Written Statement of the United Kingdom

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28 November 2013

M. Philippe Gautier
Registrar
International Tribunal for the Law of the Sea
Am Internationalen Seegerichtshof 1
22609 Hamburg
Germany

Dear M. Gautier,

Case No. 21: Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)

I have the honour to refer to Case No. 21: Request for an Advisory Opinion, submitted by the Sub-Regional Fisheries Commission (SRFC), and to the Order made by the Tribunal on 24 May 2013.

I am pleased to attach the written statement made on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland.

The United Kingdom is aware of the severe problems created by Illegal, Unregulated and Unreported fishing off the coast of West Africa, and of the concerns of the West African States in this respect. The United Kingdom is already active in providing assistance with capacity-building for West African States (both nationally and through the European Union), and would be very happy to discuss with the Members of the Sub-Regional Fisheries Commission, either individually or as a group, the possibility of engaging consultants to provide advice to the Commission and its Members about the issues raised by the request made to the Tribunal.

Yours sincerely,

C A Whomersley
Deputy Legal Adviser

Case No 21: Request for an Advisory Opinion

submitted by the Sub-Regional Fisheries Commission

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Written Statement of the United Kingdom

1. On 27 March 2013, the Sub-Regional Fisheries Commission ("SRFC") requested an advisory opinion from the International Tribunal for the Law of the Sea ("the Tribunal")[1]. The questions submitted to the Tribunal read, in English, as follows:

> *"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?*

[1] Letter from the Permanent Secretary of the Sub-Regional Fisheries Commission to the President of the International Tribunal for the Law of the Sea, dated 27 March 2013. See also the letter dated 9 April 2013.

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 French text of the questions differs, in important respects, from the English text. This is particularly the case with question 3:

1. Quelles sont les obligations de l'Etat du pavillon en cas de pêche illicite, non declarée, non réglementée (INN) exercée à l'intérieur de la Zone Economique Exclusive des Etats tiers ?

2. Dans quelle mesure l'Etat du pavillon peut-il être tenu pour responsable de la pêche INN pratiquée par les navires battant son pavillon ?

3. Une Orgnisation Internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l'Etat côtier par les navires de pêche bénéficiant desdites licences ?

4. Quelles sont les droits et obligations de l'Etats côtier pour assurer la gestion durable des stock partagés et des stocks d'interêt commun, en particulier ceux des thonidés et des petits pélagiques ?

3. In its Order of 24 May 2013, the Tribunal invited the States Parties to the United Nations Convention on the Law of the Sea ("the Convention" or "UNCLOS") and others to present written statements on the questions submitted to the Tribunal for an advisory opinion, and fixed a time-limit of 29 November 2013.

4. Before reaching the substance, the Tribunal will need to consider (a) whether it has jurisdiction to give the advisory opinion requested by the SRFC, and (b) if so, whether it should exercise its discretion to give the opinion or not.

5. In **Section I** of this Written Statement, the United Kingdom will explain that the Tribunal is without jurisdiction to give the advisory opinion, and that article 138 of the Tribunal's Rules of Procedure ("the Rules") is *ultra vires.* In the alternative, in **Section II**, the United Kingdom will explain that, if it were to find that it had jurisdiction, the Tribunal should exercise its discretion to decline to give an opinion in the present case. The section also deals with the related matter of the lack of documentation and other information placed before the Tribunal.

I. The Tribunal is without jurisdiction to give the advisory opinion requested by the SRFC

(a) *Article 138 of the Rules of the Tribunal*

6. Annex VI of the United Nations Convention on the Law of the Sea ("the Convention") sets out the Tribunal's Statute ("the Statute"). The Tribunal has adopted Rules of Procedure ("the Rules"), article 138 of which is the only text that makes provision for the Tribunal to give advisory opinions. Article 138 reads as follows:

> *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.

7. Article 138 of the Rules of the Tribunal was included in the Rules as originally adopted by the Tribunal on 28 October 1997. There is virtually no publicly available material on the origin of this provision. Apart from a very early proposal that the Tribunal should be empowered to give advisory opinions at the request of domestic courts[2], which was not taken up, there would not appear to have been discussion of any power for the Tribunal (as opposed to its Seabed Disputes Chamber) to give advisory opinions at any point during the negotiations among States which led to and followed the adoption of the Convention. The matter seems not to have been raised in the Ad Hoc Committee (1967-1968) or Seabed Committee (1968-1973), or at the Third United Nations Convention on the Law of the Sea (1973-1982), or in the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (1983-1996). Nor has it arisen during Meetings of States Parties held subsequent to the entry into force of the Convention. In particular, the Preparatory

[2] In the Informal Working Group on dispute settlement in 1974 (A/CONF.62/L.7 of 27 August 1974); see A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (1987), pp. 33-34.

