

Written Statement of the Argentine Republic

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE NO. 21)

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-
REGIONAL FISHERIES COMMISSION (SRFC)

WRITTEN STATEMENT OF THE ARGENTINE REPUBLIC

NOVEMBER 28, 2013

I. Introduction

1. The Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) –a Regional Fishery Body based in Dakar and whose members are Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra-Leone– adopted a resolution during its fourteenth session (27-28 March 2013), by which it decided, in accordance with article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, to authorize the Permanent Secretary of the SRFC “to seize the International Tribunal for the Law of the Sea [...] in order to obtain its advisory opinion on the following matters:

“1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?”

“2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?”

“3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?”

“4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?”

When it comes to the French version of these questions, they read as follows:

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

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

“3. Une organisation internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l’Etat côtier par les bateaux de pêche bénéficiant desdites licences?”

“4. Quels sont les droits et obligations de l’Etat côtier pour assurer la gestion durable des stocks partagés et des stocks d’intérêt commun, en particulier ceux des thonidés et des petits pélagiques ?”

2. Pursuant to the said resolution, the Permanent Secretary of the SRFC transmitted the request for an advisory opinion by letter dated 27 March 2013 addressed to the President of the International Tribunal for the Law of the Sea (hereinafter “the Tribunal” or “ITLOS”), and received by the Registry on 28 March 2013.

3. By letter dated 28 March 2013, the Registrar of the Tribunal invited the Permanent Secretary of the SRFC to submit to the Tribunal all documents likely to throw light upon the questions contained in the request for an advisory opinion, pursuant to article 131 of the Rules of the Tribunal. As a result of this, by letter dated 9 April 2013, pursuant to article 131 of the Rules of the Tribunal, the Permanent Secretary of the SRFC transmitted additional documents.

4. By a note verbale dated 8 April 2013, pursuant to article 133, paragraph 1, of the Rules of the Tribunal, the Registrar gave notice of the request for an advisory opinion to the States Parties to the United Nations Convention on the Law of the Sea (hereinafter “the Convention”).

5. By Order 2013/2 of 24 May 2013, the Tribunal decided that the SRFC and several other intergovernmental organizations are likely to be able to furnish information on the questions submitted to the Tribunal and invited them as well as the States Parties to the United Nations Convention on the Law of the Sea to present written statements on the questions contained in the Request, fixing 29 November 2013 as the time-limit for the presentation of such written statements.

6. The intergovernmental organizations in question were listed in the Annex to the Order and they included United Nations bodies, regional fishery bodies and other intergovernmental organizations invited to attend the 30th meeting of the Committee on Fisheries (COFI, a subsidiary body of the FAO Council) and those with observer status at the fourteenth session of the Conference of Ministers of the SRFC, which took place in March 2013.

7. In reply to the invitation sent by the Tribunal, the Argentine Republic hereby presents its observations as follows:

II. General remarks

8. Argentina possesses an extensive coastline which calls for great effort and resources in order to fully exercise its duties and responsibilities related to its condition as a coastal State. Particular attention should be paid to the work carried out in the surveillance, management and control arena of the Argentine maritime areas.

9. In order to face the challenge posed by the fulfillment of such responsibilities, our country has been involved in international cooperation projects with African countries. Indeed, "South-South Cooperation" represents one of the priorities of Argentina's foreign policy and it is relevant to emphasize the links between South America and Africa.

III. Jurisdiction

10. The jurisdiction of the Tribunal to give advisory opinions has been requested on the basis of Article 138 of the Rules of the Tribunal, which reads:

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

"2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal."

"3. The Tribunal shall apply mutatis mutandis articles 130 to 137."

11. Article 21 of the Statute of the Tribunal, was also invoked -presumably as a basis for jurisdiction- by the international organization requesting the advisory opinion to the Tribunal in Case 21. That clause of the Statute reads:

"The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

12. Nevertheless, no clause in the Convention nor in the Statute of the Tribunal provides for an advisory jurisdiction of a general scope for the Tribunal as a full Court. Advisory

opinions are only mentioned in the Convention as procedures that may take place in accordance with the relevant provisions of Part XI under the competence of the Seabed Disputes Chamber.

That circumstance alone might lead the Tribunal to consider that it has no jurisdiction to render the advisory opinion requested under Case 21. Article 21 of the Statute of the Tribunal invoked in the Request as a basis for jurisdiction relates to Part XV of the Convention, namely the part of the Convention dealing with “Settlement of Disputes”.

