

Spain before the advisory jurisdiction International of the International Tribunal for the Law of the Sea

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Abstract: On 2 April 2015, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion in response to the Request submitted by the Sub-Regional Fisheries Commission (the SRFC) on the obligations of flag States in respect of their vessels fishing in the exclusive economic zones of other States and on the obligations of coastal States to cooperate over the managements of shared stocks. The broad participation in oral and written proceedings is considered to be as a success of the case. Twenty-one States Parties, the European Union, the United States of America, as well as SRFC and 6 intergovernmental organizations participated in those proceedings. Spain was among the 7 member States of the European Union that participated while confining its statements to the jurisdictional issue. In fact, it can be considered the most relevant aspect of the case. In part II of the Advisory Opinion the ITLOS considered these questions and decides unanimously that it has jurisdiction and that its jurisdiction is limited to the exclusive economic zones of the SRFC Member States. It decides by 19 votes to 1 to respond to the Request for an advisory opinion submitted by the SRFC. Notwithstanding, the controversy over the most important questions related to jurisdictional issue is likely to continue after the case.

Keywords: Law of the sea – International Tribunal for the Law of the Sea – Advisory function – Spain

(A) INTRODUCTION

On 2 April 2015, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion in response to the Request submitted by the Sub-Regional Fisheries Commission (the SRFC) on the obligations of flag States in respect of their vessels fishing in the exclusive economic zones of other States and on the obligations of coastal States to cooperate over the managements of shared stocks¹. This was the first time that an advisory opinion was rendered by the Tribunal in its full composition under article 138 of the ITLOS Rules. Therefore, this advisory opinion “broke new ground in the ITLOS jurisprudence”². Previously, on 1 February 2011, the Seabed Disputes Chamber of the ITLOS rendered an advisory opinion on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, requested by the Council of the International Seabed Authority on the basis of article 191 of the United Nations Convention on the Law of the Sea (UNCLOS)³, that has greatly contributed to strengthening the Law of the Sea⁴.

The SRFC is an international organization for fisheries cooperation integrated by seven West

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¹ Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Case N° 21). *Advisory Opinion of 2 April 2015*. The Advisory Opinion and relevant materials for the proceedings are available at the website of the ITLOS (www.itlos.org).

² Y. Tanaka, “Reflections On the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion”, 14 *The Law and Practice of International Courts and Tribunals* (2015), 318-339, at 318.

³ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

⁴ Responsibilities and Obligations of States with respect to Activities in the Area, *Advisory Opinion of 1 February 2011*.

African States⁵. It was created by the Agreement of Dakar, adopted on 29 March 1985, in order to “harmonize in the long-term, policies of member countries in terms of preservation, conservation and management of fisheries resources and strengthen their cooperation for the well-being of their populations”⁶. On 28 March 2013, the SRFC submitted its Request on the basis of article 33 of the Convention on the Determination of the Minimal Access Conditions for Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of SRFC (the CMA Convention)⁷. Under this rule, the Conference of Ministers of the SRFC authorized the Permanent Secretary to refer the following questions to the ITLOS for an advisory opinion:

- “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?”⁸

On 24 May 2013, the ITLOS adopted an Order inviting—in accordance with article 133 (3) of the ITLOS Rules⁹—, the States Parties to UNCLOS, the SRFC and the other organizations listed in the annex, to present written statements on the questions submitted to the Tribunal for an advisory opinion, and decides—in accordance with article 133 (4) of the ITLOS Rules—, that oral proceedings shall be held¹⁰. Twenty-one States Parties¹¹, the European Union as entity Party¹², the United States of

⁵ The SRFC comprises 7 Member States: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone (<http://www.spcsrp.org/>).

⁶ Article 2 of the Agreement Establishing a Sub Regional Fisheries Commission of 29 March 1985 in Dakar, amended on 14 July 1993.

⁷ Convention on the Determination of the Minimal Access Conditions for Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC), concluded in 8 June 2012 and entered into force on 16 September 2012.

⁸ Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS, Advisory Opinion of 2 April 215.

⁹ Rules of the Tribunal (ITLOS/8), as adopted on 28 October 1997 and amended on 15 March 2001, 21 September 2001 and 17 March 2009.

¹⁰ Order of 24 May 2013.

¹¹ The Kingdom of Saudi Arabia, The Federal Republic of Germany, New Zealand, The People’s Republic of China, The Federal Republic of Somalia, Ireland, The Federation of States of Micronesia, Australia, Japan, The Portuguese Republic, The Republic of Chile, The Argentine Republic, The United Kingdom, The Kingdom of Thailand, The Kingdom of the Netherlands, The Republic of Cuba, The French Republic, The Kingdom of Spain, Montenegro, The Swiss Confederation, The Democratic Socialist Republic of Sri Lanka.

¹² The EU, together with its Member States, is a Contracting Party to UNCLOS (Article (2) (2) and article 305 (1) (f) UNCLOS, article 1 Annex IX). Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (DO L 179 23 June 1998, p. 1). Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing 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 stocks and highly migratory fish stocks (DO L 189 de 3 July 1998, p. 14).

America¹³, as well as SRFC and 6 intergovernmental organizations¹⁴ submitted statements in two rounds of written pleadings. Hearings in the case were held in September 2014 with the participation of 9 States¹⁵, the European Union, the SRFC and 2 intergovernmental organizations. Spain was one of the 7 Member States of the European Union, which participated in both written and oral proceedings¹⁶. In conformity with the commitment adopted, its statements were confined to the jurisdiction of the Tribunal¹⁷. In general terms, the broad participation has been considered a success of these advisory proceedings¹⁸.

This is the first time that Spain participates in advisory proceedings before the ITLOS. Its first contentious case was *The M/V "Louisa" Case between Saint Vincent and the Grenadines and the Kingdom of Spain* (Case N° 18)¹⁹. In its Judgment of 28 May 2013, the ITLOS found that no dispute concerning the interpretation or application of the UNCLOS existed between the Parties at the time of the filing of the Application and that, therefore, it had no jurisdiction *ratione materiae* to entertain the case²⁰. Recently, Spain has also become involved in *The M/V "Norstar" Case (Panama v. Italy)*

¹³ Whereas the United States is not a State Party to UNCLOS—but is party to the Agreement for the implementing 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 stocks and highly migratory fish stocks—the Tribunal decided that its Statement should be considered as a party of the case file.

¹⁴ The United Nations, The Food and Agriculture Organization of the United Nations, The Caribbean Regional Fisheries Mechanism, The Central American Fisheries and Aquaculture Organization, Forum Fisheries Agency, The International Union for Conservation of Nature and Natural Resources.

¹⁵ The Federal Republic of Germany, Australia, The Republic of Chile, The Argentine Republic, The United Kingdom, The Kingdom of Spain, The Federation of States of Micronesia, New Zealand, The Kingdom of Thailand.

¹⁶ Written Statement of the Kingdom of Spain, 29 November 2013; Presentation by Mr. Martín y Pérez de Nanclares, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 3 September 2014, 30-37.

¹⁷ It was common ground among the Member States that the questions raised by the request for an advisory opinion concern, at least in part, the area of the conservation of marine biological resources under the common fisheries policy, which constitutes, pursuant to Article 3(1)(d) TFEU, an area of exclusive EU competence, and that the European Union, as a contracting party to UNCLOS, on the basis of which ITLOS was set up, was competent to take part in the advisory opinion proceedings before that court in Case No 21, in accordance with Article 133 of the Rules of procedure of ITLOS. However, the advisory proceeding initiated by the SRFC before ITLOS (case n° 21) highlighted the internal difficulties involved in the appropriate coordination of the EU and the Member State's participation in proceedings before international tribunals. On 29 November 2013, the European Commission submitted a written statement on behalf of the European Union to the ITLOS regarding an advisory opinion to be delivered by that court. The Council of the European Union sought annulment of 'the Commission's decision of 29 November 2013' to submit that statement. Supported by a number of Member States, it claimed essentially that the Commission should have requested and obtained its approval before submitting the written statement to ITLOS. In its judgement of 6 October 2015, the European Court of Justice dismissed the action of the Council and clarified a number of issues concerning the definition of EU position and its representation before international courts and tribunals (Case C-73/14 Council of the European Union v. European Commission (ITLOS) EU:C:2015:663). On this matter, E. Paasivirta, "The European Union and the United Nations Convention on the Law of the Sea", 38 *Fordham International Law Journal* (2015), 145-171; G. A. Oanta, "Tres sentencias claves para la delimitación del contorno jurídico de las competencias convencionales de la Unión en el ámbito pesquero", 53 *Revista de Derecho Comunitario Europeo* (2016), 201-231; S. R. Sánchez Tabernero, "Swimming in a Sea of Courts: The EU's Representation Before International Tribunals", 1 (2) *European Papers* (2016), 751-758; D. Simon, "Représentation de l'Union", 12 *Europe*, (Décembre 2015), 15-16; R. Ojinaga Ruiz, "La Unión Europea y los Estados miembros en los procedimientos de arreglo jurisdiccional de controversias de la CNUDM", 55 *Revista de Derecho Comunitario Europeo* (2016), 977-1018 dismiss the action of the Council of the European Union (2016), pp. 751-758

¹⁸ Declaration of judge Cot, para. 1.

¹⁹ The judgment and all the documents of the case are available [here](#).

²⁰ C. Escobar Hernández, "España y el Tribunal Internacional de Derecho del Mar: especial referencia al caso M/V

(Case N° 25), but in its Judgment of 4 November 2016, on Preliminary Objections, ITLOS concluded that Italy is the proper respondent to the claim made by Panama in these proceedings²¹. Furthermore, this judgment illustrates quite often is the jurisprudence in the M/V “Louisa” Case now relied by the ITLOS.

In the replies to the questions posed by SRFC, ITLOS outlines a number of “due diligence” obligations of flag States —or international organizations with exclusive competence in fisheries matters— regarding IUU fishing activities in the economic exclusive zones of other States and on the obligations of coastal States to cooperate over the management of shared stocks²². In its reasoning, the ITLOS followed the approach taken by the Seabed Disputes Chamber in its advisory opinion as well as the International Court of Justice (ICJ) in the Pulp Mills on the River Uruguay case²³. Thus, the subject matter of this advisory procedure was one of paramount importance in view of the serious

“Louisa”, en J. Martín y Pérez de Nanclares (dir.), *España y la práctica del Derecho Internacional*, LXXV Aniversario de la Asesoría Jurídica Internacional del MEC, Colección Escuela Diplomática 20, Madrid, 2013, pp. 179-221; M. J. Aznar Gómez, “El Tribunal Internacional del Derecho del Mar”, en Vázquez Gómez, Adam Muñoz, Corgano Prieto (coords.), *El arreglo pacífico de controversias internacionales* (Tirant lo Blanch, Valencia, 2013), 371-412; R. Ojinaga Ruiz, The M/V “Louisa” Case: Spain and the International Tribunal for the Law of the Sea”, 18 *Spanish Yearbook of International Law* (2013-2014), 199 -221.

