

**Written Statement of the People's Republic of China**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA  
(CASE NO.21)

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

(REQUEST FOR ADVISORY OPINION SUBMITTED  
TO THE TRIBUNAL)

**WRITTEN STATEMENT OF**  
**THE PEOPLE'S REPUBLIC OF CHINA**

26 November 2013

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## I. Introduction

1. Currently pending before the International Tribunal for the Law of the Sea (ITLOS or Tribunal), established under the *United Nations Convention on the Law of the Sea* of 1982 (UNCLOS or Convention), Case No. 21 arose from a request of the Sub-Regional Fisheries Commission (SRFC) for advisory opinion (Request), which was received by the Tribunal on 28 March 2013.<sup>1</sup> The membership of the SRFC includes the Republic of Cape Verde, Republic of The Gambia, Republic of Guinea, Republic of Guinea-Bissau, Islamic Republic of Mauritania, Republic of Senegal, and Republic of Sierra Leone. All of them have become States Parties to UNCLOS since 1996, and all are coastal States.

2. The Request was submitted on the basis of Article 21, Annex VI (which contains the Statute of the ITLOS), UNCLOS, Article 138 of the *Rules of the Tribunal*, and Article 33 of the *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* (MCA Convention).<sup>2</sup> Article 33 of the *MCA Convention* provides:

[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion.<sup>3</sup>

It was based on this article that the Permanent Secretary was authorized by the

<sup>1</sup> At [www.itlos.org](http://www.itlos.org).

<sup>2</sup> Annex VI contains the *Statute* of the ITLOS, which is an integral part of UNCLOS under Art. 318, UNCLOS. Art. 138 (1) of the *Rules of the Tribunal* reads: "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."

<sup>3</sup> At [www.itlos.org](http://www.itlos.org). There is no similar provision in the other treaties listed or referred to by the SRFC Permanent Secretary in support of the Request. Those treaties are therefore irrelevant to the basis of the advisory competence of the full bench of the Tribunal.

Conference of Ministers of the SRFC during its session of 27-28 March 2013 to submit the Request to the ITLOS.

3. The reason for the Request is that, due to “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”, the SRFC felt it “useful” for its member States to know from the Tribunal precisely “what their rights and obligations are in this connection, especially the newly created rights and obligations”.<sup>4</sup> The Request contains four questions in respect of which advisory opinion is being sought, and they are set out as follows:

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

4. The ITLOS, by order of 24 May 2013 in accordance with Article 133 (3) of the *Rules of the Tribunal*,<sup>5</sup> invited “the States Parties to the Convention, the SRFC and the other organizations referred to above to present written statements on the questions submitted to the Tribunal for an advisory opinion”. The order also

<sup>4</sup> See the *Technical Note* prepared by the Permanent Secretariat of the SRFC (Technical Note), 6, at [www.itlos.org](http://www.itlos.org). This document serves as an explanation of the background of the Request. Also see the preamble of the resolution adopted by the Conference of Ministers, attached to the Request.

<sup>5</sup> At [www.itlos.org](http://www.itlos.org).

fixed 29 November 2013 as the time limit for submission of such statements.

5. The Chinese Government, having received the ITLOS order referred to above, would present a written statement (Chinese Statement) accordingly. The Chinese Government takes the general view that, given the great importance of the work of the Tribunal in the field of the law of the sea, it is necessary for the Tribunal to satisfactorily explain the basis and rationale for claiming advisory competence for its full bench. It should be borne in mind that the Tribunal, through its Sea-Bed Disputes Chamber, has already been granted advisory competence under UNCLOS. There is, therefore, the concern that, without a proper basis in the constituent instrument of the Tribunal, ie UNCLOS, the advisory competence thus claimed, with few or less stringent conditions for application than those associated with the ITLOS's competence to settle disputes, may be abused for the purposes of avoiding the UNCLOS-based procedures for the settlement of disputes concerning the interpretation and application of the *Convention*, resulting in the undermining of the efficacy of UNCLOS as a whole.

6. The *Chinese Statement* will first recall the practice in respect of the establishment of the advisory competence of international courts—especially of the Permanent Court of International Justice (PCIJ or the Court) and the International Court of Justice (ICJ or the Court), with a view to demonstrating the commonly known basis for such competence. If the ITLOS seeks this power for its full bench, it should conform to the practice so established. The rationale for this view lies with the understanding that “[t]he general procedures for the functioning of the tribunal and its powers are on the lines of the Statute of the International Court of Justice and other international judicial tribunals”.<sup>6</sup> That understanding had been adhered to throughout the negotiations held at the Third

<sup>6</sup> UNCLOS III, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9 (A/CONF.62/WP.9/Add.1)*, 31 March 1976, *Official Records*, vol. v, 122, para 30.

United Nations Conference on the Law of the Sea (UNCLOS III) over the provisions concerning dispute settlement by a tribunal of the law of the sea.<sup>7</sup> The understanding so articulated by the President of UNCLOS III had survived the conclusion of UNCLOS III. When reviewing the draft *Rules of the Tribunal* before submitting them to the Meeting of States Parties to UNCLOS,<sup>8</sup> Special Commission 4, of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (Preparatory Commission),<sup>9</sup> stated explicitly that:

To remain consistent with this guideline, which was adopted by the Special Commission, the Rules of the Tribunal should as far as possible follow the practice of the International Court of Justice and the usage in its Rules of Court.<sup>10</sup>

7. The *Chinese Statement* will next show that, under UNCLOS, there is but one such competence recognized in favour of the Sea-Bed Disputes Chamber of the ITLOS. UNCLOS, as it stands, contains no justification or basis for an extension of that competence to the full bench of the Tribunal. In addition, it will be shown that the doctrine of inherent jurisdiction, if considered at all as an alternative to UNCLOS, has no applicability in relation to the advisory competence of the full bench of the ITLOS. It follows that, if the full bench of the ITLOS is found not to

<sup>7</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.VI.10, 336-337.

<sup>8</sup> The Meeting of States Parties in turn recommended these draft Rules to the ITLOS: ITLOS, *Report of the ITLOS for the period 1996-1997*, SPLOS/27, 23 April 1998, para 42.

<sup>9</sup> Established under Resolution I, Final Act, UNCLOS III. The Preparatory Commission was charged by the resolution to prepare a report containing recommendations regarding practical arrangement for the establishment of the ITLOS: Preparatory Commission, *Report of the Preparatory Commission under Paragraph 10 of Resolution I Containing Recommendations for Submission to the Meeting of States Parties to be Convened in Accordance with Annex VI, Article 4, of the Convention Regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea, LOS/PCN/152 (Vol. I)*, 28 April 1995, Vol. I, 3. Special Commission 4 was designated by the Preparatory Commission to prepare the report.