Commission, in which all States were entitled to participate, adopted Draft Rules of the Tribunal in 1995[3], which included nothing equivalent to article 138. In short, the question of the Tribunal giving advisory opinions seems not to have been discussed by the negotiating States.[4]

8. The main commentary on the Rules of the Tribunal sheds little light on the origin of article 138:

> *"The text of this article has no precedent in the Rules of the PCIJ or in the Rules of the ICJ. Nor was it proposed in the Preparatory Commission Draft Rules. It came about as a proposal presented during the drafting of the Rules of the Tribunal in 1996."*[5]

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[3] Final Draft Rules of the Tribunal, *Draft Report of the Preparatory Commission under Paragraph 10 of Resolution I containing Recommendations for Submission to the Meeting of States Parties, to be convened in accordance with Annex VI, Article 4 of the Convention regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea*, LOS/PCN/152 (Vol. I), 28 April 1995, pages 26/29 and following.

[4] Wolfrum has described the position as follows: "The drafters of the UN Convention were rather reluctant to entrust the Tribunal, including the Chamber for Deep Seabed Disputes, with competence to give advisory opinions equivalent to the ones of the ICJ.": "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?", in Wolfrum and Gätzschmann, *International Dispute Settlement: Room for Innovations?* (2013), p. 35, at p. 55. Such doubts may have reflected concerns about the appropriateness of advisory proceedings more generally: see, for example, R. Higgins, "A Comment on the Current Health of Advisory Proceedings", in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (1996), 567, reprinted in R. Higgins, *Themes and Theories, Selected Essays, Speeches, and Writings in International Law* (2009), 1043; F.D. Berman, 'The Uses and Abuses of Advisory Opinions', in N. Ando, E. McWhinney, R. Wolfrum (eds.), *Liber Amicorum Judge Shiguru Oda* (2002), 809; A. Aust, "Advisory Opinions", 1 (2010) *Journal of International Dispute Settlement*, p. 123; M. Wood, "Advisory Jurisdiction: Lessons from Recent Practice", in H. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P.-T. Stoll, S. Vöneky (eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (2012), p. 1833.

[5] Jesus, in *The Rules of the International Tribunal for the Law of the Sea. A Commentary*, ed. Chandrasekhara Rao, Gautier, 2006, p. 393. See *ibid.*, p. 3-4 for the dates of the Tribunal's consideration of its Rules in 1996 and 1997, and for a reference to its Working Group chaired by Judge Treves. Writings on the Tribunal prior to the adoption of article 138 contain no hint of any advisory jurisdiction for the Tribunal as such: see, for example, A. Cannone, *Il Tribunale Internazionale del Diritto del Mare* (1991), pp. 239-243.

(b) *Any power to give advisory opinions must be express*

9. The consent of States remains fundamental to the jurisdiction of international courts and tribunals. Such courts and tribunals only have jurisdiction in so far as it conferred upon them by their constituent instruments. While international courts and tribunals have such inherent powers as are necessary for the proper conduct of proceedings over which they have jurisdiction, that does not include the conferral of a new jurisdiction. It cannot be said that the power to give advisory opinions is necessary for the proper administration of justice in cases where the Tribunal has jurisdiction under the UNCLOS.

10. The only provision that refers to the Tribunal as such giving advisory opinions is article 138 of the Rules of the Tribunal. It has been said that article 138 "*establishes* ... the jurisdiction of the Tribunal to give an advisory opinion".[6] The question arises as to whether article 138 falls within the powers conferred by the Statute. In other words, is article 138 *ultra vires* the powers of the Tribunal? The difficulty is that article 138, paragraph 1, purports to confer a power upon the Tribunal to give advisory opinions, which has no basis in the Convention or its Annexes.

11. It has been suggested that article 138 of the Rules can be justified because there is "nothing in the Convention or in the Statute itself to exclude or reject such jurisdiction"[7]. However, it is submitted that this line of argument cannot be accepted: the powers of a body created by a treaty, such as the Tribunal, are not limited

[6] Wolfrum, footnote 4 above, at p. 54 (emphasis added); see also (at p. 53): "The competence to give an advisory opinion for the Tribunal rests in Art. 138 of the Rules."

[7] Jesus (in *The Rules of the International Tribunal for the Law of the Sea. A Commentary,* ed. Chandrasekhara Rao, Gautier, 2006, pages 393-4).

solely by any express exclusions in its constituent instrument. Rather, the correct legal analysis is that, since the Tribunal is an entity created by a treaty, it does not "possess a general competence"[8]. It may, of course, in addition to the powers expressly conferred upon it by the Convention and Statute, have certain implied powers. However, according to the case-law of the ICJ, implied powers are those which "are conferred upon [the organisation] by necessary implication as being essential to the performance of its duties"[9]; or expressed in another way, as those which "arise ... by necessary intendment"[10]. The same position was taken by the ICJ in the Advisory Opinion on the competence of the World Health Organisation[11].

12. The principles laid down by the ICJ apply equally to the powers of the Tribunal. Applying those principles, can it be argued that the power to provide for a wholly new jurisdiction of the kind purportedly established by article 138 of the Rules is a power which could be said to be "conferred upon [the Tribunal] by necessary implication as being essential to the performance of its duties"; or as one which could be said to be to "arise by necessary intendment" (to use the phraseology of the ICJ quoted in the preceding paragraph)? It is submitted that the answer to this question must be in the negative. In other words, it cannot be concluded that the Tribunal has any implied power to make a rule such as article 138 of the Rules.