²¹ Panama claimed compensation from Italy for damage caused by the illegal arrest of the M/V *Norstar* in 1998. Following a request for judicial assistance by the Prosecutor at the Court of Savona pursuant to article 15 of the European Convention on Mutual Assistance in Criminal Matters done in Strasbourg on 20 April 1959 and article 53 of the Schengen Agreement of 14 June 1985, the Spanish authorities seized the M/V “*Norstar*” when it was anchored in the Bay of Palma de Mallorca, in September 1998.

In its Preliminary Objections, Italy argued that the case falls outside the jurisdiction of the Tribunal since Italy is the wrong respondent in the present case and, in any event, adjudication over the claim advanced by Panama would require the Tribunal to ascertain rights and obligations pertaining to Spain, in its absence. In its Judgment of 4 November 2016, on Preliminary Objections, ITLOS concluded that Italy is the proper respondent to the claim made by Panama in these proceedings: “The Tribunal notes that the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the M/V “*Norstar*”. It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the M/V “*Norstar*” through the investigation and proceedings. Spain merely provided assistance in accordance with its obligations under the 1959 Strasbourg Convention. It is also Italy that has held legal control over the M/V “*Norstar*” during its detention. This is clearly evidenced by the communication that took place between Italy and Spain subsequent to the seizure of the M/V “*Norstar*”, including Italy’s letter of request dated 18 March 2003 for the release of the vessel and its return to the owner following the judgment of the Court of Savona and Spain’s letter dated 6 September 2006 asking for Italy’s authorization to demolish the vessel. Accordingly, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy” (para. 167).

²² H. Tuerk, “Liability of international organizations for illegal, unreported and unregulated fishing”, 55 (2) *Indian Journal of International Law* (2015), 161-176 [doi: 10.1007/s40901-015-0010-3]; R. R. Babu, “State responsibility for illegal, unreported and unrelated fishing and sustainable fisheries in the EZZ: some reflections on the ITLOS Advisory Opinion of 2015”, 55 (2) *Indian Journal of International Law* (2015), 239-264 [doi: 10.1007/s40901-015-0012-1]; V.A.M. Feitosa Ventura, “Tackling illegal, unregulated and unreported fishing: the ITLOS Advisory Opinion on Flag State Responsibility for IUU fishing and the principle of due diligence”, 12 (1) *Brasilian Journal of International Law* (2015), 50-68; C. Costa Riveira, Comentário à Opinião Consultiva 21 do Tribunal Internacional para o Direito Do Mar [02/04/2015] (Responsabilidade do Estado de Bandeira pela pesca ilícita, não declarada ou não regulamentada), 12 (1) *Brasilian Journal of International Law* (2005), 25-32; V. Schatz, “Combating Illegal Fishing in the Exclusive Economic Zones – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State”, 2 *Goettingen Journal of International Law* (2015), 1-28 [doi:10.3249/1868-1581-7-2-schatz]; V. Schatz, “Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EZZ”, 47 (4) *Ocean Development & International Law* (2016), 327-345 [doi:org/10.1080/00908320.2016.1229939]; D. Owen, *The ITLOS Advisory Opinion in Case N° 21. Introductory briefing on the due diligence obligation of flag States regarding their fishing vessels, the liability for breach of this obligation and the possibilities for litigation*, WWF (2016).

²³ Advisory Opinion, *supra* note 1, para. 128, 131, 132.

consequences related to IUU fishing activities²⁴. Nevertheless, as expressed by Australian delegation, the relevance of the subject matter of these proceedings is not, of itself, a legal justification underpinning the ability of this Tribunal to give an advisory opinion on this matter²⁵. Thus, to a considerable extent, “the jurisdictional issue should be considered the most important aspect of the case”²⁶, as evidenced by an extensive doctrine²⁷.

Some of 10 States out of 21 which submitted written statements were in the view that ITLOS as a full court does not have advisory jurisdiction under UNCLOS²⁸ and 5 States explicitly supported it²⁹. Additionally, some 7 States and the European Union claimed that the request should be considered inadmissible³⁰. The main arguments against the advisory jurisdiction of ITLOS were that UNCLOS makes no reference to advisory opinions by the full Tribunal and that if ITLOS were to exercise advisory jurisdiction, it would be acting *ultra vires* under the Convention³¹. It has also been contended that the Tribunal has no implied powers to serve as an independent source of authority to confer upon itself an advisory jurisdiction that it does not otherwise possess³². In part II of the Advisory Opinion the ITLOS considered these questions and decides unanimously that it has jurisdiction and that its jurisdiction is limited to the exclusive economic zones of the SRFC Member States. It decides

²⁴ T.M. Ndiaye, “Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa”, 10 *Chinese Journal of International Law* (2011), 373-405.

²⁵ ITLOS/PV.14/C21/Rev.1, 03/09/2014 am, 12, 42-44.

²⁶ J. Gao, “The ITLOS Advisory Opinion for the SRFC”, 14 (4) *Chinese Journal of International Law* (2015), 709-733, at para. 4.

²⁷ J. Gao, “The Legal Basis of the Advisory Function of the International Tribunal for the Law of the Sea as A Full Court: An Unresolved Issue”, 4 (1) *International Journal of Maritime Affairs and Fisheries* (2012) 83-106; J.L. Kateka, “Advisory Proceedings before the Seabed Disputes Chamber and before the ITLOS as a Full Court”, 17 *Max Planck Yearbook of United Nations Law* (2013), 159-171; M. Lando, “The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission”, 29 (2) *Leiden Journal of International Law* (2016), 441-461; T. Ruys and A. Soete, “Creeping Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea”, 29 *Leiden Journal of International Law* (2016), 155-176; L. Marotti, “Sulla funzione consultative del Tribunale internazionale del diritto del mare”, *Rivista di Diritto Internazionale*, 1171-1197; P. Weckell, “Chronique de jurisprudence internationale”, *Revue Générale de Droit International Public*, 445-457; R. Churchill, “Dispute Settlement in the Law of the Sea: Survey for 2015-Part I”, 31 *The International Journal of Marine and Coastal Law* (2016), 555-582; Y. Tanaka, ‘Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: the ITLOS Advisory Opinion of 2015’, 14 (2) *Law and Practice of International Courts and Tribunals* (2015), 318-339; H. Tuerk, “The Advisory Jurisdiction of the International Tribunal for the Law of the Sea”, 32 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2014), at 3. [DOI: 10.1163/9789004316553_002]. H. Tuerk, “Advisory Opinions and the Law of the Sea”, in M. Pogacnik (ed.), *Challenges of Contemporary International Law and International Relations, Liber Amicorum in Honour of Ernest Petrich* (European Law Faculty of Nova Guinea, 2013); YE. Quiang “A Study on the Advisory Proceedings before the ITLOS as a Full Court”, 1 *China Oceans Law Review* (2014), 24-58; M. García-Revilla, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, (Brill/Nijhoff, Leiden/Boston, 2016).

²⁸ Argentina, Australia, the People’s Republic of China, Thailand, the United Kingdom, Spain, France, Ireland, United States of America and Portugal.

²⁹ Germany, Japan, Micronesia, New Zealand and Somalia.

³⁰ Argentina, Australia, China, Spain, Thailand, the United Kingdom and the United States. See too, European Union, Second Written Statement, 13 March 2004.

³¹ The United Kingdom used this terminology in relation to article 138 of the Rules of the Tribunal (Written Statement of the United Kingdom, 28 November 2013, at 7-8, para. 9-12) and Australia considered that “article 138 is beyond the rule-making power of the Tribunal” (Written Statement of Australia, at 14, para. 39).

³² Advisory Opinion, *supra* note 1, para. 40-41.

by 19 votes to 1 to respond to the Request for an advisory opinion submitted by the SRFC. Notwithstanding, it has attached criticism³³ in relation with the questions posed by judge Cot when he expressed its “reservations in respect of the Tribunal’s convoluted reasoning in establishing the basis for its jurisdiction and of its refusal to exercise the discretionary power which it does nonetheless recognize that it holds”³⁴.

This note is about the advisory jurisdiction of ITLO in its full composition in the light of its Advisory Opinion of 2 April 2015 and the arguments raised in written and oral submissions, with a particular reference to the participation of Spain in these proceedings. Firstly, the question of the sources or legal basis of the ITLOS’s advisory jurisdiction will be considered; in particular, the interpretation of article 21 of the ITLOS Statute. It will be followed by an examination of the prerequisites of the ITLOS’s advisory jurisdiction established by article 138 as applied by the Tribunal. The following section is about admissibility and the discretionary power of the Tribunal in advisory proceedings. Final conclusions will be posed.

(B) THE LEGAL BASIS OF THE ITLOS’S ADVISORY JURISDICTION: THE INTERPRETATION OF ARTICLE 21 OF THE STATUTE

As the Tribunal confirmed, neither the UNCLOS nor the Statute makes explicit reference to the advisory jurisdiction of the Tribunal³⁵. For some delegations, the discussion on the legal basis of the ITLOS’s advisory jurisdiction could have finished at this point. Neither the Convention nor the Statute confers expressly to the ITLOS—in its full composition—advisory jurisdiction and the exercise of advisory function does not belong to the inherent functions of judicial bodies, as confirmed by the international practice and doctrine.

Various States posed its arguments on the exigence of an express conferral of a power to adjudicate—including contentious or advisory jurisdiction³⁶—. This exigence derives from the principle of the sovereignty of States and it has been formulated in the following terms by Amerasinghe:

“[i]n the international legal system a judicial tribunal does not have inherent advisory jurisdiction unless its constitutive instruments expressly give it that jurisdiction. Equally the advisory jurisdiction, if expressly attributed to a tribunal, will be confined to the express grant of jurisdiction and only to

³³ In this sense, Tanaka *supra* note 27; Gao *supra* notes 26, 27; Churchill *supra* note 27. On the contrary, Weckel, *supra* note 27.