As recognized by the International Court of Justice¹,

“the purpose of the advisory function is not to settle -at least directly- disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”

Then, Argentina does not consider Article 21 of the Statute as providing for an advisory jurisdiction of a general scope for the Tribunal as a full court applicable to all States parties to UNCLOS.

13. The rule specifically allowing for the possibility of an advisory jurisdiction to be given by the Tribunal as a full Court is article 138 of its Rules, but restricted to those cases in which *“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”*. Then it needs to be determined whether the *“Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the Member States of the SRFC”*, fulfils the conditions required by that provision.

14. According to the request by the Conference of Ministers of the Sub-Regional Fisheries Commission, Article 33 of the above mentioned Convention applies to this case. That clause reads *“The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion”*. This provision seems to comply with one of the procedural requirements of Article 138 of the Rules.

¹ *Legality of threat or the use of nuclear weapons.*, Advisory Opinion, ICJ Reports 1996, p. 226, para 15.

15. Nevertheless, the very nature of the instruments the Tribunal is invited to interpret in the Request poses an additional obstacle to the exercise of an advisory jurisdiction. Since this case can not be deemed as a dispute or an application “submitted to [it] [the Tribunal] in accordance with this Convention”, the other possibility considered in Article 21 of the Statute of the Tribunal for the exercise of its jurisdiction refers to “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”. Therefore, it is necessary to determine whether the Request actually refers in substance to a matter provided for in the “other agreement”, namely, in the “Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the Member States of the SRFC”.

None of the questions posed to the Tribunal identifies what are the substantial rules of that particular Convention that are requested to be interpreted by the Tribunal in order to answer them. Nevertheless, there are very clear indications regarding which are the instruments requested to be applied by the Tribunal under title V) “Justification for the Request to the International Tribunal for the Law of the Sea for an Advisory Opinion” of the “Technical Paper” submitted in March 2013 after the Request:

“There now exist many new economic and scientific uses of the seas whose legal status is open to argument. New developments call for new legal responses which the Tribunal can give through its advisory opinions. The advisory function of the Tribunal can make a great contribution to sound governance of the seas and oceans.”

“More specifically, the 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing and the 2009 Port State Measures Agreement include important provisions aimed at reinforcing the powers of the coastal State in the fight against IUU fishing. These legal instruments, especially the 2009 Agreement, are binding on the SRFC Member States and are helpful to these countries, whose fragile economies suffer serious damage from IUU fishing.”

“These instruments bring major innovations to classic international law, notably in the area of the flag State’s obligations in respect of vessels engaged in IUU fishing not only in its own EEZ but also in those of other countries.”

“Accordingly, it is particularly useful for the SRFC Member States to know precisely what their rights and obligations are in this connection, especially the newly created rights and obligations. Given its powers and competencies, the Tribunal is well placed to provide the necessary elucidation of these points and other related ones involving fishing licenses and sustainable management of shared stocks and stocks of common interest.”²

2 Emphasis added.

16. Several conclusions may be drawn from the quoted text. The relevant one regarding jurisdiction in the present case is that the instruments that the SRFC indicates the Tribunal to be the object of an advisory opinion do not belong to the “agreement” that allegedly attributes consultative jurisdiction upon it. Then, the condition established under Article 21 of the Statute of the Tribunal is not met since no “*matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*” are invoked in the Request as the object of the advisory opinion. The only two instruments identified as relevant under the title “*V. Justification...*” for this advisory opinion are not even of a binding nature and are not “agreements” conferring jurisdiction to the Tribunal.

17. The Argentine Republic notes that if the Tribunal finds that in this case “an international agreement” confers upon it a certain judicial function regarding “*matters specifically provided for*” in that agreement, the jurisdiction stemming from those circumstances is necessarily restricted *rationae materiae* to the matters regulated by that particular agreement and *rationae personae* to the requesting international organization and - possibly- to the States parties to such “international agreement”. In this context, Argentina considers the invitation sent by the Tribunal to all States Parties to UNCLOS through its Order of 24 May 2013 “*to present written statements on the questions submitted to the Tribunal for an advisory opinion*” as offering the possibility to States Parties to UNCLOS of expressing its opinion regarding jurisdiction and admissibility in the present case.