<sup>10</sup> *Provisional Report of Special Commission 4, Addendum (Final draft Rules of the Tribunal)*, LOS/PCN/SCN.4/WP.16/Add.1, 19 Jan. 1994, para 2, in: Preparatory Commission, *Report of the Preparatory Commission under Paragraph 10 of Resolution I Containing Recommendations for Submission to the Meeting of States Parties to be Convened in Accordance with Annex VI, Article 4, of the Convention Regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea, LOS/PCN/152 (Vol. I)*, 28 April 1995, Vol. I, 26.

have advisory jurisdiction, the Request of the SRFC will have to be rejected by the Tribunal for lack of jurisdiction. The *Chinese Statement* will then look briefly at the possibility of amending UNCLOS to provide the full bench of the Tribunal with advisory competence.

8. The *Chinese Statement* will next consider whether the Request falls within the jurisdiction of the Tribunal, on the hypothesis that its full bench had advisory competence. In addition, it will examine the issues of judicial propriety that need be addressed in relation to the Request before the advisory competence could be exercised. This is because, the ITLOS, "being a Court of Justice, cannot, even in giving advisory opinion, depart from the essential rules guiding [its] activity as a Court".<sup>11</sup> The *Chinese Statement* will finally offer its conclusion and submissions.

## II. The Basis of the Advisory Competence of International Courts

### 1. The advisory competence of the PCIJ

9. The advisory competence of an international court was first provided for in Article 14 of the *Covenant of the League of Nations* (LON Covenant).<sup>12</sup> The article reads as follows:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. *The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly* [italics added].

It was an innovation in international judicial practice at the time.<sup>13</sup> But there was

<sup>11</sup> PCIJ, *Status of Eastern Carelia*, Advisory Opinion, 23 July 1923, PCIJ Series B, No. 5, 29.

<sup>12</sup> [1920] *Australian Treaty Series*, 1 (adopted 28 June 1919; entry into force 10 Jan. 1920).

<sup>13</sup> LON, *Documents concerning the Action Taken by the Council of the League of Nations under Article*

no doubt that the basis for the advisory competence of the PCIJ was statutory by nature.<sup>14</sup>

10. The PCIJ had since the beginning been envisaged and treated by the League of Nations (LON) and States as a component part of the LON, ie its judicial organ.<sup>15</sup> The approach, that advisory competence is provided for in the constituent instrument, was deliberately followed when the *Statute of the International Court Justice* (ICJ Statute) was adopted at the United Nations Conference On International Organization in 1945 as an annex and “an integral part” of the *Charter of the United Nations* (UN Charter).<sup>16</sup> In reality, the relationship between the PCIJ and the LON was like the one between the ICJ and the United Nations (UN). There is an organic connection between each of the two pairs of bodies, which has, in addition to the terms of the constituent treaties of the Courts, defined the scope of the advisory competence of the Courts.

## *2. The advisory competence of the ICJ*

11. Article 96 of the *UN Charter* thus provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request

*14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (Geneva, 1921), 211, No. 48, available at [www.icj-cij.org](http://www.icj-cij.org). Also see Manley O. Hudson, *The Permanent Court of International Justice 1920-1945: A Treatise* (New York, The MacMillan Co., 1943), 484-485.

<sup>14</sup> Art.1 of the PCIJ Statute stated: “A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations”.

<sup>15</sup> *LON Official Journal*, March 1920, 37; Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, 16 June-24 July 1920, with Annexes* (The Hague, Van Langenhuisen Brothers, 1920), 704, at [www.icj-cij.org](http://www.icj-cij.org).

<sup>16</sup> Art. 92, *UN Charter*. Cf Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. i (4<sup>th</sup> edn., Leiden/Boston, Martinus Nijhoff, 2006), 60-62.



advisory opinions of the Court on legal questions arising within the scope of their activities.

12. It is clear from the provision of Article 96 that the advisory competence of the ICJ is limited to requests made by the General Assembly (GA) and the Security Council (SC) of the UN, as well as other organs of the UN and specialised agencies authorised by the UNGA to make such requests. This defines the *ratione personae* aspect of the advisory competence of the Court. It is also clear that for those entities as authorised under Article 96 (2) to request advisory opinions, their requests must concern legal questions arising within the scope of their activities. This requirement, particular to Article 96 (2), constitutes the *ratione materiae* aspect of the advisory competence of the Court in respect of a particular kind of requests for advisory opinion.

13. Also very important in this respect is the provision of Article 65 of the *ICJ Statute*. Article 65 (1) reads:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

The provision confirms the advisory competence of the Court, in correspondence with the power granted under Article 96 of the *UN Charter* for various bodies to request such opinions from the Court. The logical completeness and the legitimacy of the competence in the case of the ICJ are plain to see through this combination of provisions of the constituent treaty.

### *3. Conclusion*

14. The established practice is therefore that the PCIJ and the ICJ have been expressly given advisory competence by the constituent treaties to advise the organs of a general organization or other relevant institutions. Both Courts have

functioned as the judicial organs of general international organizations. It is known that certain regional judicial bodies are also in possession of such competence in fulfilling a mandate to safeguard the integrity of a legal system, to which they belong, through authoritatively interpreting the constitutive treaties of that system.<sup>17</sup> With that, both the access to advisory opinions and the range of matters on which such opinions may be sought have been widened.<sup>18</sup> However, it remains true that the establishment and expansion of advisory competence for these judicial bodies have been realized by way of concluding, amending or supplementing the constituent treaties. This fact has fortified the established practice as pioneered by the PCIJ and the ICJ. It follows that any assumption of advisory competence by a judicial body, *proprio motu*, would be in disregard of the established practice and should be guarded against with great caution.

15. The following section will show, where relevant, that the established practice was the basis on which the provisions of UNCLOS concerning the work of the ITLOS were negotiated and adopted at UNCLOS III.

### **III. The Advisory Competence of the ITLOS**

16. It has been said that the advisory competence of the ITLOS, as based in Article 21 of the Statute of the Tribunal, “is a significant innovation in the international judicial system”,<sup>19</sup> and is seen as “a potential alternative to contentious proceedings”.<sup>20</sup> The Chinese Government would make four general

<sup>17</sup> Art. 47 (1), *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), at [www.echr.coe.int](http://www.echr.coe.int) (Protocol No. 2, of 6 May 1963, to the Convention provided the court with advisory competence); Grand Chamber, European Court of Human Rights, *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 Feb. 2008, para 37, available at [hudoc.echr.coe.int](http://hudoc.echr.coe.int). Also see Art. 64 (1), American Convention on Human Rights (at [www.oas.org](http://www.oas.org)) and Art. 2 (2), *Statute for the Inter-American Court of Human Rights* (at [www.corteidh.or.cr](http://www.corteidh.or.cr)).