13. In addition, the argument that there is no implied power enabling the Tribunal to provide for a jurisdiction

[8] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 66, at p. 78, para. 25.
[9] *Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 17, at p. 182.
[10] Ibid, p. 184.
[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 66, at p. 79. para. 25.

to give advisory opinions in its Rules is further strengthened by two points. First, a proposal that the Tribunal should be given a limited power to give such opinions was not pursued[12]. And second, there are the express powers in articles 159(10) and 191 of the Convention, which explicitly enable the Tribunal to give advisory opinions, and which specifically entrust that power to the Seabed Disputes Chamber of the Tribunal; the existence of these express powers cannot be construed as implying that the Tribunal as such has an inherent power to give advisory opinions; indeed, on the contrary.

14. This conclusion is confirmed by article 40(2) of the Statute which provides that –

"*In the exercise of its functions relating to advisory opinions, the [Seabed Disputes] Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.*"

There is no corresponding provision for the Tribunal itself, notwithstanding the existence of Article 68 of the Statute of the International Court of Justice, which indicates that no advisory jurisdiction for the Tribunal as such was foreseen.

(c) Is there any basis in UNCLOS for a power to give advisory opinions?

15. The following provisions will be considered in turn, to see whether they provide a legal basis for article 138 of the Rules: (i) Article 16 of the Statute; (ii) Article 288 (2) of the Convention; and (iii) Articles 20 and Article 21 of the Statute.

[12] See footnote 2 above.

(i) *Article 16 of the Statute*

16. Most naturally one should look to Article 16 of the Statute to justify the adoption of article 138 of the Rules of Procedure, given that Article 16 is headed "Rules of the Tribunal" and refers specifically to rules of procedure. But it is striking that none of those who have considered the question[13] have sought to rely on Article 16 as the legal basis for the asserted advisory jurisdiction; it is submitted that they are right not to do so.

17. In considering the proper interpretation of Article 16, it is important to note its structure; the second sentence is only a sub-set of the first; this is demonstrated by the use of the phrase "in particular" in the English and "*notamment*" in the French. Thus, the first sentence has a wider ambit than the second, and more importantly it is the first sentence which contains the key provision, namely that the Tribunal shall frame "rules relating to its functions". There are two elements to this provision. The first is that the Tribunal may only frame "rules"; but article 138 of the Rules purports to

[13] Chandrasekhara Rao (in "ITLOS: The First Six Years", 6 (2002) *Max Planck UNYB*, p. 183 at pp. 210-212); Jesus (footnote 4 above); Ndiaye (in "The Advisory Function of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal Revisited", in *Chinese Journal of International Law*, 2010, volume 9, p. 565, at pp. 580-2); Chandrasekhara Rao (in "International Tribunal for the Law of the Sea", in Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. VI, pp. 188-199, paragraph 29); Wolfrum (in "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?", in Wolfrum and Gätzschmann, *International Dispute Settlement: Room for Innovations?*, 2013, p. 35, at pp. 54-5); and Kateka (in "Advisory Proceedings before the Seabed Disputes Chamber and before ITLOS as a Full Court" in *Max Planck United Nations Yearbook*, volume 17, 2013, pp 159-71); have each offered detailed comments. In addition, Treves has stated that: "whether Article 138 is compatible with the Convention might perhaps be debated" (in "Advisory Opinions under the Law of the Sea Convention" in *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, ed Nordquist and Moore, 2001, p. 81, at p. 92).

provide for a substantive jurisdiction: it cannot on any reasonable reading be said only to set out "rules".

18. Second, Article 16 states that the rules are to be "for carrying out [the Tribunal's] functions". But those functions are set out in the Convention and do not include the giving of advisory opinions (except as specifically provided for in the Convention in respect of the Seabed Disputes Chamber); the Tribunal cannot give itself a new function through a provision in the Rules. In other words, article 138 does not lay down any "rule" for the "carrying out of any of the Tribunal's functions". On this ground alone, article 138 should be held to be *ultra vires.*

(ii) Article 288(2) of the Convention

19. Alternatively it might be argued that Article 288, paragraph 2, of the Convention could be prayed in aid to support the adoption of article 138 of the Rules. Ndiaye rejects this suggestion[14], and it is submitted that he is right to do so. To begin with, Article 288 is located in Section 2 of Part XV of the Convention, which is entitled "Compulsory Procedures Entailing Binding Decisions"; this would not of course cover a non-binding advisory jurisdiction of the kind contemplated in article 138 of the Rules. Furthermore, Article 288, paragraph 1, expressly relates to "any dispute concerning the interpretation or application" of the Convention. Article 288, paragraph 2, then goes on to deal with the Tribunal's "jurisdiction over any *dispute* concerning the interpretation or application of *an international agreement related to the purposes of the Convention*" (emphasis added). The specific reference to a "dispute" must again exclude an advisory jurisdiction; and the reference to "an international

[14] See footnote 14 above.

agreement related to the purposes of the Convention" makes it clear that paragraph 2 is not concerned with the interpretation or application of UNCLOS.