³⁴ Declaration of judge Cot, para. 2.

³⁵ Advisory Opinion, *supra* note 1, para. 53.

³⁶ Written Statement of Australia, 28 November 2013, paras 7-9 and Australia, Presentation by Mr. Campbell, Verbatim Records ITLOS/PV.14/C21/2/Rev.1, 03/09/2014 am, at 13, 26 y ss; First Written Statement of the United Kingdom, 28 November 2013, para. 9, Second Written Statement of the United Kingdom, para. 6 and presentation by Ms Smith, Verbatim Records ITLOS/PV.14/C21/3/Rev.1, 04/09/2014 am at 18, 20 y ss; Written Statement of the Kingdom of Spain, 29 November 2013, para. 6, and presentation by Mr. Martín y Pérez de Nanclares, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014 am, at 31, 37 y ss; Written Statement of the United States, 27 November 2013, at 31, 37 y ss; Written Statement of the People’s of the Republic of China, 26 November 2013, paras. 9-14; Written Statement of the Portuguese Republic, 27 November 2013, paras 13-14.

the extent and within the limits expressly established in such grant³⁷.

In practice, the power to deliver advisory opinions has been laid down expressly in the case of the Permanent Court of International Justice —article 14 (3) of the Covenant of the League of Nations— and the International Court of Justice —article 96 (2) of the Charter of the United Nations—. The same can be said with respect to the specialized regional tribunals on human rights, as the European Court of Human Rights —articles 47 and 48 of the European Convention of Human Rights and Protocol 16 to the Convention—, the Inter-American Court of Human Rights —article 64 of the San Jose Convention— and the African Court of Human and People's Rights —article 4 of the Protocol to the African Charter of Human and People's Rights on the Establishment of the African Court on Human and People's Rights—. This is again the case of jurisdictions established in the framework of regional economic integration organizations, as the European Court of Justice —article 218 (11) TFEU— and the Court of Justice of the Economic Community of West African States —article 10 of the Protocol of the Community Court of Justice—³⁸. Each of the instruments which expressly confer advisory jurisdiction to courts and tribunals included more or less detailed provisions on substantive and procedural requirements subjects to jurisdictional control. This is a remarkable point in the light that UNCLOS address explicitly the regulation of these aspects in respect the advisory jurisdiction of the Seabed Disputes Chamber of the Tribunal in article 191 and 159 (10) of UNCLOS and article 40 of the Statute. That being so, it could have been expected that at least the same express basis would have been used to confer a broader advisory jurisdiction for the ITLOS as a whole.

It has been argued that while not explicitly providing for the advisory function of ITLOS as a full court, there is nothing in the Convention or the Statute to exclude such jurisdiction. Thereof, "it is possible for an organ with a judicial role to render an opinion on a point of law"³⁹. As stated by Spain and other States⁴⁰, international courts and tribunals have inherent powers as are necessary for the proper conduct of proceedings over which they have jurisdiction, but the exercise of advisory jurisdiction is not one of the inherent functions of international judicial bodies. The doctrine of inherent functions of judicial organs was referred by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Blaskic Subpoena Appeal Decision⁴¹ and was also formulated by the ICTY in the Tadic case: "[i]t is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive document [...] although this is often

³⁷ C. F. Amerasinghe, *Jurisdiction of specific international tribunals* (Martinus Nijhoff Publishers, 2009) at 199; See also, H. Thirlway, "Advisory Opinions", *Max Planck Encyclopedia of Public International Law* (OUP), para. 4; S. Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume II: Jurisdiction*, (Martinus Nijhoff, Leiden, 2006), at 94-95.

³⁸ An analysis of the advisory jurisdiction of each of these courts and tribunals in K. Oellers-Frahm, "Lawmaking through Advisory Opinions", 12 (5) *German Law Journal* (2011), 1033-1056.

³⁹ M. Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", *Chinese JIL* (2010), 565-587, at 581; C. Rao, P. Gautier (eds), *The Rules of the International Tribunal of the Law of the Sea: A Commentary*, (Nijhoff, 2006), at 393; B. Vukas, *The Law of the Sea-Selected Writings* (Martinus Nijhoff Publisher, 2004), at. 309.

⁴⁰ Presentation by Mr. Martín y Pérez de Nanclares, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014 am, at 30-32.

⁴¹ Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for the Review of the Decision of the Trial Chamber III of 18 July 1997, Appeals Chamber Judgment of 2 October 1997, Case No IT-95-14-AR108bis, A.

done.”⁴² These decisions, and the earlier ICJ Nuclear Tests case⁴³, confirm that international courts and tribunals have inherent functions; however, these are limited to ensuring that the exercise of the jurisdiction given expressly to a tribunal or court by its statute is not frustrated, and that its basic judicial functions are safeguarded. They are aimed either at ensuring the proper administration of justice or guaranteeing the effectiveness of the courts’ jurisdiction⁴⁴. In a manner consistent with this functional approach, advisory jurisdiction is not considered as belonging to those inherent functions which ensure the proper administration of justice⁴⁵. Thus, it has to be conferred expressly to a court or tribunal.

The next step in the reasoning on the legal basis of the advisory jurisdiction of the ITLOS relates to the interpretation of articles 288 (2) UNCLOS and 21 of the ITLOS Statute in relation to article 138 of the ITLOS Rules⁴⁶. In this regard, the general criticism expressed in respect to the reasoning adopted by ITLOS in its Advisory Opinion has been its “limited interpretative approach”⁴⁷ as it does not made use of all means set out in articles 31-33 of the Vienna Convention on the Law of Treaties⁴⁸. The main debates are about interpretation of article 21 of the ITLOS Statute as the more plausible legal argument in support of the advisory jurisdiction of the full ITLOS integrated in UNCLOS. Article 21 states as follows:

⁴² ICTY, Prosecutor v. Dusko Tadic, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Case N° IT-94-I-A-R77, 31 January 2000, para. 13.

⁴³ In this regard, the ICJ ruled that it: “possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character” [...] Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever finding may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded” (Nuclear Test (Australia v. France), Judgment, I.C.J., Reports 1974, para. 23).

⁴⁴ P. Gaeta, “Inherent Powers of international courts and tribunals”, in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003), cites *Blaskic subpoena case* and *Rio Grande Irrigation and Land Company* (UK-US arbitral tribunal, 1923).

⁴⁵ H. Thirlway, “Advisory Opinions”, in: *Max Planck Encyclopedia of Public International Law* (MPEPIL), online edition (section B.1, para. 4); Oellers-Frahm, *supra* note 38, at 1033; Ch. Brown, “Inherent Powers in International Adjudication” in C. Romano K. Alter and Ch. Aygerou (eds), *The Oxford Handbook of International Adjudication* (2013), at 829 et ss.

⁴⁶ In relation to the earlier commentaries to these dispositions: T. Treves, “Advisory Opinions under the Law of the Sea Convention”, in M.H. Norquist and J.N. Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Martinus Nijhoff Publisher, The Hague/Boston/London, 2001); J. L. Jesus, “Article 138”, in C. Rao, P. Gautier (eds), *The Rules of the International Tribunal of the Law of the Sea: A Commentary*, (Nijhoff, 2006), at 393-394. C. Espósito, “Advisory Opinions and Jurisdiction of the International Tribunal for the Law of the Sea”, Paper presented at the Law of the Sea Institute Conference on Institutions and Regions in Oceans Governance, 5-6 October 2010; K-J You, ‘Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal Revisited’, 39, *Ocean Development & International Law* (2008), 360-371; T. Ndiaye, *supra* note 37; In more general terms, R. Wolfrum, “Panel II: Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?”, en R. Wolfrum e I. Gätzschmann, “*International Dispute Settlement: Room for Innovations?* (2013), at 33-123; M. Wood, “Advisory Jurisdiction: Lessons from Recent Practice”, in H. Hestermeyer et al., *Coexistence, Cooperation and Solidarity: liber amicorum Rüdiger Wolfrum*, Nijhoff, Leiden, 2012, Volume 2, 1833-1849.

⁴⁷ Churchill, *supra* note 27, at 561. On analogous criticism in this regard, GAO *supra* note 26, para. 9. Declaration of judge Cot, para. 3.

⁴⁸ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

“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 first question under discussion is about the lecture of article 21 in relation to article 288 (2) UNCLOS. As article 288 provides for the contentious jurisdiction of the court or tribunal under Part XV of the Convention —which is entitled “Settlement of Disputes”—, Section 2 —titled “Compulsory Procedures Entailing Binding Decisions—, the same would be the case of article 21 of the ITLOS Statute. The Tribunal rejected this interpretation by stating that:

“the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention”⁴⁹.

But the real question seems not to be the subordination of article 21 but the systematic interpretation of the overall elements of UNCLOS. As posed by Wood, “[t]he concluding words of article 21 have to be read in the context of the Statute and Part XV as a whole”⁵⁰. In any case, the affirmation that article 288 (2) is referred to contentious jurisdiction and not to advisory jurisdiction seems to be uncontroversial⁵¹ but is not without consequences; in particular, in relation to the position of the ICJ. The Australian delegation considered this problem in very abstract terms, when it stated that “if article 288, paragraph 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, paragraph 1 —that is the ICJ and Annex VII and VIII tribunals— could also have advisory jurisdiction. Such a result was not intended and is unsustainable”⁵². The questions related to these arguments were raised in more general terms by You:

“First, Article 288 (2) of the LOS Convention provides that not only the ITLOS, but also the International Court of Justice (ICJ) or an arbitral tribunal as provided for in Article 287 of the Convention, may have jurisdiction. Accordingly, the question arises as to why it should be assumed that Article 288 (2) grants only the ITLOS advisory jurisdiction and not also the International Court. Second, Article 288 (2) is in the section called: Compulsory Procedures Entailing Binding Decisions”. Article 296 provides for the finality and binding force of “[a]ny decision rendered by a court or tribunal having jurisdiction under this section”. In view of this provision, it seems that Article 188 (2) cannot serve as the legal basis for an advisory jurisdiction since it is fundamental to advisory opinions that they are not legally binding”⁵³

But, considering that ITLOS founded its advisory jurisdiction on article 21 of the Statute in disconnection with article 288 (2) the real question is about the possible development of the ITLOS's advisory role on the basis of a “liberal interpretation” of this autonomous legal basis of advisory

⁴⁹ In a similar way Germany, presentation by Mr Ney, Verbatim Records, ITLOS/PV.14/C21/Rev.1, 03/09/2014, at p. 2, 15-21.