<sup>18</sup> Cf Art. 1(1), Protocol No. 16, of 2 Oct. 2013, to the ECHR, at [www.echr.coe.int](http://www.echr.coe.int).

<sup>19</sup> President of the ITLOS, Speech before the 55<sup>th</sup> Plenary Meeting of the UNGA (A/60/PV.55), Agenda Item 75, “Oceans and the Law of the Sea”, 28 Nov. 2005, 27.

<sup>20</sup> *Ibid.*

comments in this respect.

17. It is clear, first of all, that Part XV, UNCLOS, is only concerned with settlement of disputes, and that such disputes are confined in Part XV to those concerning the interpretation or application of the *Convention*. It is unsurprising, therefore, that the source of the advisory competence of the Tribunal is not to be found in Part XV, but within the special regime of Part XI. Moreover, apart from certain provisions in Parts XI and XV regarding jurisdiction—namely, Articles 187, 191 and 288—the jurisdiction of the ITLOS can also be founded on Article 21 of Annex VI, UNCLOS. Article 21, Annex VI, is a compendium expression of the Tribunal's jurisdiction *ratione materiae*, which is defined in greater detail in the three earlier articles of the *Convention*. But out of those four articles, only Article 191, of Part XI, expressly recognises the advisory competence of a chamber of the Tribunal.

18. Secondly, in distinguishing between contentious and advisory procedures, the ICJ once observed that

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.<sup>21</sup>

The gist of this finding is equally reflected in the relevant practice of other international judicial bodies in possession of advisory competence.

19. Thirdly, the ITLOS is not the only venue for the settlement of disputes concerning the interpretation or application of UNCLOS, as Article 287 (1) clearly shows in providing for recourse to four possible venues including the ITLOS. It would appear that, at the conclusion of negotiations at UNCLOS III, the power of the Tribunal to interpret the terms of UNCLOS was not intended by the

<sup>21</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para 15.

negotiating States to be an exclusive one. This may be contrasted with the uniqueness of the advisory competence granted to the Sea-Bed Disputes Chamber of the ITLOS.

20. Lastly, under Articles 159 (10) and 191, UNCLOS expressly grants advisory competence to the Sea-Bed Disputes Chamber of the ITLOS. There is no doubt that by inserting those two provisions in the *Convention*, the negotiating States at UNCLOS III had carefully considered the practice of the ICJ in advisory proceedings, as well as the necessity for a similar function to be conferred on that chamber of the Tribunal. The necessity, it seems, arises from the special functions with which UNCLOS entrusts the Assembly and the Council of the International Seabed Authority. Pursuant to Article 137 (2), UNCLOS, the International Seabed Authority is clearly the overarching organization in all matters relating to the Area.<sup>22</sup> On the contrary, there is no UNCLOS-based organization established to govern the whole field of the law of the sea. This fact alone heightens the need for the Tribunal to justify, in Case No. 21, its claim to a broader advisory competence in the framework of UNCLOS.<sup>23</sup>

21. In view of the preceding general points, a closer perusal of relevant provisions of UNCLOS is therefore inevitable. The Chinese Government considers that by this exercise, difficult questions may be highlighted in relation to the legal basis for the advisory competence of the full bench of the Tribunal. At present, relevant clauses of the *Convention* appear to fall short of supporting the existence of the advisory competence of the full bench of the ITLOS.

<sup>22</sup> "All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority."

<sup>23</sup> *Report of the twenty-third Meeting of States Parties*, SPLOS/263, 8 July 2013, para 21 ("it would be important for the Tribunal to fully consider the concerns of all States Parties in deciding whether to exercise jurisdiction").

*1. The advisory competence of the Sea-Bed Disputes Chamber of the ITLOS*

22. Within the framework of UNCLOS, one chamber of the ITLOS has been explicitly given advisory competence. In that sense, the ITLOS already possesses advisory competence. Article 191, UNCLOS, states:

The Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

Of course, Article 159 (10) has foreshadowed that competence by enabling the Assembly of the International Seabed Authority to seek advisory opinions from the Tribunal under certain conditions.

23. There are four reasons why the advisory competence of the Sea-Bed Disputes Chamber is unique, and specially created for the regime of the Area in UNCLOS. In contrast, any sign of a similar competence reserved for the full bench of the Tribunal is non-existent.

24. First, Article 191 appears in section 5 of Part XI that is entitled "Settlement of Disputes and Advisory Opinions". There is no doubt that the negotiating States at UNCLOS III took a deliberate step in labelling the section as such. In the *Informal Single Negotiating Text* (1975), the proposed tribunal was provided with advisory competence in relation to the work of the Council of the future Sea-Bed Authority, with the name of the tribunal changed only in 1979 to that of "Sea-bed Disputes Chamber of the Law of the Sea Tribunal".<sup>24</sup> This consistency in recognising the advisory competence of the Sea-Bed Disputes Chamber was contrasted by the complete lack of recognition of a similar competence in favour of the full bench of the Tribunal in the negotiations held at UNCLOS III. That

<sup>24</sup> Satya N. Nandan, Michael W. Lodge, and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. vi (Martinus Nijhoff Publishers, 2002), ss. 191.3-191.5, 642-643.

differential treatment has naturally given rise to the inference that the full bench of the Tribunal was not envisaged to have and indeed has no advisory competence.<sup>25</sup> Furthermore, the contrast between the jurisdiction of the Sea-Bed Disputes Chamber and that of the full Tribunal is clearly shown in the fact that, in the later stages of UNCLOS III when the shape and form of the future UNCLOS became gradually settled, among the negotiating States, "there was a wide measure of agreement that the acceptance of the jurisdiction of the Sea-Bed Disputes Chamber for the resolution of conflicts arising from activities in the Area should not entail acceptance of the jurisdiction of the Law of the Sea Tribunal for other disputes."<sup>26</sup> It was clear, then, that nothing more was acceptable to the States without an explicit provision in the negotiating texts.

25. Secondly, it is notable that as regards the Sea-Bed Disputes Chamber, Article 14, Annex VI, UNCLOS, provides that "[i]ts jurisdiction, powers and functions shall be as provided for in Part XI, section 5". It follows that Article 21, Annex VI, does not cover the chamber's jurisdiction, even though the article defines the competence of the Tribunal as a whole. The Sea-Bed Disputes Chamber has that competence because it is explicitly so given in Part XI. In addition, the jurisdiction *ratione personae* of that chamber and the applicable law are to be found in section 4 rather than section 2 of Annex VI. Therefore, an extension of advisory competence to the full bench of the Tribunal would require an explicit provision in UNCLOS.

