

Written Statement of the Portuguese Republic

International Tribunal for the Law of the Sea

Case No 21 ITLOS: Request for an Advisory Opinion

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27 November 2013

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I. Introduction

1. On 28 March 2013, the International Tribunal for the Law of the Sea (‘the Tribunal’ or ‘ITLOS’) received a request from the Sub-Regional Fisheries Commission (‘SRFC’) to render an advisory opinion on the following matters:

“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 Zones 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 24 May 2013, the Tribunal decided to invite the States Parties to the United Nations Convention on the Law of the Sea (‘the Convention’ or ‘UNCLOS’) to present written statements on the questions submitted to the Tribunal for an advisory opinion, fixing 29 November 2013 as the time-limit for such proceeding.

3. In this context, Portugal finds opportune to present a written statement expressing its views on whether the ITLOS full Court has jurisdiction to examine requests for advisory opinions in general.

II. Legal Aspects

4. Acknowledging the relevance – and potential impact – of the questions raised by the case, especially regarding the jurisdiction of the ITLOS (and its scope) as established under the Convention, Portugal believes that the admissibility of such a procedure should be analysed in a cautious and thorough manner.

5. In this respect, it should be initially recalled that there is no express provision for the advisory jurisdiction of ITLOS full Court under either the Convention or the ITLOS Statute (Annex VI of the Convention), and only Article 138 of the ITLOS Rules specifically confers such advisory jurisdiction¹.

6. Even though the provision was included in the ITLOS Rules as adopted by the Tribunal on 28 October 1997, there is scarce information on the origin and foundation of Article 138, especially since the negotiations among States which led to (and followed) the adoption of the Convention did not include

¹ Regarding this subject, judge Tafsir Ndiaye mentions that “(...) it is interesting to note that the possibility of the ITLOS rendering advisory opinions is not expressly contemplated in UNCLOS or in the Statute of the Tribunal, but is rather provided in the Rules of the Tribunal. It is for this reason that the jurisdiction clause is *oddly* introduced in the Rules” [emphasis added]. In “The Advisory Function of the International Tribunal for the Law of the Sea”, *Chinese Journal of International Law* (2010), Vol. 9, pp. 565–587. For an identical view, see also Ki-Jun You, “Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited”, *Ocean Development & International Law* (2008), Vol. 39, pp 360-371.

any discussion between the negotiating Parties in regard to the possibility of advisory opinions being rendered by the ITLOS full Court².

7. In addition, it should be noted that, although the provisions of Article 288, paragraph 2, and those of Article 21 of the Statute of the Tribunal have been called upon to justify the advisory jurisdiction of the full Court, it is not certain that these can be relied upon or interpreted as a basis for the advisory jurisdiction of the ITLOS full Court.

8. Firstly, regarding Article 288, paragraph 2, of the Convention, questions arise on whether this provision covers the non-binding advisory jurisdiction reflected in Article 138 of the ITLOS Rules, as Article 288 pertains to Section 2 of Part XV of the Convention (entitled “Compulsory Procedures Entailing **Binding** Decisions” [emphasis added]), and, particularly, given that Article 288, paragraph 1, relates to “any **dispute** concerning the interpretation or application” of the Convention [emphasis added].

9. Secondly, in regard to Article 21 of the ITLOS Statute, it is important to note that this provision should be interpreted in the light of, and consistent with, the other provisions of the Convention, in particular the abovementioned Article 288³.

² In particular, it should be recalled the work of the Preparatory Commission, in which all States were entitled to participate, that adopted Draft Rules of the Tribunal. Part VI of these Draft Rules, entitled ‘Advisory Proceedings’, set out draft rules for the conduct of advisory proceedings **by the Seabed Disputes Chamber only**, in accordance with Articles 159(10) and 191 of the Convention. No provision was made in those Draft Rules for any other type of advisory proceeding or for anything equivalent to Article 138; such a silence was – one is to believe – the expected outcome of the absence of an express provision in the Convention for the advisory jurisdiction of the full Court. See LOS/PCN/152 (Vol. I), 28 April 1995 – LOS/PCN/SCN.4/WP. 16/Add. 1.