⁵⁰ Presentation by Mr. Wood, Verbatim Records, ITLOS/PV.14/C21/3/Rev.1, 04/09/2014, at 22, 25-26.

⁵¹ The same conclusion regarding the idea that article 288 (2) cannot be relied upon or interpreted as a basis for a general advisory jurisdiction of the full ITLOS can be found in T.M., Ndiaye *supra* note 37; K-J., You *supra* note 46.

⁵² Presentation by Mr Campbell, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014, at 16, 18-23. In analogous way, Kateka, *supra* note 27, at 169. Tanaka, *supra* note 27, at 324-325.

⁵³ You, *supra* note 46, at 361-362. Also Ndiaye, *supra* note 37, at. 581.

jurisdiction. Obviously, the International Court of Justice has advisory jurisdiction on the basis of article 96 of the United Nations Charter and the ICJ Statute. But the advisory procedure in the International Court of Justice is governed by a tight framework while the scope, procedures and prerequisites for the exercise of the ITLOS's advisory jurisdiction are insufficiently defined. It would be a paradoxical result if we remembered, as stated by judge Wolfrum, that "[t]he 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"⁵⁴.

In any case, ITLOS affirmed in its Advisory Opinion that article 21 confers a broad jurisdiction upon the Tribunal that is not limited to the settlement of disputes. The principal argument of the Tribunal is the recourse to the interpretation of the three elements contained in article 21: i) all disputes submitted to the Tribunal in accordance with the Convention; ii) all applications submitted to the Tribunal in accordance with the Convention; iii) all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. For the Tribunal, as supported by some States⁵⁵, the expression "all disputes and all applications" refers to the contentious jurisdiction of ITLOS⁵⁶. In particular, the notion of application seems to be intended to encompass request for provisional measures and applications for the prompt release of vessels made under UNCLOS⁵⁷. However, the term "matters" is interpreted as giving the Tribunal a broader jurisdiction, including advisory jurisdiction:

"It is the third element which has attracted diverse interpretations. The words all "matters" ("toutes les fois que cela" in French) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That something more must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal."

The argument that the expression all "matters" should have the same meaning here as it has in the Statutes of the PCIJ and ICJ is not tenable. As the Tribunal held in the *MOX Plant Case*, "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*. (*MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 106, para. 51)"⁵⁸

The Tribunal made recourse to the doctrine of the parallelism of treaties which was the focus of important criticism in the *MOX Plant Case*⁵⁹ but presented no evidence in support of the affirmation

⁵⁴ R. Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes", in R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement. Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), at 55.

⁵⁵ Written Statement of Japan, 29 November, at 2-3, para. 5; Written Statement of New Zealand, 27 November, at 4, para. 10.

⁵⁶ P. Gautier, "The Settlement of Disputes", D. J. Attard et al. (eds.), *The IMLI Manual on International Maritime Law*, Vol. I (2014), 533-565.

⁵⁷ M.H. Norquist et al (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume IV (Martinus Nijhoff, Dordrecht, 1991 (eds), vol. V, at 378; Presentation by Mr. Wood, Verbatim Records, ITLOS/PV.14/C21/3/Rev.1, 04/09/2014, at 21, 25.

⁵⁸ Advisory Opinion, para. 56-57.

⁵⁹ B. Kwiatkowska, "The Ireland v United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism",

that the term all matters includes advisory opinions. Certainly, the lecture of article 21 was under discussion according to the accepted principles of interpretation contemplated in articles 30-33 of the Vienna Convention on the Law of Treaties. The meaning of the term “matters” is not so clear⁶⁰ and seems to be based upon article 36 of the Statute of the ICJ —and article 36 of the Statute of the Permanent Court of International Justice— where the word matters is referred to disputes and not to advisory opinions. In particular, Rosenne interprets the terms “other matter” as referred to eventual disputes arising out of the interpretation or application of the treaty in which the compromissory clause appears⁶¹. Then, the most respected doctrine does not find evidence that the use of the term “all matters” in this article should encompass anything but disputes⁶². The comparison of the terms of article 65 (1) of the ICJ Statute and article 40 (2) of the ITLOS Statute indicates that the full ITLOS is not expected to exercise any advisory function⁶³. The recourse to the systematic interpretation and the travaux préparatoires could confirm the same conclusion.

The travaux préparatoires confirmed the idea that the lack of provisions under UNCLOS for the rendering of advisory opinions by ITLOS acting as a full court “seems to be due to the fact that it is not an organ of an international organization like the ICJ nor has it been conceived as a legal advisor to such an organization; a task that has been entrusted to the Seabed Disputes Chamber with respect to the ISA”⁶⁴. As explained by professor Sohn, in view of the previous practice of the Permanent Court of International Justice, the International Court of Justice and the Inter-American Court of Human Rights⁶⁵, the question of endowing the ITLOS with jurisdiction to render advisory opinions was raised early at the Third United Nations Conference on the Law of the Sea but only in relation to the seabed disputes⁶⁶. It appeared first in the draft prepared by the Chairman of the First Committee of the Conference which deal with deep seabed mining and provided for the creation of a Tribunal conceived as an organ of the International Seabed Authority. But none of the drafts for the establishment of an autonomous tribunal for the settlement of the law of the sea disputes, prepared by

18 (1) *The International Journal of Marine and Coastal Law* (2003), at 1-58; R. Churchill, y R. Scott, “The MOX Plant Litigation: The First Half-Life”, 53 *International and Comparative Law Quarterly* (2004), 643-676; P. Terrile, “L’ordinanza del Tribunale del Mare nel caso Mox Plant”, *Il Diritto Marittimo* (2003), 1243-1248. P. Weckel, “Ordonnance du 24 juin 2003 (suspension de l’instance et mesures conservatoires)”, 107 (4) *Revue Générale de Droit International Public* (2003), 984-994; R. Ojinaga Ruiz, “La competencia exclusiva del TJCE en las controversias entre Estados miembros relativas a la aplicación del Derecho Comunitario y el recurso a los procedimientos jurisdiccionales internacionales de arreglo de controversias. El asunto de la fábrica de MOX”, C. Arranz and M. Serna (coord.), *Estudios de Derecho Español y Europeo: libro conmemorativo de los primeros 25 años de la Facultad de Derecho de la Universidad de Cantabria* (2009), pp. 677-706.

⁶⁰ Judge Cot considered that “[t]he ambiguity of the provision is blindingly obvious” (Declaration of Judge Cot, para 3).

⁶¹ S. Rosenne, *The Law and Practice of the International Court*, 1920-2005, Vol. II, 4^a ed. (Martinus Nijhoff Publishers, 2006), at 641.

⁶² C. Tomuschat (Article 36), *The Statute of the ICJ: A commentary* (Oxford University Press, 2006); Rosenne, *supra* note 58.

⁶³ Gao, *supra* note 27, at. 90.

⁶⁴ H. Tuerk, “The Advisory Jurisdiction of the International Tribunal for the Law of the Sea”, 32 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2014), at 3. [DOI: 10.1163/9789004316553_002].

⁶⁵ A. Aust, “Advisory Opinions”, 2 (1) *Journal of International Dispute Settlement* (2010), 123; H. Thiriway, “Advisory Opinions”, *Max Planck Encyclopedia of Public International Law*, at para. 1 (available at www.mpepil.com).

⁶⁶ L.B. Sohn, “Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber”, in M.H. Norquist and J.N. Moore, *Oceans Policy: New Institutions, Challenges and Opportunities* (Martinus Nijhoff Publisher, The Hague/Boston/London, 1999), at 61.

the President of the Conference in the meantime, contained provisions for advisory opinions⁶⁷. Finally, with the decision to establish ITLOS as an autonomous international body, the general provisions of settlement of disputes were placed in Part XV and the related Statute of the ITLOS become Annex V. The Seabed Disputes Chamber was established as a special chamber of ITLOS—or a tribunal within a tribunal—to deal with seabed disputes and to provide assistance to the International Seabed Authority to the proper exercise of its functions in accordance with UNCLOS, and these provisions are found in Part XI. Thus, UNCLOS provisions on advisory jurisdiction are those contained in Part XI—articles 159 (10) and 191—entitled the Seabed Disputes Chamber for the rendering of advisory opinions of a request by the Assembly or the Council of ISA⁶⁸. It has been argued with criticism that other international organizations that are entrusted with other functions under UNCLOS, such as the IMO, has not been given the power to request advisory opinions⁶⁹. But in any case, as summarized in the Virginia Commentary: “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”⁷⁰.

The arguments of the Tribunal on the interpretation of the terms of article 21 of the ITLOS Statute have been complemented with other approach as the dynamic interpretation of UNCLOS supported by judge Lucky in his Separate Opinion⁷¹ or the subsequent practice by States parties to UNCLOS adopted by judge Cot⁷². But the lack of express reaction to the adoption of article 138 of the ITLOS Rules or the positive opinions expressed by some delegates in regional and international fora as the Meeting of the Parties to the UNCLOS and the UN General Assembly seems to be not considered relevant even by ITLOS which did not rely on these arguments in its Advisory Opinion⁷³. Moreover, as stated by Smith the fact that no State formally objected to article 138 until the present case if of not legal significance, as “States has not reason to react earlier, absent the present case”⁷⁴.

The main question is if the Tribunal have implicated admitted it has not advisory jurisdiction of a general character by virtue of the UNCLOS dispositions, but a special advisory jurisdiction could be attributed to it by virtue of “other” international agreement, as contemplated in article 138 of the ITLOS Rules and admitted by the interpretation of article 21 of the ITLOS Statute established by the

⁶⁷ Informal Single Negotiating Text presented by the Chairman of the First Committee, 7 May 1975, article 25 (8). UN Doc. A/CONF/62/WP.8/Part I, reprinted in 4 Third United Nations Conference on the Law of the Sea, Official Records, at 137, 141; Revised Single Negotiating Text presented by the Chairman of the First Committee, 6 May 1976, article 25 (7), article 25 (11), article 34 and Annex III, para. 17 (b), UN Doc. A/CONF/62/WP.8/Part I, reprinted in 5 Third United Nations Conference on the Law of the Sea, Official Records, at 125, 132, 136, 147. Presentation by Mr. Wood, Verbatim Records, ITLOS/PV.14/C21/3/Rev.1, 04/09/2014, at 22.