(iii) Articles 20 and 21 of the Statute

20. Both Articles 20 and 21 of the Statute of ITLOS have been cited as 'relevant provisions' for advisory proceedings before the Tribunal[15]. However, it is submitted that Article 20 of the Statute cannot be construed so as to confer jurisdiction on the Tribunal to give advisory opinions[16]. Article 20 deals solely with the question of access to the Tribunal, in other words, which States Parties and other 'entities' may have access to the Tribunal. It does not confer jurisdiction on the Tribunal.

21. Article 21 of the Statute deals with the jurisdiction of the Tribunal *ratione materiae*[17] and reads:

> *"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."*

The French text is rather different, especially the concluding phrase. It reads:

> *"Le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à*

[15] *A Guide to Proceedings before the International Tribunal for the Law of the Sea* (ITLOS 2009/1), p. 30 (section 3, subsection B), available on the Tribunal's website; the *Guide* is 'issued by the Registry for information purposes' (see the Foreword). See also Chandrasekhara Rao, "ITLOS: The First Six Years", 6 (2002) *Max Planck UNYB*, p. 183 at pp. 210-212;

[16] It will be recalled that the present request originally referred to Article 20, but was later corrected to refer to Article 21.

[17] Article 20 corresponds to Article 35(1) of the ICJ Statute (see *Virginia Commentary*, vol. V, pp. 374-5).

la Convention et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal."

22. Article 21 refers to "all ... applications" as well to "all disputes", and is thus wider than Article 288. But the use of the term "all applications" (as mentioned by Judge Jesus[18]) must be read in the light of, and consistently with, the other provisions of the Convention, in particular Article 288. As You says:

> *"the wording of Article 21 of the ... Statute is, to a large extent, a paraphrase of Article 288(1) and (2) of the ... Convention. Put simply, the differences in the two provisions should not be exaggerated. .... [I]t appears logical to assume that the ... Statute is subject to Part XV of the ... Convention, in general, and to Article 288, in particular, which ... may not be interpreted as authorizing the [Tribunal] to render advisory opinions"*[19].

23. The learned authors of the *Virginia Commentary* explain the use of the word "applications" as follows:

> *"having regard to the provisions on the choice of procedure in Article 287, special provisions have been included in the Convention to deal with cases over which some other court or tribunal has jurisdiction, pending the constitution of that other court or tribunal"*[20].

The authors then refer to the procedures provided for in Article 290(5) and Article 292(1) of the Convention, and continue: "in each case, once the court or tribunal has

[18] See footnote 14 above.

[19] You, "Article 138 of the Rules of the ITLOS, Revisited", in *Ocean Development & International Law*, 2008, volume 39, p. 360 at pp. 362-3.

[20] *United Nations Convention on the Law of the Sea 1982. A Commentary* ed Nordquist, 1989, Volume V (Volume Editors, Shabtai Rosenne and Louis Sohn), p. 360.

been constituted, the Tribunal has no further functions to perform in this respect. The reference in Annex VI, article 13, paragraph 3, to "disputes and applications" alludes to this"[21]. It is submitted that this is also the explanation for the use of the term "applications" in Article 21 of the Statute.

24. It might be argued that the last phase in Article 21 (*"and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal"/"et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal"*) is wide enough to cover advisory opinions provided for in any other agreement. At the end of the day, those who seek to argue that the Tribunal has the power to give advisory opinions (and hence that article 138 of the Rules is *intra vires*) rely mainly on these words. Article 21 is also the provision invoked by the SRFC in making the present request.[22] Yet these words are a very tenuous basis upon which to construct a far-reaching advisory jurisdiction. The French text, in particular, makes it clear that such an interpretation is not justified, since it refers back to other cases where disputes and applications are submitted *(toutes les fois que cela est expressément prévu)*. The words in question have to be read in the context of Article 21 and Part XV as a whole. Article 21 is intended to encapsulate the Tribunal's jurisdiction, which is set out more fully elsewhere in the Convention. Article 21 makes no reference, express or implied, to advisory opinions. Had the negotiating States intended to confer such a jurisdiction the inclusion of an express provision would have been straightforward. They did not do so. It would be a strained interpretation indeed to read into Article 21 a wholly new jurisdiction, a

[21] *Ibid.*

[22] As corrected by the letter of 9 April 2013, which replaced Article 20 by Article 21.

jurisdiction which could have unpredictable and potentially far-reaching consequences for States Parties and for the rules set forth in UNCLOS, including the painstakingly negotiated institutional and dispute settlement provisions. It is respectfully submitted that such a result would not be the outcome of a proper application of the rules on treaty interpretation set forth in the Vienna Convention.

(d) A Consensual Solution?

25. Wolfrum refers to a "consensual solution"[23]. If the suggestion is 'the parties concerned' may, by agreement *inter se*, confer 'an additional jurisdiction' upon an international court or tribunal, going beyond the jurisdiction conferred by its constituent instrument, then, with respect, such suggestion would seem questionable. The States Parties to the instrument establishing an international court or tribunal define its jurisdiction in the constituent instrument, and - unless they have expressly so agreed - cannot be said to have consented to 'an additional jurisdiction' being conferred upon the body which they have established for specified purposes and for which they provide the financial and other resources.

