

**Written Statement of the Federal Republic of Germany**

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL  
FISHERIES COMMISSION (SRFC)  
(CASE NO. 21)**

**WRITTEN STATEMENT BY THE FEDERAL REPUBLIC OF GERMANY**

18 November 2013

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## CHAPTER I

### INTRODUCTION

1 In its order of 24 May 2013 the International Tribunal for the Law of the Sea ('the Tribunal') invited the States Parties to the United Nations Convention on the Law of the Sea of 10 December 1982 ('the Convention') to present written statements regarding the request by the Sub-regional Fisheries Commission ('SRFC') for an advisory opinion on four questions concerning illegal, unreported and unregulated ('IUU') fishing.

At its Fourteenth Extraordinary Session held from 25 to 29 March 2013 in Dakar, Republic of Senegal, the Conference of Ministers of the SRFC in accordance with Article 33 of the 2012 *Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC* ('MCA Convention') adopted a resolution to authorize the Permanent Secretary of the SRFC to submit a request for an advisory opinion to the Tribunal on the following four 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?

The SRFC is an intergovernmental organization established in 1985 by seven West African coastal States: Cape Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. Its 'objective is to bring about the long-term harmonization of the Member

States' policies on the preservation, conservation, and sustainable exploitation of their fisheries resources and to enhance cooperation for the benefit of the well-being of their respective populations<sup>1</sup>.

2 By Order 2013/2 of 24 May 2013, the President of the Tribunal invited the States Parties to the Convention, the SRFC and other intergovernmental organizations listed in the annex to the order to present written statements on the questions submitted to the Tribunal by 29 November 2013.

3 Germany welcomes the fact that use is being made of the possibility to request advisory opinions from the Tribunal according to Article 138 of the 2009 Rules of the Tribunal ('Rules'), which will further strengthening the Tribunal's comprehensive role in matters concerning the Law of the Sea.

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<sup>1</sup> See p. 3 Technical Note of the SRFC Permanent Secretariat on the 2012 MCA Convention submitted to the Tribunal for the Law of the Sea.

## **CHAPTER II LEGAL ASPECTS**

### **I. Jurisdiction**

4 The request submitted by the SRFC constitutes the first request to the full Tribunal to render an advisory opinion. The Tribunal may therefore wish to examine the questions of jurisdiction that may arise while performing this essential function.

#### ***1. Legal basis***

5 The jurisdiction of the Tribunal to issue advisory opinions derives from Article 138 Rules, which reads:

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

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.

6 According to the high standards of Article 138 Rules, the Tribunal in order to consider a request must be satisfied that (1) the questions are of a legal nature and precisely formulated<sup>2</sup>, (2) the questions are transmitted to the Tribunal by an authorized body and (3) the body is authorized by an international agreement related to the purpose of the Convention and that agreement specifically provides for the submission of a request to the Tribunal.

7 According to Article 16 of the Statute of the Tribunal (Annex VI of the Convention) ('Statute') the Tribunal had the authority to decide upon its own Rules, albeit bound by the Convention and the Statute that were agreed upon by States Parties. In this context, Article 21 Statute confers a broad jurisdiction upon the Tribunal; it reads:

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<sup>2</sup> See Article 138 para. 3 Rules read in conjunction with Article 131 para. 1 Rules.

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 by any other agreement which confers jurisdiction on the Tribunal.

8 Article 21 Statute stipulates that besides disputes already explicitly provided for by the Convention, '*all matters specifically provided for by any other agreement which confers jurisdiction on the Tribunal*' are part of the Tribunal's jurisdiction. These prerequisites are transposed in Article 138 Rules. Particularly, Germany holds that the wording '*all matters*' includes requests for advisory opinions.<sup>3</sup> Notably, neither the Convention nor the Statute explicitly indicate that such jurisdiction shall be excluded.<sup>4</sup> In our view Article 21 Statute by itself already provides an implicit legal basis for the competence of the full Tribunal to issue advisory opinions.