26. Thirdly, the uniqueness of the chamber's advisory competence is also shown by the provision of Article 40 of Annex VI, which reads:

1. The other sections of this Annex which are not incompatible with this section apply to the Chamber.

<sup>25</sup> *Ibid.*, s. 191.7(b), 644.

<sup>26</sup> UNCLOS III, *Memorandum by the President of the Conference on document of A/CONF.62/WP.10, A/CONF.62/WP.10/Add.1, 22 July 1977, Official Records*, vol. viii, 70.

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

The chamber is therefore not necessarily bound by the sections of Annex VI except section 4, and may disregard the rules of procedure of the annex as it sees fit when it exercises advisory competence. The specific reference to the chamber's advisory competence in Article 40 (2) is remarkable, because it shows that the procedures of the annex, which Article 40 allows the chamber to follow at its discretion, do not contain one that suits the exercise of advisory competence by the chamber. If the other sections of Annex VI contained a modicum of rules on the advisory jurisdiction of the Tribunal, it would be unlikely that the Sea-Bed Disputes Chamber is given such discretion as specifically provided for under Article 40 (2). The only possible reason to explain that discretion is that the provisions in other sections of Annex VI, as far as they are "relating to procedure before the Tribunal", do not pertain to advisory proceedings, thus forcing the chamber to improvise, as it were. This provision clearly reveals the legislative intent of the negotiating States at UNCLOS III, to the extent that the leading commentary on UNCLOS states, matter-of-factly, that "the Tribunal itself has no advisory jurisdiction".<sup>27</sup>

27. Fourthly, the uniqueness of the chamber's advisory competence is complete by the fact that it is provided for in Article 191 as an obligation imposed upon the Sea-Bed Disputes Chamber, thus foreclosing any room for discretion on the part of the chamber to decline advisory requests. This mandatory characteristic of the advisory competence of the chamber stands in contrast to the discretionary feature of the advisory competence of the PCIJ, ICJ, and other judicial bodies.

28. It is therefore clear that the advisory competence of the Sea-Bed Disputes

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<sup>27</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.VI.204, 416.

Chamber of the ITLOS is unique to that chamber, which has been so since it made first appearance in the course of the negotiations at UNCLOS III. Moreover, Special Commission 4 of the Preparatory Commission only included this advisory competence of the chamber in Part VI, titled 'Advisory Proceedings', of its *Final Draft Rules of the Tribunal* of 1994.<sup>28</sup> There is therefore a *prima facie* impossibility that the negotiating States at UNCLOS III somehow implicitly left the door open in the final text of UNCLOS for the competence to be extended to the full bench of the ITLOS. Justification is sorely needed for that implied intention, if any. In short, UNCLOS is not silent on the advisory function of the ITLOS, but confines it to one of its chambers.

*2. No advisory competence can be derived from Article 288 (2), UNCLOS*

29. Article 288 (2) of UNCLOS is concerned with any dispute concerning the interpretation or application of an international agreement related to the purposes of UNCLOS, which is submitted to a court or tribunal referred to in Article 287 in accordance with the agreement. This article clearly has no relations to the advisory competence of the Tribunal. Article 288 is included in section 2, Part XV, UNCLOS, and the section heading is "compulsory procedures entailing binding decisions". As a matter of established practice, the exercise of advisory competence does not result in binding decisions,<sup>29</sup> except in rather exceptional circumstances in which such an opinion is given that binding force by way of treaty.<sup>30</sup> Moreover, legal questions for advisory proceedings are not necessarily interchangeable in meaning with "disputes".<sup>31</sup>

<sup>28</sup> Preparatory Commission, *supra* note 10, 86-89.

<sup>29</sup> ICJ, *Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports 1950, 65, 71 ("[t]he Court's reply is only of an advisory character; as such, it has no binding force").

<sup>30</sup> Art. XII, *Statute of the Administrative Tribunal of the International Labour Organization*, at [www.ilo.org](http://www.ilo.org).

<sup>31</sup> ICJ, *Peace Treaties*, *supra* note 29. Also see ICJ, *Case Concerning the Northern Cameroons* (Cameroon v. UK), Preliminary Objections, ICJ Reports 1963, 131, 133, para 4 (Separate Opinion of Judge Morelli); ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 21 ("The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.")



Otherwise, the advisory procedures in any given treaty would become redundant, because they would be subsumed by standard conventional rules for dispute settlement. In addition, disputes may be presented as legal questions for advisory opinion. That would entail the serious problem of adjudicating a dispute without the consent of the States concerned, of which further discussion will be given in sub-section VI.2, below. It must be recalled that this problem was firmly borne in mind by the members of the Informal Inter-Allied Committee in 1944, when the committee considered the future of the PCIJ and the idea of a new court for the post-war era.<sup>32</sup>

30. Acceptance in UNCLOS of the established practice in this respect is also confirmed by the fact that the section heading under which Article 191 is found, "Settlement of Disputes and Advisory Opinions", clearly differs from the section heading under which Article 288 appears, "Compulsory Procedures Entailing Binding Decisions".

31. The preceding reasoning applies to other provisions in Part XV, such as Article 280. While States Parties to UNCLOS are given the freedom of choice under this article, the choice is confined therein to a means of settlement in respect of *disputes* concerning the interpretation or application of UNCLOS. No provisions of Part XV, on the whole, can be so interpreted as to imply a possible case for the existence of advisory competence.

*3. No advisory competence can be inferred from Annex VI, UNCLOS*

a) Article 21

32. This article of Annex VI, UNCLOS, has been relied on as the legal basis for

<sup>32</sup> *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 10 Feb 1946, in 39 *American Journal of International Law* (1945), Supplement, 1, para 71.

the advisory competence of the full bench of the ITLOS.<sup>33</sup> The article, titled “Jurisdiction”, 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.

33. This article recognises the jurisdiction of the ITLOS over three types of cases. First, there is the type of cases involving “all disputes...submitted to” the Tribunal “in accordance with this Convention”. Secondly, there is the one consisting of “all applications submitted to” the Tribunal “in accordance with this Convention”. Thirdly, there is the type of cases comprising “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”. These three types are all concerned with the *ratione materiae* jurisdiction of the Tribunal.

34. As regards the first type of cases, there is no doubt that, in the framework of UNCLOS, a “dispute” requires for its solution the exercise of contentious jurisdiction by the ITLOS, and that this special term cannot engender advisory competence.