26. It is clear in both Article 288 and Article 21 that the basis of the Tribunal's jurisdiction must be sought in *that other agreement*; in other words, neither provision gives the Tribunal itself power in its Rules to establish a jurisdiction not provided for in the Convention, but rather allows the Tribunal to decide a dispute if that is provided for in another agreement.

27. It may be that it would be acceptable for the Tribunal to give an advisory opinion where the advisory

[23] See footnote 4 above, at p. 54.

opinion only affects matters internal to a particular organisation, such as admission of new members (as in the *Admissions case*[24] in the ICJ) or the budget of the organisation (as in the *Expenses case*[25] in the ICJ). But again these are cases where the jurisdiction should be conferred, not by the Tribunal's Rules, but by the agreement in question – and the result should, consistent with a consensual solution, be relevant only to the parties to the agreement in question. In the same way, the instances quoted by Ndiaye[26], i.e., the Italy-US and France-US agreements, were ones in which the agreement itself provided for the procedure in question; in other words, it was specifically agreed between the States concerned; these agreements do not provide any precedent to justify the inclusion of article 138 in the Rules.29. Ndiaye[27] refers to various statements suggesting that it might be desirable to confer upon the Tribunal a wider jurisdiction to give advisory opinions. But these statements were *de lege ferenda*, not *de lege lata*, and have not commanded sufficient support that they have been incorporated into an international agreement – or even for one to be proposed.

(e) Other Practice

29. It is instructive to compare the position of the International Court of Justice ("the ICJ"). Under Chapter IV of its Statute, the ICJ may give an advisory opinion in certain circumstances. The ICJ has insisted on many occasions that as the principal judicial organ of the United Nations it should play its full role in the activities

[24] *I.C.J. Reports, 1948*, page 57.
[25] *I.C.J. Reports, 1962*, page 151.
[26] See footnote 14 above.
[27] See footnote 14 above.

of the United Nations[28]. But there are already specific provisions in the Convention under which the Tribunal through its Seabed Disputes Chamber can give advisory opinions to the organs of the International Seabed Authority (ISA). Article 159(10) and Article 191 specifically enable the Seabed Disputes Chamber to play its full part in the system of regulation of the Area, as established by Part XI of the Convention. And these provisions relate to the internal workings of the ISA, only have relevance within the ISA and are accepted by all the members of the ISA.

30. Accordingly, there is no need for the Tribunal to confer upon itself any further jurisdiction to give advisory opinions in order to enable it to play its full role within the system established by Part XI of the Convention, and indeed the existence of these Articles in the Convention indicates, as stated in paragraph 14 above, that there is no justification for the Tribunal to confer upon itself a wider jurisdiction to give advisory opinions through its Rules.

32. It is also relevant that Article 16 of the Statute is in the same terms as Article 30(1) of the Statute of the ICJ; in relation to the latter provision, Thirlway has stated that:

> *"The effect of Art. 30 ... is to confer on the Court the power to enact what might be called subsidiary legislation, in the form of rules of procedure, which are ... binding on States parties to the Statute by virtue of their consent to Art. 30 as contained in the Statute. ... There are, however, evident limitations on the rule-making power of the Court. First, the power*

[28] Most recently in *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. 415-416, para. 30; and in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development, Advisory Opinion*, 1 February 2012, paras. 33-34.

> *can only be exercised in the terms in which it is conferred. It would not be possible, e.g., for the Court, by enacting a rule, to confer upon itself a jurisdiction which it did not otherwise possess*"[29].

It is submitted that Article 16 of the Statute should be interpreted in the same way that Thirlway interprets Article 30 of the Statute of the ICJ, and in particular that the Tribunal should follow the last sentence of the above quotation.

32. The position in other judicial bodies created by treaty is instructive:

- As regards the European Court of Human Rights, the original Convention (Rome, 4 November 1950) which established the Court did not include any power for the Court to give advisory opinions. Such a power was given to the Court by the Second Protocol to the European Convention (Strasbourg, 6 May 1963), and is now included in the Convention itself as Articles 47 to 49. A further such power has recently been agreed and the necessary provision was adopted as Protocol No 16 to the Convention at Strasbourg on 2 October 2013. (Protocol No. 16 will allow States Parties' highest courts to ask the European Court of Human Rights for an advisory opinion on questions relating to the interpretation or application of the Convention or its Protocols.)
- The European Court of Justice, now the Court Justice of the European Union, has no general jurisdiction to give advisory opinions. There are however two provisions under which the Court has a power to give what are in essence advisory opinions; these are:-

[29] Thirlway, in *The Statute of the International Court of Justice: A Commentary*, 2012 (ed. Zimmermann, Tomuschat, Oellers-Frahm, Tams), pp 517-8.

i. Article 218(11) of the Treaty on the Functioning of the European Union (as amended at Lisbon on 13 December 2007) which goes back in substance to Article 228(1), paragraph 2, of the Treaty Establishing the European Economic Community (Rome, 25 March 1957), confers on the Court power to give an opinion about whether an agreement envisaged between the European Union and a third State or international organisation is compatible with the Treaties relating to the European Union;

ii. Chapter X of the Treaty Establishing the European Atomic Energy Community (Rome, 25 March 1957) sets out a similar power for the Court to give an opinion on draft agreements or contracts with third States, international organisations or nationals of third States

- The EFTA Court also has power to give advisory opinions, but again this is provided through an agreement between the State parties (Article 34 of the Agreement between the EFTA States (Iceland, Liechtenstein and Norway) on the Establishment of a Surveillance Authority and a Court of Justice (Oporto, 2 May 1992).