⁶⁸ UN Doc. A/CONF/62/WP.10, 15 July 1977 reprinted in 8 Third United Nations Conference on the Law of the Sea, Official Records, pp. 1-63; UN Doc. A/CONF/62/C.1/L.25, 26 April and 23 May 1979 reprinted in 11 Third United Nations Conference on the Law of the Sea, Official Records, at 109, 110, 113, 119.

⁶⁹ Treves, *supra* note 46, at 18.

⁷⁰ M.H. Norquist et al (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume IV (Martinus Nijhoff, Dordrecht, 1991), at 644; See also Commentary, Volume V, at 416.

⁷¹ Separate Opinion of judge Lucky, para.11.

⁷² Declaration of judge Cot, para. 4.

⁷³ A broader commentary of these arguments in Tanaka, *supra* note 27, at 328-331.

⁷⁴ Presentation by Mr. Smith, Verbatim Records, ITLOS/PV.14/C21/3/Rev.1, 04/09/2014, at 20, 26-31.

Tribunal. It seems to be confirmed the lack of conferral of advisory jurisdiction with a general scope to the ITLOS under UNCLOS. This was the position adopted by Spain and other States in the sense that ITLOS could not have but a special advisory jurisdiction conferred by virtue of other international agreements in the perspective of the “consensual approach” advocated by judge Wolfrum⁷⁵. In this sense:

“The Tribunal wishes to clarify that the expression “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the “other agreement” which confers such jurisdiction on the Tribunal. When the “other agreement” confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to “all matters” specifically provided for in the “other agreement”. Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal⁷⁶.

But the legal basis of jurisdiction as established by the Tribunal remains “fragile”⁷⁷ since they are constructed in an isolation of article 21 from the travaux préparatoires and the relevant dispositions of the Statute and UNCLOS. As stated by Tanaka: “[n]or can the jurisdiction be justified by the non-existence of a provision which excludes the advisory jurisdiction of the full Tribunal, by evolutionary or dynamic treaty interpretation, or by subsequent State practice and the inherent powers of international courts and tribunals. Even though there should be no decisive reason to deny the positive role of ITLOS in this field, great caution is advisable when exercising the advisory jurisdiction of the full Tribunal”⁷⁸.

In any case, it seems to be confirmed the interpretation of Spain and other States when considering that neither the UNCLOS nor the Statute provides for an advisory jurisdiction of a general scope for ITLOS as a full court⁷⁹. Even if the broad interpretation of article 21 is adopted, it remains necessary to determine its scope and the prerequisites for the exercise of the advisory jurisdictions specifically provided to ITLOS in a special agreement related to the purposes of UNCLOS according to article 138 of the ITLOS Rules.

(C) THE PREREQUISITES OF THE ITLOS'S ADVISORY JURISDICTIONS: THE INTERPRETATION OF ARTICLE 138 OF THE RULES

The Advisory Opinion embodies the conception of article 138 of the ITLOS Rules as “a legitimate interpretation of article of article 21 of the Statute”⁸⁰:

“The argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal and that, being a procedural provision, article 138 cannot form a basis for the advisory

⁷⁵ Wolfrum, *supra* note 46.

⁷⁶ Advisory Opinion, para 58.

⁷⁷ Tanaka, *supra* note 27, at. 339.

⁷⁸ *Ibid.*

⁷⁹ Argentina adopted a same approach and terminology (ITLOS/PV.14/C21/Rev.1, 03/09/2014, p. 7 at 37).

⁸⁰ C. Rao, P. Gautier (eds), *The Rules of the International Tribunal of the Law of the Sea: A Commentary*, (Nijhoff, 2006), at 394.

jurisdiction of the Tribunal is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction”.⁸¹

Taking into account the inexistence of dispositions on advisory opinions by ITLOS in its full composition in UNCLOS⁸², the ITLOS included in its Rules of Procedure a set of rules relating to advisory opinions⁸³. These rules deal not only with advisory opinions by the Seabed Disputes Chamber but also with advisory opinions on a legal question requested under an international agreement related to the purposes of UNCLOS that specifically provides for that. Article 138 was introduced by the Tribunal in the first redaction of its rules in 1997 and it has not precedent in the rules of PCIJ or the rules of 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 1996⁸⁴. In particular, article 138 of the ITLOS Rules establishes that:

“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.”⁸⁵

In this respect, there have been expressed doubts on *ultra vires* of article 138⁸⁶. Judge Lucky considered that the Tribunal established article 138 of the ITLOS Rules in accordance with article 16 of the ITLOS Statute setting out “the procedural requirements for giving an advisory opinion”⁸⁷. But the powers of the ITLOS under article 16 of the ITLOS Statute could be considered in the light to the commentary to the powers of ICJ under article 30 of its Statute: “It is recognized 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 should not be possible, e.g. for the Court, by enacting a rule, to confer upon itself a jurisdiction which it did not otherwise possess, under the Statute or on some other basis”⁸⁸.

⁸¹ Advisory Opinion, para. 59. Germany stated that “Article 138 of the Rules does not create a new type of jurisdiction but only specifies the prerequisites that the Tribunal has established for exercising jurisdiction”. Verbatim Records ITLOS/PV.14/C21/2/Rev.I, 03/09/2014, at 3, 41-42.

⁸² In words of judge Turke, “[t]his gap in the legal system established by UNCLOS was realized by ITLOS from the time of its constitution in 1996. It therefore sought to remedy this unsatisfactory situation, as far as possible, through its Rules on the basis of an interpretation of Article 21 of its Statute” (*supra* note 27, at 3).

⁸³ C. Rao and P. Gautier, *The Rules of the International Tribunal for the Law of the Sea* (Martinus Nijhoff Publisher), at 394.

⁸⁴ Jesus, *supra* note 46, at 393.

⁸⁵ Rules for the Tribunal, at 49.

⁸⁶ You, *supra* note 46, at 360 y ss.; Espósito, *supra* note 46.

⁸⁷ Separate Opinion of judge Lucky, para. 14.

⁸⁸ C. Tomuschat (Article 36), *The Statute of the ICJ: A commentary* (Oxford University Press, 2006 cit., at 518. In the same “the rule-making power cannot, on this basis, be exercised at large. 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, under the Statute or on some other basis” (H. Thirway, “Article 30”, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice*. A

In its Advisory Opinion the Tribunal affirmed that article 138 only furnishes the prerequisites. But, it seems that “[i]n fact, paragraph 1 of article 138 defines the advisory jurisdiction of the Tribunal”⁸⁹. and that some of these prerequisites seems to be not procedural in character. As quoted by Churchill, “the first and third of the prerequisites in Rule 138 seems to be substantive conditions for the exercise of the Tribunal’s advisory jurisdiction”⁹⁰. In fact, the language of this rule is based in article 288 of UNCLOS that deals with the scope of the jurisdiction under the UNCLOS of ICJ, ITLOS and arbitral tribunals referred in article 287 of the Convention⁹¹. In addition to providing in that article for jurisdiction of the competent tribunal over “any dispute concerning the interpretation or application of these Convention”, article 288 considers the jurisdiction over “any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention which is submitted to it in accordance with the agreement”.

In its Advisory Opinion, the Tribunal reiterated the prerequisites of article 138 of the Rules:

“These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on “a legal question”⁹².

The first prerequisite is the existence of an international agreement “related to the purposes of the Convention”, It seems to be the more clear of the conditions established in article 138 of the ITLOS Rules but the scope of the purposes of the Convention is not wholly unambiguous if we consider that the Preamble of UNCLOS contains references to “the maintenance of peace, justice and progress for all the people of the world and the realization of a just and equitable international economic order”⁹³. The problems of interpretation of this notion could be also illustrated by the problems arose by the practical application of article 282 UNCLOS by the ITLOS, the arbitral tribunals of Annex VII of UNCLOS and the European Court of Justice—in particular, in the *MOX Plant Case* and the *Southern Bluefin Tuna Cases*— in the light of the doctrine of the parallelism of treaties and in the complex framework of the relations among international courts and tribunals⁹⁴. Another main question in relation to this first prerequisite is related to the necessary interpretation of the second one—the notion of body authorizes to request the ITLOS’s advisory opinion—. In the broader approach, that body could be interpreted to be other than an organ of an international organization

Commentary (2nd. ed., 2012) at 516. This is the approach adopted by Tanaka, *supra* note 45, at 323; and Gao, *supra* note 27, at 84.

A similar approach is adopted by Australia delegation when asserting in relation to article 16 of the ITLOS Statute that “the Tribunal shall be frame rules for carrying out its functions. In particular, it shall be lay down rules of procedure. However, it must not be taken to mean that the rule-making power of ITLOS can be an independent source of power to newly create jurisdiction that the Tribunal di not possess” (Written Statement of Australia, 28 November 2013, at 6 para. 11; Written Statement of Thailand, 14 March 2014, at 3, para. 5.

⁸⁹ GAO, *supra* note 26, para. 14.

⁹⁰ Churchill, *supra* note 27, at 562.

⁹¹ Sohn, *supra* note 62, at 68-69.

⁹² Advisory Opinion para 60.

⁹³ Tanaka, *supra* note 27, at. 336.

⁹⁴ Kwiatkowska, B. (2003): “The Ireland v United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism”, *The International Journal of Marine and Coastal Law*, 18 (1), pp. 1-58.

and even two or more States. So, the notion of “international agreement” could be potentially related to agreements without the formal character of a treaty. According to Gao it should be interpreted that the notion of international agreement is that of the international treaty and, more specifically, substantive treaties relating to the law of the sea, and not the special agreements whereby the parties simply agreed to ask for advisory opinions⁹⁵.

Furthermore, one of the most relevant questions raised by the interpretation of article 138 of the ITLOS Rules is about the constrain of the notion of “body authorized” to request advisory opinions; that is the second prerequisite posed by article 138 of the ITLOS Rules. In general terms, the right to seek an advisory opinion rest with the collegiate organ of an international organization. Only States working collectively through the duly qualified organs, can initiate an advisory case⁹⁶. This is the case of the advisory opinions submitted to the Seabed Disputes Chamber by the Assembly or the Council of the International Seabed Authority according to articles 159 (10) and 191 UNCLOS. The same can be said in relation to the ICJ and other judicial bodies with an explicit conferral of advisory opinion. Notwithstanding, in order to maintain the integrity of its legal regimen some regional human rights instruments as the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights⁹⁷ and the American Convention on Human Rights has established other solutions. In particular, at the request of a Member State of the Organization of American States, the Inter-American Court of Human Rights may provide “that state with opinion regarding the compatibility of any of its domestic laws with the aforesaid international instruments”⁹⁸. In any case, States are authorized in these cases to request advisory opinion with the limited aim to facilitate the compliance of their obligations by virtue of this instrument.