35. As to the second type, while the phrase “all applications” might appear to be broad enough in connotation to imply an application or request for advisory opinion, it is qualified by the condition of Article 21 that the applications must be submitted in accordance with UNCLOS. The phrase cannot by itself conjure up the advisory competence of the full bench of the ITLOS if, with regard to that competence, the *Convention* is otherwise silent throughout. Indeed, the word “application” has defined meanings and circumstances for application in Part XV, UNCLOS, as has been used specifically in, for instance, Article 292 regarding

<sup>33</sup> President of the ITLOS, Speech before the 55<sup>th</sup> Plenary Meeting of the UNGA (A/60/PV.55), Agenda Item 75, “Oceans and the Law of the Sea”, 28 Nov. 2005, 27.

prompt release cases and Article 294 concerning preliminary proceedings. Neither article can support a claim to advisory competence for the full bench of the Tribunal.

36. As for the third type of cases, the negotiating history of Article 21 has shown clearly that the context in which the article was drafted had been one of dispute settlement.<sup>34</sup> At no point in time during the negotiation of the article was it suggested by any negotiating State or the drafting committee that the article would countenance the advisory competence of the full bench of the Tribunal. Furthermore, Article 21 reflects the approach of Article 36 (1), of the *ICJ Statute*.<sup>35</sup> Article 36 (1) provides:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

According to one authority, the phrase “all matters specially provided for” in Article 36 (1) “points to a category of unidentified future cases, such as a dispute arising out of the interpretation or the application of the treaty in which the compromissory clause appears”.<sup>36</sup> In both “cases” and “matters”, the ICJ’s jurisdiction “flows from the consent of the parties to the dispute”.<sup>37</sup> There is no indication that “all matters” under Article 36 (1) may be other than cases or more generally, disputes.<sup>38</sup> The three terms are therefore interchangeable in this legal context. It is also clear that the structure of the *ICJ Statute* is such that the advisory competence of the ICJ is expressly recognised under Article 65, and that Article 36 does not need to touch upon that competence at all. This

<sup>34</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.VI.125-128, 378-380.

<sup>35</sup> *Ibid.*, A.VI.122, 378.

<sup>36</sup> Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. ii (4<sup>th</sup> edn., Leiden/Boston, Martinus Nijhoff, 2006), 641.

<sup>37</sup> *Ibid.*

<sup>38</sup> Christian Tomuschat, “Article 36”, in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, and Christian Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn., Oxford, Oxford University Press, 2012), 660, mn 38.

approach of the *ICJ Statute* shows that the correct understanding of the phrase “all matters” is that it only means cases involving disputes.

37. None of the three types of cases is open to the advisory competence of the full bench of the Tribunal. They cannot support the founding of such competence.

38. In any case, Article 21 has to be read within the context of section 2 of Annex VI. This is a broader point, to be given next, that the scope of Article 21 is limited by other provisions of Annex VI that leave no doubt that Article 21 only relates to the contentious jurisdiction of the Tribunal over cases involving disputes.

b) Other Provisions of Annex VI Further Limit the Application of Article 21 to Disputes

b. i) Article 1 (4)

39. Article 1 (4), Annex VI, UNCLOS, provides that “[a] reference of a dispute to the Tribunal shall be governed by the provisions of Parts XI and XV.” This is part of a single article entitled “General Provisions” in the Annex. It envisages the settlement of a dispute by the ITLOS, without mentioning any “legal question” that may imply an exercise of advisory competence by the Tribunal. Further, under this clause, the reference of a dispute to the Tribunal must follow the terms of Part XI and Part XV, UNCLOS. Neither Part contemplates the employment of the full bench of the Tribunal in advisory proceedings. The only body for which advisory competence is recognised is the Sea-Bed Disputes Chamber under various provisions of Part XI.

40. It is clear that Article 1 (4) confines the function of the Tribunal to that of

settling disputes as defined in Parts XI and XV, and nothing more.

b.ii) Article 20

41. In Annex VI, Article 20 appears in section 2, with the section heading of “competence”. Its own heading is “access to the Tribunal”. The section includes Articles 20-23. Article 20 (1) opens the Tribunal to all States Parties to UNCLOS. Article 20 (2) reads:

The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

Article 20 is thus concerned with the *ratione personae* aspect of the jurisdiction of the ITLOS.

42. As the heading of Article 20 shows, it cannot generate the Tribunal’s jurisdiction, which is solely within the province of Article 21. The key phrase in Article 20 is that of “open to”, which relates to entities that can come before the Tribunal. Furthermore, the reference in Article 20 (2) to “all the parties to that case” indeed limits the application of the jurisdiction of the Tribunal in that situation to disputes. It is apparent that a case as such is a contentious one, to which alone there are “parties”. The wording of “parties to that case” is plainly incompatible with the nature of advisory proceedings.

b. iii) Article 22

43. It suffices to point out that this article is concerned with “any disputes concerning the interpretation or application of such treaty or convention” that is both in force and concerned with the subject matter of UNCLOS. If this article is

seen as anything close to a clarification of the provision of Article 21, Annex VI,<sup>39</sup> that effect only strengthens the overall point made in this section, that the competence of the Tribunal in section 2, Annex VI, is concerned solely with disputes, being thus contentious in nature.

b. iv) Article 23

44. The contentious nature of the Tribunal's competence under section 2, Annex VI is further buttressed by the presence in this section of Article 23, entitled "Applicable law". The article provides that "[t]he Tribunal shall decide all disputes and applications in accordance with article 293". Article 293 is included in section 2, Part XV, UNCLOS, stating in part that "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

45. Thus, the provision of Article 293 is applicable to a court or tribunal given jurisdiction under section 2, Part XV. It is interesting that Article 23, Annex VI, only deals with the applicable law relating to the compulsory, contentious jurisdiction of the ITLOS. If the competence of the full bench of the Tribunal did cover advisory proceedings, there would appear to be a serious gap under UNCLOS as to the applicable law for such proceedings. For, other than Article 40, Annex VI, there is no other provision in UNCLOS allowing for a *mutatis mutandis* application of the provisions of Annex VI.

b. v) Article 24

46. This article, appearing in section 3 of Annex VI on the procedures before the Tribunal, provides for the institution of proceedings before the ITLOS. Paragraph 1 states:

<sup>39</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.VI.129, 380.

Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated.

47. The paragraph allows the submission of a dispute by the alternative means of special agreement or written application. Both means of submission will have to indicate the subject of, and “the parties” to, the dispute. There is no room for implying, in the light of the wording of the paragraph, that the procedure it prescribes also covers the submission of a legal question for advisory opinion. The only adaption of this procedural rule as allowed under UNCLOS is to be found in the provision of Article 40 (2), Annex VI, regarding the advisory procedure before the Sea-Bed Disputes Chamber. There is no other possibility to apply the procedural rules of section 3 *mutatis mutandis* in advisory proceedings.