33. In each of these cases the jurisdiction to give advisory opinions was created by international treaties between the relevant States, and was not established through the Rules of Procedure of the judicial body concerned. It is particularly noteworthy that Rules of Procedure were not used to give the European Court of Human Rights this power, but rather that the adoption of Protocols was the mechanism used. This suggests strongly that it was not thought possible for a power to

give advisory opinions to be conferred by an amendment to Rules of Procedure. Indeed, Thirlway concludes that

> *"the creation of a body as a 'court' or 'tribunal' and its empowerment to discharge judicial functions do not appear automatically to confer power to give advisory opinions. Such 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"*[30].

(f) *Concluding Remarks*

34. As the quotation from Thirlway given in paragraph 31 above makes clear, it is important that the Tribunal should not stray beyond the terms of the powers granted to it by the States Parties; otherwise there will be a concern among States that the powers granted by them are being used in a manner which goes beyond their terms. Wolfrum rightly refers[31] to the reluctance of the drafters of the Convention to confer a jurisdiction to give advisory opinions; this also indicates that the Tribunal should avoid too expansive an exercise of the powers conferred on it by the Convention.

35. It is submitted therefore that the Tribunal fell into error in adopting article 138 of the Rules, that the Tribunal should hold that the article is *ultra vires,* and that accordingly the Tribunal has no jurisdiction to provide the requested advisory opinion.

[30] Thirlway, "Advisory Opinions of International Courts" in Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* (2012), paragraph 4.
[31] See footnote 4 above.

II. Should the Tribunal accede to the request for an advisory opinion?

(a) Introductory Issues

36. Without prejudice to its primary submission that the Tribunal has no jurisdiction, the United Kingdom submits, in the alternative, that the Tribunal should, in the exercise of its discretion, decline to give the opinion requested in the present case. This would be consistent with the caution which it is appropriate for international courts and tribunals to exercise in approaching their advisory jurisdiction,[32] having regard, among other things, to the need to maintain judicial integrity, to avoid blurring the boundary between contentious and advisory matters, and to avoid undermining the principle of consent which remains a key requirement for the jurisdiction of international courts and tribunals.[33]

37. In the first place, the Tribunal will need to establish to its own satisfaction that the request complies with article 138. In particular, the Tribunal needs to establish three matters:-

- Is the opinion sought on "a legal question";
- Is the international agreement under which the request is made related to the purposes of the Convention; and
- Has the request been made by an authorised body as required by paragraph 2 of article 138?

38. The United Kingdom will consider in greater detail below whether the request relates to a "legal question".

[32] See references at note 4 above.
[33] These three 'headlines' are taken from R. Kolb, *The International Court of Justice* (2013), pp. 1028-1029.

(b) Discretion

39. "It is to be noted that under Art. 138(1) of the Rules of the tribunal the latter has a discretion as to whether to accept [a request for an advisory opinion] or not."[34] Article 138 uses the word "may", and the ICJ has consistently stated that the use of that word in Article 65 of the Statute of the ICJ means that the Court has a discretion as to whether or not it should comply with any request[35]. In particular, this is in contrast to Article 191 of the Convention which uses the word "shall" and which may suggest that there is an obligation to provide an advisory opinion[36].

40. The ICJ has recalled its "duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function".[37] It is suggested that, if it has jurisdiction, the Tribunal would have a similar duty (though the criteria concerned would need to reflect the specific position of the Tribunal).

41. The ICJ has in particular commented that:

> *"the Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?"*[38]

[34] Wolfrum, footnote.4 above, p. 54.
[35] Most recently in the *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development, Advisory Opinion*, 2012, para. 33.
[36] See *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011*, p. 10, paras. 47-8, in which the Seabed Disputes Chamber expressly left open the question of the scope of its possible discretion.
[37] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 157, para. 45.
[38] *Judgments of the ILO Administrative Tribunal, I.C.J. Reports 1956*, p. 84.

42. It is submitted that, if it finds that it has jurisdiction, the Tribunal should follow the jurisprudence of the ICJ in this respect, and should first hold that it has discretion as to whether or not to comply with a request under article 138; and should then decide whether or not it would be compatible with its judicial character to exercise that discretion to give the opinion requested. On the second point, in the United Kingdom's view, the answer to the question posed by the ICJ in the above quotation is that it, in the present case, it is not possible.