³ It should also be considered that Article 24 of the Statute (‘Institution of Proceedings’) addresses only the institution of contested proceedings (i.e. disputes), not advisory ones, thus reinforcing the

10. Furthermore, it is pertinent to observe that, although Article 21 of the ITLOS Statute seems to draw its wording from Article 36, paragraph 1, of the Statute of the International Court of Justice, Article 36(1) of the ICJ Statute does not seem to provide the legal basis for an advisory opinion issued by the International Court of Justice. In fact, this advisory opinion is rendered pursuant to Article 65 of the Statute of the Court and in accordance with Article 96 of the UN Charter⁴.

11. Portugal therefore believes that Article 138 of the Rules of the Tribunal must be examined in a prudent and sensible manner, and read in consistency with the powers conferred upon the ITLOS by its Statute and by the Convention, as discussed and agreed by the negotiating Parties.

12. Likewise, Portugal recalls that any international agreement concluded by two or more States for the purpose of conferring general advisory jurisdiction upon the Tribunal full Court needs to be interpreted in line with the legal basis set by the Convention and its Annexes for such advisory jurisdiction.

13. In addition, it must be stressed that, while international courts and tribunals have such inherent powers as are regarded necessary for the proper conduct of proceedings over which they have jurisdiction, this should not include in any event the conferral of a new jurisdiction. In fact, the conferral

view that Article 21 of the Statute should be interpreted in light of Article 288(2) of the Convention.

⁴ See, for instance, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports, 2010, p. 403".

of a new jurisdiction upon international courts is a matter that only Parties to their constituent instruments should be in position to address⁵.

14. Therefore, Portugal would like to recall that international courts and tribunals only have such jurisdiction as is conferred upon them by their constituent instruments, since the specific and unambiguous consent of States remains essential to the jurisdiction of such courts and tribunals. As a result, any inherent or implied powers can only be exercised in the terms in which they are conferred upon them by those constituent instruments⁶.

III. Conclusions

- i) In analysing the present case, it is important to note that there is no express provision for the advisory jurisdiction of ITLOS full Court under either the Convention or the ITLOS Statute (Annex VI of the Convention), and only Article 138 of the ITLOS Rules specifically confers such advisory jurisdiction.
- ii) Even though the provision was included in the ITLOS Rules as adopted by the Tribunal on 28 October 1997, there is scarce information on the origin and foundation of Article 138, especially since the negotiations among States which led to (and followed) the adoption of the Convention did not include any discussion between the negotiating Parties in regard to the possibility of advisory opinions being given by the ITLOS full Court.

⁵ This is the case with judicial bodies created by treaty such as the Court Justice of the European Union or the European Court of Human Rights, where the jurisdiction to render advisory opinions was created by international treaties between the relevant Parties.

⁶ Which means that the maxim *boni iudicis est ampliare jurisdictionem* does have an important limit under international law.

- iii) Although the provisions of Article 288, paragraph 2, and those of Article 21 of the Statute of the Tribunal have been called upon to justify the advisory jurisdiction of the full Court, questions arise on whether these can be relied upon or interpreted as a basis for the advisory jurisdiction of the ITLOS full Court.
- iv) While case law upholds the view that international courts and tribunals have such inherent powers as are regarded necessary for the proper conduct of proceedings over which they have jurisdiction, those powers should be exercised in the terms in which they are conferred upon international tribunals by their constituent instruments.
- v) Therefore, as a firm supporter of the exceptional role of the ITLOS in the settlement of Law of the Sea disputes and in the application and interpretation of the Convention, in accordance with the mandate conferred upon it by the Convention as discussed and agreed by the negotiating Parties, Portugal believes it is crucial that the Tribunal examines the scope of its jurisdiction – and, thus, the admissibility of the present case – in a thorough, precise and sensible manner.