Germany further holds that, keeping in mind that the Convention and the Statute are living instruments, the customary international law rules of treaty interpretation as codified in Articles 31, 32 of the Vienna Convention on the Law of Treaties ('VCLT') support this view. Article 31 VCLT establishes as a general rule that treaties shall be interpreted objectively, i.e. 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

In light of a general movement amongst States in favor of the Tribunal's jurisdiction to issue advisory opinions<sup>5</sup>, jurisdiction would seem to find its legal basis in an objective interpretation of Article 21 Statute. In contrast, preparatory work only serves as a supplementary means of interpretation, Article 32 VCLT. Insofar, negotiating history that may have shown a certain reluctance on some Member States' part to explicitly confer advisory jurisdiction on the full Tribunal would not seem to be contradictory, but superseded.

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<sup>3</sup> See also: Doo-young Kim, 'Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea' in 'Issues in Legal Scholarship/Symposium: Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea', 2010, p. 4; Commentary on Article 138 Rules, page 393f. in P. Chandrasekhara Rao and Ph. Gautier 'The Rules of the International Tribunal for the Law of the Sea: A Commentary', Martinus Nijhoff Publishers, 2006.

<sup>4</sup> Commentary on Article 138 Rules, page 393f. in P. Chandrasekhara Rao and Ph. Gautier 'The Rules of the International Tribunal for the Law of the Sea: A Commentary', Martinus Nijhoff Publishers, 2006.

<sup>5</sup> See Tafsir Malick Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', Chinese Journal of International Law (2010), 565, 583; Ki-Jun You, Advisory Opinion of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited, Ocean Development & International Law (2008), 360, 363.

## 2. Elements of Article 138 Rules

9 Three conditions must be satisfied in order to found jurisdiction: (1) the request of an opinion must concern a legal question, (2) be submitted by an authorized body and (3) an international agreement related to the purposes of the Convention must specifically provide for the submission to the Tribunal of a request for such an opinion.

Relevant International Court of Justice ('ICJ'/'the Court') case law as well as Article 96 of the United Nations Charter ('UN Charter') and Article 65 para. 1 of the Statute of the International Court of Justice ('ICJ Statute') may generally provide some additional guidance on the interpretation of the elements of Article 138 Rules, even though its applicability would have to be verified on a case by case basis insofar as the Tribunal's Rules differ from those of the Court.

10 Considering the first element – the nature of the questions submitted – the questions put forward by the SRFC in Case 21 are clearly legal, precisely formulated and in the Law of the Sea framework, for they touch upon the scope of rights and obligations (see questions 1 and 4) as well as liabilities (see questions 2 and 3) of flag and coastal states in a fisheries context. ICJ case law does not seem to provide additional guidance here, as the Court mainly defined scope and meaning of 'legal question' and in doing so applied a rather broad reading<sup>6</sup> that would unquestionably include the questions submitted.

11 As for the second element – transmission by an authorized body –, it is noted that the request was rightfully submitted by the Permanent Secretary as an organ of the intergovernmental fisheries organization SRFC. As the body is only the conveyor of the request, requirements should not be overly strict.<sup>7</sup> Consequently, 'body' may be any organ, entity, institution, organization or State.<sup>8</sup> The important part is its authorization, which is clearly given by Article 33 MCA Convention.

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<sup>6</sup> The Court dealt with the distinction between legal and political questions (see ICJ (1975) *Western Sahara* p. 18ff.; ICJ (1996) *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, p. 73f.; ICJ (2004) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 153) as well as the scope of possible fact finding by the Court (see PCIJ (1923) *Status of Eastern Carelia*, p. 28 and ICJ (1975) *Western Sahara*, p. 12).

<sup>7</sup> Commentary on Article 138 Rules, page 393f. in P. Chandrasekhara Rao and Ph. Gautier 'The Rules of the International Tribunal for the Law of the Sea: A Commentary', Martinus Nijhoff Publishers, 2006.

<sup>8</sup> Doo-young Kim, 'Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea' in 'Issues in Legal Scholarship/Symposium: Frontier Issues

ICJ case law does not seem instructive here as Article 96 of the United Nations Charter – unlike Article 21 Statute, 138 Rules – restricts eligibility to the General Assembly, the Security Council as well as other organs and specialized agencies which may at any time be so authorized by the General Assembly.