(c) Relevance of other international agreements

43. In its Technical Note, the SRFC refers to a number of international agreements, and in the exercise of its discretion, the Tribunal needs to take into account particularly that there are three major multilateral international agreements which deal with fishing, namely:

- UNCLOS (and in particular Articles 61-67 and 116-120);
- the 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 (4 August 1995) ("the Fish Stocks Agreement");, and
- the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted by the Food and Agricultural Organisation

on 24 November 1993) ("the Compliance Agreement").[39]

44. The answer to the questions submitted by the SRFC will depend on whether the States concerned are parties to these three agreements. Even participation in UNCLOS is not universal; for example two states with Atlantic seaboards (i.e., Venezuela and the United States of America) are not parties. The other two Agreements have significantly fewer parties; the Fish Stocks Agreement has 80, and the Compliance Agreement only 39. Furthermore, of the members of the SRFC, only Senegal is party to both of these Agreements; Guinea is a party to the Fish Stocks Agreement; Cape Verde is a party to the Compliance Agreement; and the other four members are not party to either. But the treaty relations existing between the flag State and the coastal State will significantly determine the answer to the questions submitted by the SRFC and these relations will vary, depending upon the respective participation of the States in these multilateral Agreements.

45. Furthermore, the answers to the questions put by the SRFC would have to take account of the provisions of any relevant regional or bilateral agreements. Certainly it is not at all unusual for there to be an agreement between the coastal State and the flag State of vessels fishing in its exclusive economic zone. And question 3 (though it is expressed quite differently in the English and French texts) seems to contemplate that there is, or will be, such a bilateral agreement. The terms of that

[39] The Technical Note supplied by the SRFC also refers to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the Food and Agricultural Organisation on 22 November 2009, and states in Part V that it is "binding" on the Member States of the Commission; it is, however, not clear on what basis this is said, since according to the FAO website this Agreement is not yet in force and none of the Member States of the SRFC have expressed their consent to be bound by it (although Sierra Leone has signed it).

bilateral agreement would be highly relevant to the legal issues.

46. Overall, as indicated in paragraph 27 above, the United Kingdom can see that it might be useful for the SRFC to seek advice on matters internal to it, but it seems inappropriate for the organisation to be seeking advice about its rights and obligations vis-à-vis third parties, and not only because the treaty relationship with those third parties is not adequately specified.

47. In addition it is relevant that the Fish Stocks Agreement and the Compliance Agreement both have their own provisions about the settlement of disputes (Part VIII and Article IX, respectively), and any relevant bilateral agreements may also include such provisions. It would be inappropriate to use the advisory opinion jurisdiction to circumvent such provisions in other agreements which may be binding on the parties thereto.

(d) A "Legal Question"

48. Under article 138(1) the Tribunal may only give a decision on a "legal question". This is elaborated by article 131(1), which applies by virtue of article 138(3), and which states that the request *"shall contain a precise statement of the question"*.

49. A preliminary question is the scope of the term 'a legal question' in the present context. It clearly cannot mean *any* legal question. Indeed, it has been suggested that "the competence of the Tribunal to render an advisory opinion under Art. 138 of the Rules is limited to the interpretation of the Convention."[40]

[40] Wolfrum, footnote 4 above, p. 63.

50. Furthermore, it is submitted that the questions put by the SRFC are so general and vague that it is difficult to regard them as constituting a "legal question", still less as complying with the requirement to give a "precise statement of the question".

51. In particular, the following points should be noted:-

a) In Question 1, it is not clear whether the reference to "the flag State" refers to other members of the SRFC, or whether it refers to third party states. If the former, presumably the question resolves itself into the extent of the obligations under the Convention establishing the SRFC. But if it is the latter, then of course bilateral agreements and the multilateral agreements referred to above will be highly relevant.

b) As regards Question 2, again the multilateral and bilateral agreements (if any) will be relevant; but it is not clear what, if any, geographical limitations are being considered here; presumably it is fishing in the territorial sea and/or the exclusive economic zone, but that is not stated.

c) Question 3 is formulated quite differently in the English and French texts and certainly in the English there are some ambiguities. For example, the term "an international agency" in the English does not have a clear meaning. In any event, as indicated above, the terms of any response to the question must depend very substantially upon the terms of the international agreement referred to in the English text.

d) As regards Question 4, the term "small pelagic species" is not a term of art and presumably the reference to "tuna" means that not all the species

listed in Annex I of UNCLOS are intended to be covered.

52. It is also important to note that very little if anything by way of facts has been supplied. Clearly, the Tribunal cannot give a view on any of these issues without some appreciation of what the background is. It is noteworthy that in the *Wall* case the ICJ was only prepared to give an advisory opinion because it was satisfied that sufficient facts had been made available to it to enable it to give a view[41]. And in the most recent advisory opinion, the ICJ said that it would go ahead and give the advisory opinion because "it does have the information it requires to decide on the questions submitted"[42].

53. Again, since these questions clearly raise questions about the relationship between the States members of the SRFC and third States, the Tribunal should be mindful of the decision of the Permanent Court in the case of *Eastern Carelia*[43]; whilst the Tribunal may not necessarily be deterred from giving an opinion solely because it might affect the position of third states, nevertheless the Tribunal may consider that it ought to decline to provide an opinion if the facts underlying the request cannot properly be established without the involvement of third states; it is on this basis that Rosenne explains the *Eastern Carelia* case.[44]

54. It is instructive for the Tribunal to note the approach

[41] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004*, p. 136, at pp. 160-162, paras. 55-58. For the view that the Court "did not have before it the requisite factual bases for its sweeping findings" and that "it should therefore have declined to hear the case", see Judge Buergenthal's Declaration: *ibid.*, pp. 240-5.