48. The existence of a deficit in procedural rules for the advisory function of the full bench of the Tribunal, if any, is also shown in Article 30, Annex VI.

b.vi) Article 30 and related provisions

49. Article 30 defines the way in which the Tribunal renders its judgments. Even with a broad meaning given the word “judgment”, it cannot include an advisory opinion. Similarly, the term “decision”, used in such provisions as Article 39, Annex VI, cannot embrace an advisory opinion, but should be understood, literally, to include judgments or orders of the Sea-Bed Disputes Chamber.

*4. No advisory competence can be inferred from Annex IX, UNCLOS*

50. Annex IX, UNCLOS, is entitled “Participation by International Organizations”. Article 7, with the heading “settlement of disputes”, relates to “disputes concerning the interpretation or application” of UNCLOS. Article 7 (2) states

that:

Part XV applies *mutatis mutandis* to any dispute between Parties to this Convention, one or more of which are international organizations.

51. What has been stated above with regard to the purpose and object of Part XV applies to disputes involving international organizations as referred to in this article. By the reference in Article 7 to Part XV, UNCLOS, Annex IX is thus integrated in the system of settlement of disputes established under UNCLOS.<sup>40</sup> No advisory jurisdiction can be inferred from the wording of Article 7.

52. In addition, it may be observed that Annex IX does not have other provisions than Article 7 that may allow for the involvement of judicial bodies in the implementation of this annex. In other words, apart from settlement of disputes, the annex is silent with regard to any other function of the judicial bodies, including the ITLOS. This silence, as the one prevalent in Part XV, militates against any interpretation that advisory competence may be reserved under this annex.

### 5. Conclusion

53. The analysis in this section shows a lack of legal basis in UNCLOS for the advisory competence of the full bench of the ITLOS. The conclusion is of two-fold.

54. First, the regime of Annex VI is integral to that of UNCLOS, and subject to relevant provisions of Parts XI and XV of the *Convention*, and that they combine to serve the ultimate purpose of settlement of disputes concerning the interpretation or application of UNCLOS and other related treaties. As a result, the clauses of Annex VI, primarily organizational and procedural by nature, are

<sup>40</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.IX.10, 462.



designed to carry into effect the provisions in Parts XI and XV regarding the jurisdiction of the Tribunal. Article 21, Annex VI, is a generalisation of the jurisdictional provisions of the two Parts. It follows that the full bench of the Tribunal cannot acquire advisory competence under Annex VI any more than it can under Parts XI and XV. This submission is not weakened by an examination of the provisions of Article 288 and Annex IX.

55. Secondly, the wording of relevant provisions of Annex VI further limits the competence of the full bench of the Tribunal to contentious cases.

#### **IV. The Doctrine of Inherent Jurisdiction of a Court or Tribunal**

56. This question will be considered, even though the ITLOS has not formally claimed advisory competence on the basis of it. But it is relevant to the present debate, in that possible sources of the competence of the full bench of the Tribunal might eventually turn on inferences drawn from established doctrines outside the Statute of the ITLOS.

57. In international judicial practice, there is known the doctrine of inherent jurisdiction or powers of a court or tribunal, which exist in certain circumstances. Such powers are “judicial in nature and not expressly provided for” in the constitutive instruments of the court or tribunal.<sup>41</sup> The ICJ explained the notion of inherent jurisdiction as follows:

It should be emphasized that the Court 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

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<sup>41</sup> International Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95-14-AR 108bis, Appeals Chamber, 29 Oct. 1997, para 25, n 27.

"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 findings 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.<sup>42</sup>

58. In the instant case, the powers so expounded by the ICJ were employed for the Court "to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters".<sup>43</sup> More specifically, the Court sought, at that stage of the case, to determine the existence of the real dispute of the case.<sup>44</sup> The inherent powers were, therefore, ancillary to the primary jurisdiction of the Court over the merits of a pending case.

59. It is clear, therefore, that, in its practice, the ICJ has assumed a type of jurisdiction that is not equal in status to its primary jurisdiction as recognised in the *UN Charter*, including the *ICJ Statute*. This assumed jurisdiction is regarded by it as "a necessary condition of the Court—or any court of law—being able to function at all".<sup>45</sup> But in contrast, advisory jurisdiction is on the same footing as contentious jurisdiction—both being part of the Court's primary jurisdiction. The advisory competence is by nature not one that is necessary to safeguard the contentious jurisdiction of the ICJ. Nor is it necessary for the orderly function of the Court or for maintenance of its judicial character. In short, it parallels the Court's contentious jurisdiction.<sup>46</sup>

60. The ICJ's notion of inherent jurisdiction has been recognised by other

<sup>42</sup> ICJ, *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 253, para 23.

<sup>43</sup> *Ibid.*, para 22.

<sup>44</sup> *Ibid.*, para 29.

<sup>45</sup> ICJ, *Northern Cameroons*, supra note 31, 97, 103 (Separate Opinion of Judge Fitzmaurice).

<sup>46</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, supra note 21, Dissenting Opinion of Judge Oda, para 47.

international judicial bodies. Thus, in relation to contempt powers not provided for in its Statute, the Appeals Chamber of the ICTY stated that it “does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.”<sup>47</sup> It is well known that inherent jurisdiction in international judicial practice manifests most often in various types of procedural powers necessary for the administration of justice by the relevant courts and tribunals.<sup>48</sup>

61. What may be inferred from the preceding is that reliance upon the doctrine of inherent jurisdiction by an international court or tribunal has to be based on such a general premise as recognised in international judicial practice, that the jurisdiction so claimed is ancillary in nature and concerned with procedural powers that are facilitative to the exercise of the primary jurisdiction of the court or tribunal. The primary jurisdiction, however, has to come from the constituent instrument of the court or tribunal. Additional powers of the same calibre can only be acquired as the result of a legislative act authorized under the constituent instrument. The acquisition of those powers by the court or tribunal through case law is inappropriate for maintaining its judicial character.

62. There is a further point to be made. While a court or tribunal may be given the power by the constituent instrument to devise its rules of procedure, never has one such institution acquired advisory competence by the simple fact that it itself inserts a provision in the rules of procedure to that effect. The power to devise such rules is plainly conditioned by its remit: rules on *procedure*, as distinct from jurisdiction or substantive law. In this regard, the practice remains settled that the legislative prerogative, in terms of adding new types of

<sup>47</sup> ICTY, *Prosecutor v. Duško Tadić, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, Case No. IT-94-1-A-R77, 31 Jan. 2000, para 13.

<sup>48</sup> Cf Chester Brown, “The Inherent Powers of International Courts and Tribunals”, 76 *British Year Book of International Law* (2005), 195, 211-222.

competence for an international court or tribunal, clearly rests with the States Parties to the constituent treaty, rather than the judicial body itself.