12 With regard to the third element – the authorization by an international agreement related to the purpose of the Convention that specifically provides for the submission of a request to the Tribunal – Germany holds that the request submitted fulfills all these prerequisites.

12.1 International agreements may be bilateral, regional or global. Notably, international agreements may even include agreements between States or States and international organizations.<sup>9</sup> The SRFC constituted itself as an intergovernmental organization by means of the Convention of 29 March 1985, with regard to which and especially its provisions on strengthening cooperation, Member States adopted the MCA Convention. The MCA Convention – fisheries-related and the basic document of the SRFC – clearly is an international agreement. In its Article 33, it explicitly foresees the submission of matters to the Tribunal for advisory opinions.

12.2 Article 138 Rules – according to its wording – asks for an international agreement related to *the purposes of the Convention*. Object and purpose of this criterion would seem to be guaranteeing for the Tribunal to only attend to Law of the Sea matters. The MCA Convention as an agreement relating to a regional fisheries organization may easily be characterized as an international agreement related to the purposes of the Convention<sup>10</sup>,

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in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea', 2010, p. 8; Commentary on Section H. Advisory Proceedings of the Rules, pages 379, 393f. in P. Chandrasekhara Rao and Ph. Gautier 'The Rules of the International Tribunal for the Law of the Sea: A Commentary', Martinus Nijhoff Publishers, 2006

<sup>9</sup> Germany therefore is of the view that not only international organizations may request advisory opinions, but also groups of two or more states that – on the basis of a bi- or multilateral agreement concluded for that purpose – want to make use of the Tribunal's competency in law of the sea matters.

<sup>10</sup> Cf. Doo-young Kim, 'Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea' in 'Issues in Legal Scholarship/Symposium: Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea', 2010, p. 6; See also: Tafsir Malick Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', Chinese Journal of International Law (2010), 565, 584; Commentary on Article 138 Rules, page 393f. in P. Chandrasekhara Rao and Ph. Gautier 'The Rules of the International Tribunal for the Law of the Sea: A Commentary', Martinus Nijhoff Publishers, 2006.

namely its Articles 61 to 64, and 116 to 119 addressing the conservation and management of the living resources in the Exclusive Economic Zone and on the High Seas.

In this respect, the ICJ in applying Article 96 of the United Nations Charter established a strict test by determining if the agencies pose questions arising within the scope of their activities.<sup>11</sup> The more lenient approach of Article 138 Rules (“related to the purpose of the Convention”) seems justified as the Court generally may deal with all matters of international law and therefore needs a criterion to secure a relation between the requesting body and the subject matter of the request, whereas the Tribunal by its very nature would only deal with questions arising from the Law of the Sea.

Germany does not see grounds for imposing on submitting States a requirement to only pose questions that may be directly derived from the international agreement that allows for the request to the Tribunal.

But even if the Tribunal should find the necessity of such a contextual connection, Germany is of the view that the Tribunal may nevertheless seize jurisdiction as the questions submitted are in fact related to the MCA Convention. Created in 1993 and revised in 2012 to meet the challenges of a drastically changed legal and factual situation, the MCA Convention is the basic document of the SRFC. It sets out the minimal agreed conditions for access to fisheries resources, conditions for conservation and management of resources as well as port state measures for the fight against IUU fishing. The 2012 revision included the implementation of measures laid down by the FAO Code of Conduct for Responsible Fisheries, the framework within which the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (‘IPOA-IUU’) was developed as a voluntary instrument, as well as the 2009 FAO Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. As the SRFC is looking to install a comprehensive system to combat IUU fishing and protect their marine living resources, the objective of the request is to get a thorough assessment of certain rights, obligations and liabilities in an area of law that has undergone changes by new legislation, in order to be able to properly exercise its functions as a fisheries-cooperation body in accordance with international law.<sup>12</sup> The questions submitted are not formulated solely with regard to international instruments other

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<sup>11</sup> ICJ (1996) *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, p. 74ff.; ICJ (2004) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 148ff.

<sup>12</sup> See insofar applicable ICJ (1975) *Western Sahara*, p. 27 ‘The object of the request is to obtain from the Court an opinion which the General Assembly deems of assistance for the proper exercise of its functions’.

than the MCA Convention – although such instruments certainly will play a role in answering them – but are connected to the MCA Convention as well as to the Convention.