18. As the Tribunal is aware, the Argentine Republic is not a party to the “*Convention on the Determination of the Minimal Conditions*”. That instrument is “*res inter alios acta*” concerning Argentina. According to the well established rule of general international law reflected in article 34 of the Vienna Convention on the Law of the Treaties “*pacta tertiis nec nocent nec prosunt*”, the above mentioned Convention “does not create either obligations or rights for a third State without its consent.” The Argentine Republic, as a third State to that Convention, has never expressed any sort of consent regarding the creation of any rights or obligations in its regard by that instrument.

Therefore, if the Tribunal finds it has jurisdiction to consider the Request by the Conference of Ministers of the Sub-Regional Fisheries Commission, any possible effect of such a procedure is confined to the international organization requesting it and to the instrument on which such jurisdiction would be based.

IV. The exercise of the Tribunal's discretion regarding this request

19. In case the Tribunal decides it has advisory jurisdiction as full bench in this case, the following elements in the Request might lead it to consider that the exercise of such jurisdiction should be declined in this particular case. Article 181 of its Rules sets forth that the Tribunal “may” give an advisory opinion and no rule in the Convention nor in the Statute compels it to exercise an advisory jurisdiction as a full bench. In the precedents of the International Court of Justice (ICJ) several circumstances have been considered as requiring it to decline the exercise of its advisory function. As stated by the Court,

*“Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request”.*³

According to the criteria developed by the ICJ, “only ‘compelling reasons’ should lead the Court to refuse its opinion”.⁴ The Court has also observed, in view of its own practice and that of its predecessor, that “in their advisory jurisdiction, they must maintain their integrity as judicial bodies”.⁵ As it has been recognized by the ICJ in several cases, it is essential

*“whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question or fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character”*⁶

A. The justification of the Request is not compatible with the judicial character of the Tribunal

20. The Technical Note submitted after the Request, under the title devoted to the “Justification for the Request...”, refers to two instruments invoked as allegedly creating “New developments call[ing] for new legal responses which the Tribunal can give through its advisory opinions”. Those instruments do not even constitute international law.

³ ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase, Advisory Opinion)*, ICJ Reports, 1950, p. 65 at p. 72.

⁴ ICJ, *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para 44.

⁵ ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 Feb. 2012, para 34, at www.icj-cij.org.

⁶ *Western Sahara*, ICJ Reports (1975) pp. 12, 28-29 (para 46); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, pp 136, 161 (para 56).

The “*International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*” (IUU IPOA) was developed by the Food and Agriculture Organization of the United Nations (FAO) “as a voluntary instrument, within the framework of the Code of Conduct for Responsible Fisheries” and adopted at the Twenty-fourth Session of its Committee on Fisheries (COFI) on 2 March 2001. It was endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001. According to its paragraph 4 “*t[The IPOA is voluntary]*”.

The “Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing” was approved by the FAO Conference at its Thirty-sixth Session (Rome, 18- 23 November 2009) under paragraph 1 of Article XIV of the FAO Constitution, through Resolution No 12/2009 dated 22 November 2009. According to information last updated on August 19, 2013⁷, the said instrument only received eight out of the twenty five consents to be bound by it required by its Article 29, paragraph 1, for its entry into force.

21. A voluntary instrument or a treaty not yet in force cannot be construed as establishing new rules, or “*new developments*” or -even less- as bringing “*major innovations to classic international law*” as claimed in the “*Justification for the Request to the International Tribunal for the Law of the Sea for an Advisory Opinion*” contained in the Technical Note submitted to the Tribunal after the Request. The instruments whose interpretation is requested to the Tribunal are not even international law as such. Neither may the interpretation of those instruments constitute the object of an activity of a judiciary nature. Even less could that be the case if -as it occurs in the Request- such instruments are requested to be considered by the Tribunal as “*major innovations to classic international law*”, a reference presumably addressed to nothing less than the United Nations Convention on the Law of the Sea.

B. The aim of the request is not compatible with the judicial character of the Tribunal

22. As expressed in the first paragraph under title V, “Justification...”, in the Technical Note,

⁷ http://www.fao.org/fileadmin/user_upload/legal/docs/5_037s-e.pdf [last retrieved on November 24 2013].