The scope of the body legitimated to request advisory opinions for the full Tribunal is one of the misgivings expressed about the abuse of advisory proceedings by States. In the commentary to the Rules of the Tribunal it is considered that article 138 of the ITLOS Rules could extend to any organ, entity, institution, organization or State⁹⁹. For Rosenne¹⁰⁰ and Treves¹⁰¹, this requirement is consonant

⁹⁵ Gao, *supra* note 27, at. 95.

⁹⁶ S. Rosenne, *The World Court: What It is and How It Works*, 5th edition (Martinus Nijhoff Publisher, 1995) at 107; Kateka *supra* note 46, at 162.

⁹⁷ Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, adopted on 10 June 1998 and entered into force on 25 January 2004. Article 4 Advisory Opinions. 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

⁹⁸ American Convention on Human Rights adopted on 18 July 1978, 1144 UNTS 123. Article 64: “1. The member states of the Organization 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 opinion regarding the compatibility of any of its domestic laws with the aforesaid international instruments.”

⁹⁹ Rao and Gautier, *supra* note 46, at 394. The same approach is adopted by Judge Wolfrum which refers to the competent organ of any entity, State or organization., in the plenary of the sixtieth session of the UN General Assembly of 2005 acting as President, Statement by Mr. R. Wolfrum on Agenda Item 75 (a), 9-10 para. 16; Statement by Judge José Luis Jesus, The Gilberto Amado Memorial Lecture held during the 61st Session of the International Law Commission, Geneva, 15

with the general concept of the advisory jurisdiction of ICJ, which does not permit a State, or a group of States, to initiate advisory proceedings other than through a duly authorized body. The risk of abuse is greater if the States could be allowed to directly request advisory opinions as it has been sugared. So, the scope of the body which is authorized to request an advisory opinion from the full Tribunal should be interpreted in a cautious and restrictive manner.

Finally, many of these mentioned problems converge in the interpretation of the notion of “legal question” as the third prerequisite established by article 138 of the ITLOS Rules. This notion—which is otherwise used in article 191 of UNCLOS—is in analogy with the terms of article 65 (1) of the ICJ Statute. It has been interpreted as referred to those questions which are “framed in terms of law and raise problems of international law” and “are by their very nature susceptible of a reply based on law”¹⁰². The fact that a question also has political aspects does not suffice to deprive it of its character as legal question¹⁰³. For the ITLOS:

“These questions have been framed in terms of law. To respond to these questions, the Tribunal will be called upon to interpret the relevant provisions of the Convention and of the MCA Convention and to identify other relevant rules of international law. As stated by the Seabed Disputes Chamber of the Tribunal (hereinafter “the Seabed Disputes Chamber”) in its Advisory Opinion: ‘The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter “the ICJ”) has stated that “questions ‘framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law”’ (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, paragraph 25; Western Sahara, Advisory Opinion, I.C.J. Report[s] 1975, p. 12, at paragraph 15). (Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 25, para. 39)’ “.¹⁰⁴

In its written and oral statements many States, including Spain, have defended that the jurisdiction of the Tribunal in advisory proceedings under article 21 of the ITLOS Statute and 138 of the ITLOS Rules should be limited to clarifying legal questions concerning the interpretation or application of the underlying agreement, which confers the advisory jurisdiction; in this case, the MCA Convention in relation to SRFC Convention¹⁰⁵. This interpretation is confirmed by the terms of article 21 of the Statute and 138 of the Rules which talks about matter specifically provide for “in” any other agreement that confer jurisdiction to the tribunal, and not merely by virtue of that agreement. As supported by Tanaka, the authorized body could not request advisory opinions concerning the application or

July 2009, 8; P. Gautier, “The Settlement of Disputes ...”, Written Statement Germany para 11 and 8 para 121.

¹⁰⁰ Rosenne “International Tribunal for the Law of the Sea: 1996-97 Survey”, 13 *The International Journal of Marine and Coastal Law* (1998), 597.

¹⁰¹ Treves, “Advisory Opinion under the Law of the Sea Convention” in JN Moore and MH Norquist (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001), 81-93, at 92. A similar approach in Ndiaye, *supra* note 37, at 583; K-J You, *supra* note 46, at 364-365.

¹⁰² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 25; *Western Sahara*, Advisory Opinion, ICJ Report, 1975, at 12, para. 15.

¹⁰³ A. Aust, “Advisory Opinion”, 1 *Journal of International Dispute Settlement* (2010), 123-155, at 136.

¹⁰⁴ Advisory Opinion, para. 65.

¹⁰⁵ Argentina, Presentation by Mr. Martinsen, Verbatim Records, ITLOS/PV.14/C21/2/Rev.I, 3 September 2014, at 8, 5-II.

interpretation of UNCLOS, for the notion of international agreement “does not include the LOS Convention because article 138 (1) mentions them side by side, and the LOS Convention itself does not [specifically] provide for the Submission of the Tribunal of a request of such opinion”¹⁰⁶. In any case, this seems to be an inherent limitation to the special nature and scope of the advisory jurisdiction conferred to the Tribunal on this legal basis. So these jurisdiction is necessarily restricted *rationae materiae* to the matters regulated by that particular agreement and *ratione personae* to the requesting international organization and the States parties to such international agreement¹⁰⁷.

As posed by Australian delegation, these conclusions flow from the express terms of article 288 (2), the main text of UNCLOS and also from the more general law concerning the *inter se* rights and responsibilities of States parties to treaties. Certainly, “[i]t would be very odd if the parties to a regional or even bilateral agreement could ask for an advisory opinion from the Tribunal concerning the interpretation or application of the provisions of the 1982 Convention when the meetings of the States Parties to the 1982 Convention cannot request such an opinion”¹⁰⁸. Even, Argentina deduces a more specific admissibility condition on the need to include all legal information and factual references of an essential nature in order to allow for a proper legal response. A basic requirement for a request for an advisory opinion is that it must contain a precise statement of the question. It must be also accompanied by all documents likely to throw light upon the question¹⁰⁹. These references should include, at least “the identification of the clauses of the instrument conferring advisory jurisdiction that are to be interpreted by the Tribunal”.¹¹⁰ So, as posed by Treves, “to permit request for advisory opinions not specifically authorized under the relevant agreement, or to accept that States could by agreement authorize themselves to request such opinions on their own would have been to treat on much unsafe ground”¹¹¹.

The Tribunal rejected this claims by adopting its proper approach based on the recourse to the notion of legal questions as referred to “matters which fall within the framework of the MCA Convention” or the international agreement conferring advisory jurisdiction to the full ITLOS:

“A further question is to what matters the advisory jurisdiction extends. Article 21 of the Statute lays down that such jurisdiction extends to “all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal.” It is necessary for the Tribunal to assess whether the questions posed by the SRFC constitute matters which fall within the framework of the MCA

¹⁰⁶ Gao, *supra* note 27, at 96.

¹⁰⁷ Argentina, Presentation by Mr. Martinsen, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 3 September 2014, at 10-14; In a similar way, Australia in its Presentation by Mr. Campbell, stated that “such an advisory jurisdiction necessarily would be limited to matters concerning the interpretation or application of that other agreement as between parties to the agreement”, (Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014, at p. 17, 31-33). Written Statement of Australia para.27; Written Statement of Ireland, para. 2.11; Written Statement of Argentina Republic, 28 November 2013, paras. 17-18; Written Statement of United Kingdom, 28 November 2013, para. 46; Written Statement of Netherlands, 29 November 2013, paras 2-3; Written Statement of the United States, 27 November 2013, para. 24; Written Statement of Spain, 29 November 2013, paras. 20-21.

¹⁰⁸ Australia, Presentation by Mr Campbell, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014, at 17-18, 37-38, 1-3.

¹⁰⁹ Article 131 of the ITLOS Rules.

¹¹⁰ Argentina, Presentation by Mr. Martinsen, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 03/09/2014, at 12, 15-16.

¹¹¹ Treves, *supra* note 46, at 92.

Convention.

The questions relate to activities which fall within the scope of the MCA Convention. The questions need not necessarily be limited to the interpretation or application of any specific provision of the MCA Convention. It is enough if these questions have, in the words of the ICJ, a “sufficient connection”¹¹² with the purposes and principles of the MCA Convention. In this respect, there is no reason why the words “all matters specifically provided for in any other agreement” in article 21 of the Statute should be interpreted restrictively.”¹¹³

Those *ratione materiae* and *ratione personae* restrictions are both related to the interpretation of notion of “legal questions” and were the principal concern of the States participating in the advisory proceeding initiated by the SRFC, including Spain. They considered that SFRC questions do not refer to any specific treaties or dispositions and were too abstract¹¹⁴. But ITLOS dismissed the arguments about the legal questions posed to it to SFRC were very general by considering it was legitimate to answer abstract questions¹¹⁵. It seems to circumvented these claims by the mere recourse to the criteria established in respect to the ICJ advisory jurisdiction in article 96 (2) of the UN Charter concerning whether the questions posed arise within the scope of the activities of the requesting specialized agency¹¹⁶. This requirement was considered by the Seabed Disputes Chamber of ITLOS according to article 191 of UNCLOS which imposes that the legal questions submitted arise within the scope of the activities of the Assembly or the Council of the ISA¹¹⁷. But this exigence is not expressly considered in the text of article 138 of the Rules of the Tribunal. In any case, as posed by judge Cot, 21 flag States were participated in the proceedings were not involved in the drafted of the questions submitted by the Request of coastal States through SRFC¹¹⁸.

The ITLOS unanimously concluded that it had jurisdiction to entertain the Request, however, limited to the exclusive economic zones of the SRFC States¹¹⁹. But the decision of ITLOS to limit the scope of its jurisdiction in the specific case to the exclusive zones of the SRFC Member States is “a somewhat illusory limitation”¹²⁰ with not enough explanation. It seems derived from the scope of application of MCA Convention, which in its article 1 (2) specifics that it “is applicable to the maritime area under jurisdiction of the SRFC Member States”. In this regard, the Tribunal considered that question 1 would be referred “only to the obligation of flag State no parties in MCA...”¹²¹; the flag State and international agency in question 3 were “limited to a flag State that has

¹¹² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, p. 66, at p. 77, para. 22.

¹¹³ *Advisory Opinion*, paras. 67-68.