12.3 The Tribunal's jurisdiction would not be in violation of the principle of the independence of States, i.e. to not be compelled to submit their disputes with other States to any kind of peaceful settlement without consent.

12.3.1 Taking into consideration relevant ICJ case law supports this result. It would seem that the ICJ in its 1950 *Peace Treaties* opinion established consent of the parties as a principle constituting the basis of the Court's jurisdiction in contentious proceedings.<sup>13</sup> The Court held that the framework was different for advisory proceedings though, even when the questions relate to a specific dispute. As advisory opinions are not legally binding, *'no State may prevent an advisory opinion an applicant considers desirable in order to obtain enlightenment as to the course of action it should take'*, especially as *'the Court's opinion is not given to a State but to the requesting body'*. An exemption is only made when *'answering the question would be substantially equivalent to deciding the dispute between parties'*, as *'the legal position of the parties to the dispute cannot in any way be compromised by the answer of the Court'*. Notwithstanding the question if the Permanent Court of International Justice's ('PCIJ') 1923 advisory opinion *Status of the Eastern Carelia* may be read as establishing the principle of consent as one of the decisive factors for founding advisory jurisdiction<sup>14</sup>, ICJ case law superseded the PCIJ's. By way of the 1975 *Western Sahara* advisory opinion, the Court established *'that the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court, but the propriety of the exercise'*.<sup>15</sup>

12.3.2 In consequence, even though the Tribunal may touch upon international agreements other than the MCA Convention – as the above mentioned FAO instruments – having their own provisions on dispute resolution, Member States' consent to be bound by those mechanisms is not to be seen as violated; a fortiori, as there is not even a dispute

<sup>13</sup> ICJ (1950) *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (first phase)*, p. 71f.

<sup>14</sup> See PCIJ (1923) *Status of Eastern Carelia*, p. 27: The Court did not decide if consent of the parties was a necessary prerequisite for its jurisdiction in general, but only held that in the case at present consent of all the parties to the underlying dispute was needed because one of them, the Soviet Union, was not a Member of the League of Nations and Article 17 of the Covenant specifically asked for such nation's consent to proceedings before the PCIJ.

<sup>15</sup> ICJ (1975) *Western Sahara*, p. 20.

underlying the request at hand, but only the abstract possibility of the advisory opinion's answers to the legal questions submitted of being relevant for future disputes between members and non-members of the SRFC.

### ***3. Conclusion***

13 Therefore, Germany holds that the questions submitted by the SRFC fall within the jurisdiction of the Tribunal.

## **II. Substance of the questions submitted**

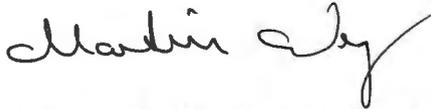
The Federal Republic of Germany refrains from extending its statement to the substance matter of the request submitted to the Tribunal.

## **CHAPTER III CONCLUSION**

14 To summarize, it is the view of Germany that:

- Article 138 Rules – being in accordance with international law, notably with Article 21 Statute – may serve as legal basis for the Tribunal's competence to issue advisory opinions.
- In order to interpret and clarify the elements of Article 138 Rules, relevant ICJ case law may generally provide insights under the condition that applicability is verified on a case by case basis.
- The request submitted to the Tribunal by the SRFC fulfils the requirements set by Article 138 Rules. The questions are of a legal nature and were transmitted by a body authorized by an international agreement related to the purpose of the Convention that specifically provides for the submission of a request to the Tribunal.
- There is no ground for a more restrictive interpretation of Article 138 Rules. Notably, questions submitted to the Tribunal merely need to be linked to the purposes of the Convention, but do not have to be limited to the international agreement allowing for

the request to the Tribunal. Particularly, this is not in violation of the principle of consent to judicial settlement.

A handwritten signature in black ink, appearing to read "Martin Ney". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Ambassador Dr. Martin Ney, M.A. (Oxon.)

Legal Advisor and Director-General For Legal Affairs  
Federal Foreign Office