup>66</sup>

61. These documents provide the Tribunal with the procedural background to the SRFC's request, and include the legal instruments setting out the rights and obligations of SRFC members as between themselves. However, given the breadth of the questions posed by the SRFC as to rights and obligations of flag States and coastal States at international law, these six documents cannot constitute "all documents likely to throw light upon the questions asked" for the purposes of Article 138. Such information as has been provided does not provide sufficient background on the practical problems that gave rise to the request and how an advisory opinion from the Tribunal would be helpful in resolving those problems. Accordingly, Australia submits that the Tribunal is not in possession of all the necessary factual information it needs to give an opinion.<sup>67</sup>

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<sup>63</sup> Done in Conakry, Republic of Guinea, on 1 September 1993.

<sup>64</sup> Done in Conakry, Republic of Guinea, on 1 September 1993.

<sup>65</sup> Done in Dakar, Republic of Senegal, on 29 March 1985.

<sup>66</sup> Done in Praia, Cape Verde, on 14 July 1993.

<sup>67</sup> *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ, Series B, no 5, p. 25; *Western Sahara*, I.C.J. Reports 1975, pp. 28 – 29, para. 44 et seq; *The Wall Advisory Opinion*, ICJ Reports 2004, p. 160, para. 55 et seq.

**CHAPTER 5**  
**SUBMISSIONS**

For the reasons stated above, Australia makes the following submissions:

- (a) The SRFC's request does not fall within the jurisdiction of the Tribunal.

*In the alternative and without prejudice to paragraph (a):*

- (b) The Tribunal should exercise its discretion and decline the request for an advisory opinion.

*In the alternative and without prejudice to paragraphs (a) and (b):*

- (c) The SRFC's request does not meet the conditions for the giving of an advisory opinion under Article 138 of the Rules of the Tribunal.



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W M Campbell QC  
General Counsel (International Law)  
Office of International Law  
Attorney-General's Department

28 November 2013

## ANNEX A ADVISORY JURISDICTION OF INTERNATIONAL COURTS

**I. Advisory jurisdiction of the International Court of Justice**Charter of the United Nations, Article 96:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialised 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.

Statute of the International Court of Justice, Chapter IV – Advisory Opinions, Article 65:

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

**II. Advisory jurisdiction of the Permanent International Court of Justice**Covenant of the League of Nations, Article 14:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Statute of the Permanent International Court of Justice, Chapter IV – Advisory Opinions, Article 65:

Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under Instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

## ANNEX A     ADVISORY JURISDICTION OF INTERNATIONAL COURTS

**III. Advisory jurisdiction of the Court of Justice of the European Union**Treaty establishing the European Economic Community, Article 228:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers conferred upon the Commission in this field, such agreements shall be concluded by the Council after the Assembly has been consulted in the cases provided for by this Treaty.

The Council, the Commission or a Member State may, as a preliminary, obtain the opinion of the Court of Justice as to the compatibility of the contemplated agreements with the provisions of this Treaty. An agreement which is the subject of a negative opinion of the Court of Justice may only enter into force under the conditions laid down, according to the case concerned, in Article 236.

2. Agreements concluded under the conditions laid down above shall be binding on the institutions of the Community and on Member States.

Treaty on the Functioning of the European Union, Article 218(11):

11. 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.

**IV. Advisory jurisdiction of the European Court of Human Rights**European Convention on Human Rights, Article 47:

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.

## ANNEX A ADVISORY JURISDICTION OF INTERNATIONAL COURTS

Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (not yet in force), Article 1:

1. Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.
3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

**V. Advisory jurisdiction of the Inter-American Court of Human Rights**American Convention on Human Rights, Article 64:

1. The member states of the Organization [of American States] 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.

Statute of the Inter-American Court on Human Rights, Article 2:

The Court shall exercise adjudicatory and advisory jurisdiction:

1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.

**VI. Advisory jurisdiction of the African Court on Human and Peoples' Rights**Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 4:

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 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.



ANNEX A      ADVISORY JURISDICTION OF INTERNATIONAL COURTS

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