63. In the *Final Draft Rules of the Tribunal* of 1994, which were later submitted to the Meeting of States Parties, Special Commission 4 of the Preparatory Commission made no mention whatsoever of the advisory competence of the full bench of the Tribunal in Part VI, "Advisory Proceedings".<sup>49</sup> The whole Part VI was explicit with its intended addressee: the Sea-Bed Disputes Chamber. While Article 16, Annex VI, UNCLOS, allows the Tribunal to adopt its rules of procedure, there is no provision of the *Convention* granting the Tribunal the power to expand its jurisdiction. Thus, adopted by the Tribunal, Article 138 of the *Rules of the Tribunal* might arguably amount to a case of the exercise of inherent jurisdiction by the Tribunal.<sup>50</sup> Caution is certainly called for in this respect.

#### **V. The Way Forward: Enlargement of Advisory Competence by Way of Amendment of UNCLOS**

64. The Chinese Government is mindful of the concerns that have prompted the filing of the Request. Were there a genuine need for the advisory competence to be extended to the full bench of the ITLOS, the remedy for the current lack of pertinent provisions under UNCLOS would be by way of amendment of the *Convention*. It is in consistence with the basic rule of the law of treaties that a treaty may be amended by agreement between the parties.<sup>51</sup> There are two sets of amendment procedures available under the *Convention*.

65. The first set is provided for under Article 312, UNCLOS. Paragraph 1 of the article provides:

<sup>49</sup> Preparatory Commission, *supra* note 10, 86-89.

<sup>50</sup> Cf P. Chandrasekhara Rao and Ph. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Leiden/Boston, Martinus Nijhoff Publishers, 2006), 375, 393.

<sup>51</sup> Art. 39, *Vienna Convention on the Law of Treaties* (1969).

After the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within 12 months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.

Thus, since November 2004, the procedures laid down in Article 312 have become operative, and the initiative to trigger them can be taken by a single State Party.

66. The second set of procedures is to be found in Article 313, UNCLOS. Paragraph 1 provides:

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.

The proposal for amendment may thus come from any State Party, and there is no need for a formal conference of all the States Parties to be convened.

67. Either procedure is clearly defined under UNCLOS. The initiating step is both easy and convenient. While no proposal for amendment has occurred so far, the prospect of pursuing either route in the circumstances of the present case is likely to be more attractive than other solutions.

68. As a word of caution, the *Chinese Statement* wishes to stress that, in the event that an amendment of the *Convention* is initiated for the present purposes, it is imperative that suitable rules of jurisdiction, applicable law, and procedure are adopted by the States Parties to UNCLOS, tailored to the special needs of

advisory proceedings before the full bench of the Tribunal. It is, for instance, both efficient and desirable that those rules to be devised reflect the existing model of the ICJ in advisory proceedings, by granting standing primarily to institutions established under UNCLOS, and then international organizations established under other treaties related to the purposes of UNCLOS, and by confining the legal questions, thus submitted, to those that arise within the scope of the activities of such institutions or organizations. It goes without saying that neither the legal questions nor the eventual advisory opinions affect third States to UNCLOS or related treaties or agreements.

## **VI. Issues of Jurisdiction and Judicial Propriety Related to the Request of the SRFC**

### *1. Issues of jurisdiction*

69. Supposing the full bench of the Tribunal could be in possession of advisory competence under Article 21, Annex VI, UNCLOS,<sup>52</sup> it seems that the Request would still fall outside the competence of the Tribunal, as it meets neither the requirements of Article 20 (2) nor those of Article 21, both of Annex VI, UNCLOS.

70. As was shown above in sub-section III.3.b), above, Article 20, Annex VI, defines the *ratione personae* aspect of the jurisdiction of the ITLOS. As this is an inherent aspect of jurisdiction, failure to meet its requirement will also result in the loss of jurisdiction, contentious or advisory, of the Tribunal. In the practice of the ICJ, the *ratione personae* aspect is considered by the Court before the *ratione materiae* aspect of its jurisdiction.<sup>53</sup> In the present context, Article 20 precedes Article 21 in Annex VI, and naturally comes first for consideration in the course of the determination of the jurisdiction of the Tribunal. In terms of the

<sup>52</sup> President of the ITLOS, Speech before the 55<sup>th</sup> Plenary Meeting of the UNGA (A/60/PV.55), Agenda Item 75, "Oceans and the Law of the Sea", 28 Nov. 2005, 27.

<sup>53</sup> ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, ICJ Reports 2004, 279, para 46.

general relation between these two important articles, Article 21 and Article 20 complement and qualify each other in defining the jurisdiction of the ITLOS, as they are wedged in the same section of Annex VI regarding the competence of the Tribunal.

71. The possibility is remote that the terms of Article 20 (1) might be relied on to justify a request for advisory opinion from the ITLOS. It is therefore certain that only Article 20 (2) is relevant to the present discussion of the advisory competence of the full bench of the Tribunal. That means that, if a request came from a State Party to UNCLOS, the Tribunal would be without jurisdiction under Article 20 (2). The Request in Case No. 21 may just be such an example, as it effectively came from seven States Parties to UNCLOS, who are at the same time the member States of the SRFC and the States Parties to the *MCA Convention*.

72. The Request has the particular aim to enable the SRFC member States, as opposed to the SRFC, to “know precisely what their rights and obligations are in this connection, especially the newly created rights and obligations”.<sup>54</sup> This apparent switch in the identity of the entity that has submitted the Request may create confusion. There is no clear indication in the *Technical Note* or other supporting documents filed together with the Request as to the nature and extent of the legal competences allocated and transferred between the SRFC and its member States, even though the SRFC has legal personality under Article 1 of the constituent treaty of 1985, as amended in 1993. Thus, as things stand, the questions of the Request may be concerned more with the rights and obligations of the member States than those of the organization of the SRFC. The Request could therefore be seen as having been submitted by the member States of the SRFC. If so, it would have been filed in apparent disregard of the

<sup>54</sup> *Technical Note*, 6.

established practice of the PCIJ and ICJ, as well as the model established under Article 191, UNCLOS, that it is the relevant organization that requests advisory opinion to guide its own activities. It therefore fails to meet the requirement of Article 20 (2), Annex VI, regarding the status of entities. Consequently, the Tribunal would be without jurisdiction over the Request on account of this failure.

73. Moreover, Article 20 (2) recognises the standing of entities other than the States Parties to UNCLOS before the Tribunal in two types of cases. The first type is of the cases “expressly provided for in certain provisions of Part XI”. The second consists of cases “submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case”. It is immediately clear that Case No. 21 is not of the first type, because it does not concern issues arising within Part XI. It is the second type of cases that is relevant, but the Request seems to have failed to meet the requirements for this type of cases.