[42] *Judgment 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development, Advisory Opinion of 1 February 2012*, para. 47.

[43] PCIJ Reports, 1923, Series B, No.5

[44] See Rosenne, *The Law and Practice of the International Court 1920-2005*, Fourth Edition, 2006, volume II, p. 986, and footnote 78.

of the European Court of Justice (now the Court of Justice of the European Union) when asked to give an advisory opinion on the question whether it was compatible with the Treaties relating to the European Community for the European Community (now the European Union) to accede to the European Convention on Human Rights[45]. The Court stated that it:

> *"must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention. As it is, the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the Community to the jurisdiction of an international court. It follows that the Court is not in a position to give its opinion on the compatibility of Community accession to the Convention with the rules of the Treaty."*[46]

In the same way the Tribunal has not been given sufficient detailed (or any) information to enable it to sensibly answer the questions put in this case and should therefore decline to do so.

(e) Compliance with the Rules

55. Furthermore, article 138(3) of the Rules specifically requires the Tribunal to apply *mutatis mutandis* Articles 130-137 of the Rules. It is submitted that in particular the Tribunal should consider article 130(2) and the first sentence of article 131(1). As regards article 130(2), it is mandatory for the Tribunal to apply this Rule, but on the basis of the documents so far submitted by the SRFC it is impossible for the Tribunal so to do. In other words, it is unclear whether there is "legal question pending

[45] *Opinion 2/94 of 28 March 1996* [1996] European Court Reports I-01759.
[46] Paragraphs 20 to 22 of the Opinion.

between two or more parties". The terms of the questions might suggest that there is, but it is obligatory that the Tribunal should satisfy itself on this issue before it proceeds to give an opinion.

(f) The Function of the Tribunal

56. As Sir Franklin Berman has written:

> *"A court asked to play an advisory role is therefore faced with a choice. It may decide that the role requires it to bring to bear its collective judicial experience and wisdom, to be sure, but nevertheless not to act as a court; so it may conceive its function as analogous instead to that of a trusted adviser, like a family lawyer or the legal counsel of a government department or international organisation. It may, on the contrary, decide that the advisory role is a judicial one, requiring it still to function as a court. This is what the International Court of Justice and its predecessor have consistently maintained in respect of their advisory jurisdiction."*[47]

In the present case, for example, if faced by these questions, the "trusted adviser" might well give a view on the desirability of the states becoming party to the Fish Stocks Agreement and the Compliance Agreement; and he or she might give guidance on the conduct of negotiations with third states; but neither of these functions are ones which are appropriate for a judicial body. It is submitted that, in relation to this request, the Tribunal is being asked to act as a "trusted adviser", rather than a court, and that the Tribunal should follow

[47] Berman, "The Uses and Abuses of Advisory Opinions", in Ando, McWhinney and Wolfrum, *Liber Amicorum Judge Shigeru Oda*, 2002, p. 809, at pp. 818-9 (emphasis in the original).

the lead of the ICJ and decline to answer the questions put.

(g) Lack of documentation and other information

57. Before deciding how to exercise its discretion the Tribunal may consider that it should request further information. The United Kingdom would draw attention to article 131(2) of the Rules of Procedure (which applies, again by virtue of article 138(3)) under which the request for an advisory opinion *"shall be accompanied by* all *documents likely to throw light upon the question"* (emphasis added). The United Kingdom notes that certain documentation has already been submitted by the SRFC. However, in Case No. 17, the Tribunal was supplied with a substantial dossier by the International Seabed Authority,[48] and in cases in the ICJ where an advisory opinion is sought the practice of the Secretariat of the United Nations is likewise to provide a full set of documents. It is difficult to believe that there is not more documentation which would throw light upon the question asked (to use the words of article 131(2)). If the Tribunal is not minded to accede to the submissions made above and decline to proceed with the case at the present stage, the United Kingdom suggests that the Tribunal should now make an order requiring the SRFC to provide the further relevant documentation. The United Kingdom believes that it would then be appropriate for the States Parties and relevant international organisations to be given the opportunity to comment on any further documents produced by the SRFC. In this respect, article 133(3) is drafted in wide

[48] *Dossier submitted on behalf of the Secretary-General of the International Seabed Authority pursuant to Article 131 of the Rules of the Tribunal.* The Authority provided further information in a Note from the Legal Counsel dated 26 August 2010 and Letters from the Legal Counsel dated 17 September and 15 November 2010.

enough terms to enable the Tribunal to make such an order.

Conclusions

58. For the reasons set out in this Written Statement, the United Kingdom invites the International Tribunal for the Law of the Sea

(a) to hold that it is without jurisdiction to give the opinion requested and that article 138 of its Rules of Procedure is *ultra vires*; or, in the alternative,

(b) to decline to exercise its discretion to give the opinion requested; if necessary, before reaching a conclusion on the exercise of its discretion the Tribunal may wish to invite the SRFC to provide the further relevant documentation and thereafter give States Parties and relevant international organizations the opportunity to comment.