¹¹⁴ European Union Statement, 29 November 4, para. 7; United Kingdom Statement, 28 November 2013, at 25-28, paras 48-54.

¹¹⁵ *Advisory Opinion*, paras. 72-74.

¹¹⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ, Reports 1996, 66, at para 10.

¹¹⁷ *Advisory Opinion on Responsibilities and Obligations...*, *supra* note 4, para. 32

¹¹⁸ Declaration of Judge Cot, para 8.

¹¹⁹ *Ibid.*, para. 69.

¹²⁰ Churchill, *supra* note 37, at 564.

¹²¹ *Advisory Opinion* para. 89

concluded a fisheries access agreement with a State party in the MCA Convention”¹²²; the rights and obligations of the coastal State referred in question 4 were “constructed as rights and obligations of SRFC Member States”¹²³. However, question 2 is too general¹²⁴

The ITLOS is not clear in its appreciation about the meaning of that limitation. In fact, although the ITLOS said that the Advisory Opinion “is given only to the SRFC”¹²⁵, “it has been formed mainly on the basis of the LOS Convention and general international law, and therefore will have a broader scope of implications”¹²⁶. More specifically, the Tribunal answered the question 1 on the basis of interpretation of the general dispositions in the matter of UNCLOS¹²⁷ and its referred to flag States which are no member of the SRFC¹²⁸. The answer to question 2 is more significant because, on the bases of UNCLOS —specially Annex IX— the Tribunal affirmed the responsibility of the European Union under fisheries access agreements with SRFC member States for any breach of its obligations arising from those agreements¹²⁹. Furthermore, it has been pointed out in this regard, that the ITLOS departs from the criteria of the International Law Commission on the international responsibility of international organizations. In particular, it made recourse to the “competence model” in lieu of the “organic model” used by International Law Commission in its Draft Articles on the Responsibility of International Organizations¹³⁰. Furthermore, the question 4 is treated by the Tribunal on the basis of

¹²² *Ibid.*, para. 154

¹²³ *Ibid.*, para. 179

¹²⁴ Separate Opinion of judge Lucky, para. 33. “were the activities referred are in the ...”.

¹²⁵ Advisory Opinion para. 76

¹²⁶ GAO, *supra* note 26, para. 31.

¹²⁷ Specially articles 94, 192, 58 (3), 62 (4) of UNCLOS (Advisory Opinion, para. 104) - complemented with the jurisprudence of the Seabed Disputes Chamber in relation to the meaning of the responsibility to ensure (para. 125-129).

¹²⁸ Advisory Opinion para 88-89.

¹²⁹ In this respect: “[t]he Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its “due diligence” obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States” (Advisory Opinion paras. 172-173).

¹³⁰ The interesting point of the ITLOS approach is that it relates the question of responsibility to the competence of the organization, instead of premising it on whether the illegal conduct (act or omission) can be attributed to the organization via the conduct of its “organs or agents.” The latter approach has been followed by the International Law Commission (“ILC”) in dealing with the rules (Article 6 of the Draft Articles on the Responsibility of International Organizations (2011) prepared by the ILC and now contained in the UN General Assembly Resolution 66/100 adopted on 9 December 2011). The ITLOS is the first international judicial body which articulates in such clear terms the connection between responsibility and the competence of the organization and the ITLOS Opinion “contributes to further clarity of international law doctrine in the case of integration organizations such as the EU” (E. Paasivirta, “The European Union and the United Nations Convention on the Law of the Sea”, 38 *Fordham International Law Journal* (2015), 145-1071, at 1069. In this regard, In respect of this matter, Pieter J. Kuijper and E. Paasivirta, “EU International Responsibility and Its Attribution: From Inside Looking Out”, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union*, Amsterdam Center for

article 61 to 64 of UNCLOS¹³¹ in the view that it considers that the expression “shared stocks” and “sustainable management” which are not used in UNCLOS are addressed to the terms of article 63¹³². Regarding question 2 the ITLOS reasoning on the basis of general international law¹³³.

This approach was complemented with the position adopted by ITLOS on the issue of applicable law. It considered, on the basis of article 23 of the ITLOS Rules and article 293 UNCLOS, that “the Convention, the MCA and other relevant rules of international law not incompatible with the Convention constitute the applicable law to this case”¹³⁴. The result is that this reasoning allowed the ITLOS to provide “extensive interpretation” of UNCLOS, and “[i]n doing so, it arguably blurred the orthodox distinction between jurisdiction and applicable law”¹³⁵.

(D) THE ADMISSIBILITY OF REQUEST FOR ADVISORY OPINION: THE DISCRETIONARY POWER OF THE ITLOS

Article 138 of the ITLOS Rules granted the Tribunal discretion as to whether to accept such a request, following the approach taken by Article 65 (1) of the Statute of the ICJ and in contrast to the provision contained in UNCLOS with respect to the Seabed Disputes Chamber. According to article 191 UNCLOS, the Seabed Dispute Chamber “shall give” advisory opinions at the request of the Assembly or the Council of ISA on legal questions arising in the scope of their activities. The mandatory language of article 191 does not give the Seabed Dispute Chamber discretion to declining giving an advisory opinion, in contrast to the ICJ. Consequently, it seems doubtful whether giving an advisory opinion could also be declined on grounds of non-admissibility “as there are strong arguments for the view that once the Chamber has established its jurisdiction, the rendering of an advisory opinion may be considered a duty”¹³⁶. It seems that this approach is the result of the fact that the functions of this Chamber in the guarantee of the rule of law regarding deep seabed activities might be comparable to that of a constitutional court¹³⁷.

In its Advisory Opinion, the Tribunal confirmed that article 138 of the ITLOS Rules should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied¹³⁸. Considering the language of article 138 of the ITLOS Rules it can be remembered the ICJ when it stated that the expression *may* give an advisory opinion “should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisprudence are met.”¹³⁹. Notwithstanding, it is well

European Law and Governance (ACELG), 2013, 35-71.

¹³¹ Advisory Opinion, paras. 207-210.

¹³² Advisory Opinion, para. 186 and 191.

¹³³ Ibid., para. 219 (4).

¹³⁴ Advisory Opinion, para. 84.

¹³⁵ Churchill, *supra* note 27, at 564.

¹³⁶ Tuerk, *supra* note 27, at 374.

¹³⁷ R. Wolfrum, “Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?”, in R. Wolfrum (ed), *International Dispute Settlement: Room for Innovations?* (Heidelberg, 2013), at 35.

¹³⁸ Advisory Opinion para 71. Kateka, *supra* note 46, at 169.

¹³⁹ *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004, ICJ Rep.,

settled that a request for an advisory opinion should not in principle be refused except for “compelling reasons”. As stated by ITLOS:

“Article 138 of the Rules, which provides that “the Tribunal may give an advisory opinion”, should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for “compelling reasons” (see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.¹⁴⁰

Several States against argued that even if the Tribunal founded that it had jurisdiction it should exercise its discretion no to render an opinion in this case for a number of reasons. But ITLOS dismissed the arguments about the legal questions posed to it to SFRC were vague, general and unclear by considering it was legitimate to answer abstract questions. It rejected too that those questions raised issues of *lex ferenda* and were beyond the functions of ITLOS as a judicial body. In particular, Argentina discussed the mere purpose of the request as expressed in the first paragraph under Title V in the Technical Note submitted by the SRFC regarding new economic and scientific uses of the seas whose legal status are open to argument and demanding “new legal responses which the Tribunal can give through its advisory opinions”¹⁴¹. But the Tribunal rejected all these arguments¹⁴².

In any case, the main concern for various States was that to give advisory opinion on highly general and abstract questions may entail the risk of affecting the rights and obligations of third States without their consent¹⁴³. According to ICJ, in the Western Sahara advisory opinion, “[i]n certain circumstances [...] the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character”¹⁴⁴. Nevertheless, the ITLOS

para. 44 and *Kosovo Opinion*, 2010 ICJ Rep., para. 29.

¹⁴⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14

¹⁴¹ Argentina, Presentation by Mr. Martinsen, Verbatim Records, ITLOS/PV.14/C21/2/Rev.1, 3 September 2014, at 8, 17 y ss.

¹⁴² The Tribunal stated as follows: “It has been argued that the questions raised by the SRFC, though legal, are vague, general and unclear. In the view of the Tribunal, these questions are clear enough to enable it to deliver an advisory opinion. It is also well settled that an advisory opinion may be given “on any legal question, abstract or otherwise” (see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 57, at p. 61).

It has also been contended that, while the four questions may be couched as legal questions, what the SRFC actually seeks is not answers *lex lata*, but *lex ferenda* and that is outside the functions of the Tribunal as a judicial body.

The Tribunal does not consider that, in submitting this Request, the SRFC is seeking a legislative role for the Tribunal. The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions” (Advisory Opinion, paras. 72-74)

¹⁴³ Written Statement of Australia, at 12 para. 30.

¹⁴⁴ *Western Sahara*, Advisory Opinion, I.C.J., Reports 1975, 12, 25, para 33 (16 October); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Reports 2004, 157, para. 47. *Kosovo Opinion*, 2010 ICJ Rep., para. 29.

The ICJ has, since its establishment, only once declined Jurisdiction but it has never used its discretion to decline a request once it stated that jurisdiction was given. This was the case in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, when it stated, with regard to the request by the World Health Organization (WHO) to give an opinion on the legality of the use by a state of nuclear weapons in armed conflict that this question was not within the competence of

rejected the arguments on the consent of the States no member of the SRFC and decided to render the advisory opinion submitted by the SRFC:

“It has been argued that in this case the Tribunal should not pronounce on the rights and obligations of third States not members of the SRFC without their consent. It has also been observed that the present Request for an advisory opinion does not involve an underlying dispute and that the issue of State consent simply does not arise in this advisory proceeding.

The Tribunal wishes to clarify in this regard that in advisory proceedings the consent of States not members of the SRFC is not relevant (see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 65, at p. 71). The advisory opinion as such has no binding force and is given only to the SRFC, which considers it to be desirable “in order to obtain enlightenment as to the course of action it should take” (*ibid.*, p. 71). The object of the request by the SRFC is to seek guidance in respect of its own actions.

The Tribunal is mindful of the fact that by answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 24, para. 30)¹⁴⁵.