“There now exist many new economic and scientific uses of the seas whose legal status is open to argument. New developments call for new legal responses which the Tribunal can give through its advisory opinions. The advisory function of the Tribunal can make a great contribution to sound governance of the seas and oceans.”⁸

No major or complex interpretation exercise is needed to conclude that the Request for an advisory opinion in Case 21 actually means a request to create new law, that is to say, to issue “new legal responses” as stated in the “Justification”. The ICJ expressed in this respect that

“It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate.”⁹

The “Justification” of the Request invokes two instruments as “new” developments calling for “new” legal responses “which the Tribunal can give through its advisory opinions”. That is precisely what an advisory opinion cannot do since by means of this advisory competence “it states the existing law and does not legislate”. Neither this Tribunal may perform such a function given its judicial character.¹⁰

23. Along these lines, the “governance of the seas and oceans” can not be the aim of an advisory opinion requested to a judicial court or the Tribunal. Such “governance” is not a legal term and it is not even mentioned neither in the Convention nor other relevant instruments.

C. The questions contained in the Request either prejudice their possible answers or lack to provide information that is of an essential nature regarding their respective answers

24. The content of question number 1), together with the assertion expressed under title V of the Technical Paper dealing with the justification for the Request, wrongly assume that “flag States” might have acquired rights or duties other than those specifically provided for

⁸ Technical Note, page 6, emphasis added.

⁹ *Legality of threat or the use of nuclear weapons.*, Advisory Opinion, ICJ Reports 1996, p. 237, para 18.

¹⁰ ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para 33.

in UNCLOS. Regarding fisheries, the sovereign rights of the coastal State recognized by the Convention are of an “exclusive” nature. Therefore, the flag State -when its vessels are fishing in foreign maritime areas - does not seem to have any right regarding such fishing activities other than withdrawing the license it might have given to those vessels to fish abroad.

25. Question 1) assumes that IUU fishing may take place in the exclusive economic zone of a coastal State. Nevertheless -by definition- in maritime areas under national jurisdiction fishing activities may be either legal or illegal. As recognized in the definitions of the IUU IPOA (paragraph 3.1.) *“Illegal fishing refers to activities: 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations”*. In maritime areas under national jurisdiction “unreported fishing” is not “IUU fishing” but “illegal fishing” if reporting is required by the laws and regulations of the coastal State.

26. For the above mentioned reasons, question 1) cannot be answered as it is framed without ignoring the exclusive sovereign rights of the coastal State over the maritime areas under its jurisdiction.

27. Question 2) lacks an essential piece of information, namely, the reference to the maritime areas to which it applies. If it addressed to activities within national jurisdiction the answer is totally different from the one to be given to the same activities beyond national jurisdiction. It is a question that cannot be answered as framed.

28. Regarding question 3), its English version greatly differs from its French version being each one of them different in meaning, so as their possible answers. For instance, the English version includes a concept such as “flag State” whereas its French version does not. For these reasons, question 3) should be disregarded due to the impossibility to determine the version that should prevail in order to give an answer.

Furthermore, question 3) in its English version also fails to include information without which it is not possible to answer it. The answer necessarily depends upon the contents of the “international agreement” it refers to. No indication of the applicable

international agreement is made in the question and therefore no answer is possible to the question as framed.

29. Question 4) cannot be answered without knowing to which treaties the coastal State is a party to, information that is not provided for in the Request.

30. In sum, none of the four questions listed in the Request seem to have a proper judicial answer in the way they are respectively framed or informed. For those reasons the exercise of replying them does not seem compatible with the judicial nature of the Tribunal.

V. Conclusion and Submissions

31. The Argentine Republic does not reject *lege ferenda* the possibility of empowering the Tribunal in the future with a competence to issue advisory opinions as full court. Such a procedure might prove to be very helpful to States parties and international organizations willing to know, for example, whether the rules they plan to adopt are in conformity with the Convention. Nevertheless, the procedural rules providing for that possibility as well as for the guarantees regarding States parties not participating in those procedures are not already in place and would need to be developed.

For the reasons expressed in these submissions the Argentine Republic considers that the Tribunal does not have jurisdiction in Case 21.

32. Besides, the Argentine Republic considers that the Tribunal should decline the exercise of such jurisdiction in the Case 21 because the submissions before it are not compatible with its judicial character.

33. The Argentine Republic hereby reserves the right to make further comments in the proceedings of Case No. 21, in light of the written statements to be submitted by other States Parties to UNCLOS and relevant international organizations in accordance with the order of the ITLOS of 24 May 2013.

*Ministry of Foreign Affairs and
Worship of the Argentine Republic*

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