Finally, it could be added that advisory opinions as such has not binding force but furnish to the requesting organs or bodies the elements of law necessary for them in their action.¹⁴⁶ Even so, advisory opinion is a judicial opinion¹⁴⁷ and, as stated by Wood,¹⁴⁸ the ICJ and the PICJ have emphasized “in their advisory jurisdiction, they must maintain their integrity as judicial bodies”¹⁴⁹.

the WHO (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep). From the very beginning it has made clear that normally it felt obliged to respond (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, 1950 ICJ Rep., at 10). In the *Nuclear Weapons* case, the jurisprudence of the following years was summarized in the following way: “Article 65, paragraph 1, of the Statute provides: ‘The Court may give an advisory opinion...’ (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute leaves it at its discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. [...] The Court has constantly evidenced its responsibilities as ‘the principal juridical organ of the United Nations’ (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only ‘compelling reasons’ could lead it to such a refusal [...]” (*Nuclear Weapons*, *supra* note 61, at para. 14). The often cited principle set out in *Status of Eastern Carelia*, decided by the PCIJ on 23 July 1923, which seemingly introduced a situation where the lack of consent between the parties of the underlying conflict requires the World Court to decline jurisdiction has remained exceptional and as of yet not applicable to other cases (*Status of Eastern Carelia*, 1923 PCIJ (Ser. B) No. 5, at 27). The prevalent opinion is that the so-called ‘discretionary power’ to decline such a request is limited to the very exceptional situation when it has to safeguard its integrity. In this respect, J.A. Frowein and K. Oellers-Frahm, ‘Article 96’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice – A Commentary* (2006), 1401-1426; R. Kolb, ‘De La Prétendue Discretion de La Cour Internationale de Justice de Refuser de Donner un Avis Consultatif’, in I. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality*. Liber Amicorum Georges Abi-Saab (2001), 609-627; A. Aust, “Advisory Opinions”, 1 *Journal of International Dispute Settlement* (2010), 123-151.

¹⁴⁵ Advisory Opinion, para. 75-77.

¹⁴⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Reports 2004, 135 et seq.

¹⁴⁷ Thirlway, *supra* note 37.

¹⁴⁸ Presentation by Mr. Wood, Verbatim Records, ITLOS/PV.14/C21/3/Rev.1, 04/09/2014, at 24, 10-16.

¹⁴⁹ *Judgment N° 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund of Agricultural Development*, I.C.J., Reports 2012, 10, at 25, para. 34; *Status of Eastern Carelia*, P.C.I.J., Ser. B., N° 5, p. 29.

(E) CONCLUSIONS

In general terms, the creeping advisory function of international courts and tribunals is a remarkable improvement in the framework of the current process of expansion of judicial function and institutions in international society. By this way, international tribunals—including the ITLOS as the specialized judicial organ in the field of the law of the sea— could development a greater role in the strengthening of the law of the sea not just by contentious procedures entailing binding decisions but also by advisory opinions¹⁵⁰.

In this framework, on 2 April 2015 the ITLOS delivered its first Advisory Opinion, acting as a full court, at the Request submitted by the SRFC on the basis of article 138 of the ITLOS Rules. The Request by SRFC and the broad participation of States in written and oral proceedings—which has been considered as one of the success of this case¹⁵¹— provided the ITLOS with the occasion to clarify the legal basis as well the substantive and procedural requirements to the exercise of its advisory jurisdiction, as a full court. But, as many of the commentaries to Advisory Opinion illustrates, the controversy over these questions is likely to continue after the case¹⁵². So, as expressly admitted by judge Lucky, “for the avoidance of doubt in the future request for advisory opinions [...] article 21 should be amended to clear up any questions of jurisdiction”¹⁵³. According to article 41 of the ITLOS Statute, the amendments to the Statute may be adopted under the procedure contemplated in article 313 UNCLOS¹⁵⁴ or by consensus at a conferred convened in accordance with UNCLOS¹⁵⁵.

To a large extend, the legal basis of the advisory function of the ITLOS as a full court remains fragile or an unresolved used.¹⁵⁶ Furthermore, the substantive and procedural requirements for its exercise remains unclear and controversial as the result of the general approach—described as “an excessive liberal approach”—¹⁵⁷ adopted by the ITLOS in respect to its interpretation. Additionally, the contents of “compelling reasons” is in need of further clarification in relation to the issue of the consent of the States parties in UNCLOS but no parties in the international agreement conferring jurisdiction to the ITLOS¹⁵⁸. As expressly admitted by judge Cot, the situation creates the risks that a

¹⁵⁰ ITLOS/PV.14/C21/Rev.I, 03/09/2014 am, at p. 1, 28–36. Kateka, *supra* note 46, at p. 171.

¹⁵¹ Declaration of judge Cot, para. 2.

¹⁵² GAO, *supra* note 26, para 31.

¹⁵³ Advisory Opinion, para. 28.

¹⁵⁴ Article 313. Amendment by simplified procedure: “1. A State Party may, by written communication addressed to the Secretary-General of the United Nations, propose an amendment to this Convention, other than an amendment relating to activities in the Area, to be adopted by the simplified procedure set forth in this article without convening a conference. The Secretary-General shall circulate the communication to all States Parties. 2. If, within a period of 12 months from the date of the circulation of the communication, a State Party objects to the proposed amendment or to the proposal for its adoption by the simplified procedure, the amendment shall be considered rejected. The Secretary-General shall immediately notify all States Parties accordingly. 3. If, 12 months from the date of the circulation of the communication, no State Party has objected to the proposed amendment or to the proposal for its adoption by the simplified procedure, the proposed amendment shall be considered adopted. The Secretary-General shall notify all States Parties that the proposed amendment has been adopted.

¹⁵⁵ See Art. 319(2)(e) UNCLOS.

¹⁵⁶ Gao, *supra* note 27, at. 87.

¹⁵⁷ Churchill, *supra* note 27, at 562.

¹⁵⁸ Tanaka, *supra* note 27, at 339.

small group of States can obtain some advantages to the detriment of the rights and interest of third States.¹⁵⁹

The main concern is about the fact that “the Opinion does not fully consider the submission of the States that opposed to jurisdiction”¹⁶⁰. In particular, in its reasoning, the Advisory Opinion seems to circumvent the question of the determination of the scope of the advisory jurisdiction of ITLOS specifically provided in an international agreement “other than UNCLOS” but “related to the purposes of UNCLOS” under article 21 of the ITLOS Statute and article 138 of the ITLOS Rules. The claims that, even if adopting the broad interpretation of article 21 of the Statute established by the Tribunal, the advisory jurisdiction of the full ITLOS has certain inherent limits derived of its proper basis and character, has not been directly addressed by the Tribunal.

In particular, the point that the full ITLOS advisory jurisdiction would be limited to the interpretation of the “any other agreement” referred to in article 21 as between the parties to that agreement is in demand of further clarification and development. In this respect, both the wording and interpretation of article 138 of the ITLOS Rules are decidedly ambiguous¹⁶¹.

In any case, it could be deduced to the reasoning of the Tribunal on the legal basis of its advisory opinion, that UNCLOS does not confer to the full ITLOS a general advisory jurisdiction in relation to the interpretation and application of its dispositions. Considering that, as affirmed by the Tribunal in its Advisory Opinion, neither article 21 of the ITLOS Statute nor article 138 of the ILOS Rules are by itself the basis of its advisory jurisdiction,¹⁶² some reflections should be posed. As a matter of principle, if article 21 of the Statute provides basis for article 138 of the Rules and under these dispositions an international agreement related to the purposes of the UNCLOS may confer specifically advisory jurisdiction to the ITLOS in its full composition, it should be admitted that as matter of principle, that advisory jurisdiction is limited to matters concerning the interpretation or application of that international agreement as between parties to the agreement. It should not be consistent with *inter se* rights and responsibilities of Sates parties to UNCLOS if a few States parties to any other agreement which confers jurisdiction to the Tribunal may request advisory opinions to ITLOS in respect to the interpretation of the provisions of UNCLOS whereas the parties to UNCLOS cannot request that opinion on the basis of main Convention.¹⁶³

In particular, the contents of “compelling reasons” is in need of further clarification in relation to the issue of the consent of the States parties in UNCLOS, but no parties in the international agreement conferring advisory jurisdiction to the ITLOS. Even that States, as Japan, which supported the existence of advisory jurisdiction of the ITLOS in its full composition, nevertheless urged restraint and caution in its exercise. The two main concerns —respect for third parties’ rights and limitation of the Tribunal’s jurisdiction to the content of the basic agreement allowing for the referral,

¹⁵⁹ Advisory Opinion, para. 9.

¹⁶⁰ Separate Opinion of judge Lucky.

¹⁶¹ Quiang, *supra* note 27, at. 27.

¹⁶² Advisory Opinion, para. 58.

¹⁶³ Written Statement of Australia, para. 28. Presentation by Campbell, Verbatim Records, ITLOS/PV.14, C21/2, 3 September 2014, 18.

in this case the MCA Convention— has been identified by judge Cot when expressing his disaccord with the fact that the Tribunal had ignored these caveats¹⁶⁴.

Finally, the most cogent reason in favor of the amendment of article 21 of the ITLOS Statute in order to establish the scope and the substantive and procedural requirements applicable to the request of advisory opinions from the ITLOS acting as a full court, has been expressed by Gao, when he started that “[o]therwise, the function of the ITLOS will become limitless”¹⁶⁵, because the wording and interpretation of article 138 of the ITLOS Rules is decidedly ambiguous¹⁶⁶. Meanwhile, as predictably the request to the ITLOS for advisory opinion would grow in the future, the ITLOS can be said to have a significant responsibility in the sound development of the advisory proceedings by considering the demands in favor of a cautious and restrictive criteria.

¹⁶⁴ The arguments of judge Cot were posed in the following terms: “The Tribunal’s position in advisory proceedings is very different from that of the Court. The advisory procedure in the International Court of Justice is governed by a tight framework. An opinion may be requested only by the General Assembly or the Security Council or with their authorization. The request is the subject of a preliminary discussion within a body in which all interested parties are represented. Each State concerned is thus involved in drafting the questions asked. The situation in the present case is entirely different. The request was written by the States of the SRFC, representing the interests, clearly legitimate interests, of coastal States. On the other hand, flag States did not take part in drafting the questions. The dangers of abuse and manipulation, if the Tribunal does not provide a procedural framework by exercising its discretionary power, are evident. States could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position” (Declaration of judge Cot, paras. 7-9).

¹⁶⁵ Gao, *supra* note 27, at. 90.

¹⁶⁶ Quiang, *supra* note 27, at. 27.