74. The agreements referred to in the second type of cases must concern a “case”, the jurisdiction of the Tribunal over which is recognised under those agreements “accepted by all the parties to that case”.<sup>55</sup> But the Request does not indicate the existence of a case. True, Article 33 of the *MCA Convention* includes the term “matter” which might include a case. However, the questions raised by the Request cannot possibly amount to contentious cases, to which alone there are “parties”, since they are considered in the Request to be within the scope of Article 33, rather than Article 34 (on dispute settlement), of the *MCA Convention*. Otherwise, they would have been dealt with under Article 34. Even supposing the phrase “a given legal matter” in Article 33 could include a case in terms of Article 20 (2), Annex VI, there is no indication in the Request as to which are the parties to the “case” it is bringing before the Tribunal—except

<sup>55</sup> Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), A.VI.115, 375.



perhaps the SRFC. It is therefore unclear from the Request how, in terms of Article 20 (2), Annex VI, the *MCA Convention* has been accepted by “all the parties” to the “case” brought by the Request. Moreover, if the *MCA Convention* is not accepted by the SRFC as a party, which might be the case on the basis of the materials currently available in Case No. 21, the SRFC could not avail itself of the provision of Article 20 (2) to found its own standing before the Tribunal. The Tribunal would in turn have no jurisdiction over the Request submitted by this organization.

75. The reference to other agreements in Article 21, Annex VI, UNCLOS, follows closely the corresponding clause in Article 20 (2), Annex VI, except for the latter’s requirement of acceptance by all the parties to a case.<sup>56</sup> Given that Articles 20 (2) and 21 differ literally on the scope of “any other agreement” used in both provisions, Article 20 (2), being the one with a narrower scope due to its condition of acceptance “by all the parties to that case”, should prevail over Article 21 in application. It follows that an agreement conferring jurisdiction on the Tribunal, in terms of both Articles 20 (2) and 21, must satisfy the condition of Article 20 (2) in any case; otherwise, the Tribunal will lose jurisdiction, notwithstanding Article 21.

76. With regard to Article 21, Annex VI, it is clear that the Request does not belong to any of the three types of cases under Article 21 as referred to in sub-section III.3.a), above. As the Request does not amount to a dispute or an application in the sense of Article 21, it could only relate to the third type of cases under that article, as one of “all matters specifically provided for” in other agreements.

77. The reasonable interpretation in this regard would be that the condition of

<sup>56</sup> Ibid., A.VI.124, 378.

Article 21, regarding all matters specifically provided for in another agreement, requires in effect that such matters be concerned with the interpretation or application of the agreement which, in Case No. 21, would be the *MCA Convention*. It follows that the questions raised by the Request must be confined to such matters as are regulated by the *MCA Convention*. If so, two problems arise with regard to the conformity of the Request with the condition of “specifically provided for” under Article 21.

78. First, the condition under Article 21 may be understood to link only to the functions of the SRFC as prescribed in the *MCA Convention*. It is, after all, the SRFC that has submitted the Request in the present case, and the proposed advisory opinion by the Tribunal is naturally to assist the SRFC, an international organization, to discharge its functions as defined in, among others, the constituent instrument: the *Agreement Establishing a Sub Regional Fisheries Commission* of 1985.<sup>57</sup> The functions of the SRFC have of course been refined, supplemented and updated in subsequent treaties concluded by the member States of the organization, including the *MCA Convention*. Those functions should therefore constitute the focus for the proposed advisory opinion. At a glance, however, there are only so few articles of the *MCA Convention* devoted to the functions of the SRFC or its organs, like Articles 19 (2), 26 (5), 29 (4), 32 (2), 33, 34 (1), 37, and 38. The Request has not shown that the questions it has submitted for advisory opinion are closely linked to the interpretation or application of those provisions. That may fail to meet the requirement of “specifically provided for” under Article 21. It is consequently unclear whether addressing the questions of the Request would help the SRFC at all in implementing the *MCA Convention*.

<sup>57</sup> At [www.itlos.org](http://www.itlos.org). Cf Art.2 of the 1985 agreement establishing the SRFC states that “[t]he Commission shall aim 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.” The 1993 revision of the agreement did not change that function.

79. Secondly, the condition of Article 21 in question may be understood as referring to all substantive matters regulated under the *MCA Convention*, including those of the functions of the SRFC. In that wider context, the Request may have raised questions that are *ultra vires* the scope of the *MCA Convention*, thus also failing the condition of Article 21, in that the questions thus raised by the Request are not necessarily matters "specifically provided for" in the *MCA Convention*. Couched in rather general terms, the questions raised in the Request are directly concerned with the rights, obligations or liabilities of the flag State, whose vessels are engaged in IUU activities, the coastal States which may suffer from such activities, and international agencies issuing fishing licenses. But the *MCA Convention* frequently refers to the obligations of the vessels of third States, rather than those of the third States. This may be shown in, for example, Articles 4 (1), 5, 10, 16, 17 (1), 18, 27, and 28 of that convention. Further, the first question of the Request involves the flag State whose vessels are allegedly involved in IUU activities in the exclusive economic zone (EEZ) of certain "third party States". The latter are third States to the *MCA Convention*, which defines "third party States" in Article 2 as, in part, non-members to the *MCA Convention* (thus also being non-members of the SRFC). If the flag State is also a third State to the *MCA Convention*, the question will have nothing to do with either the States Parties to the *MCA Convention* or the SRFC itself. Furthermore, the issue of liability, central to the second and third questions of the Request, is not covered by the *MCA Convention*, let alone "specifically provided for". Moreover, in the Request, the scope of geographical applicability is not provided for those four questions. It would be rather strange, for argument's sake, if the questions and the answers given covered the IUU fishing activities in the Bering Sea. That location would be totally irrelevant to the SRFC or the *MCA Convention*, since the title and Article 1 (2) of the *MCA Convention* confine its applicability to "the maritime area under jurisdiction" of the member

States of the SRFC. This shows that the questions raised by the Request may have manifested a degree of generality such that they could easily drift beyond the scope of the *MCA Convention*. It would follow that they could in turn go beyond the scope of the functions of the SRFC as embodied in the *MCA Convention*. Consequently, the Request falls outside the jurisdiction of the Tribunal.<sup>58</sup>

80. In conclusion, the filing and content of the Request seem to have failed to meet various requirements of Article 20 (2) and 21, Annex VI, UNCLOS. It may therefore be necessary to explain, in the proceedings of Case No. 21, whether the *MCA Convention* is to be regarded as an agreement in terms of Articles 20 (2) and 21, Annex VI. In view of the generally crafted phrase “a given legal matter” in Article 33 of the *MCA Convention*, it would also be necessary to determine whether the phrase could be compatible with the condition of “specifically provided for” under Article 21. Otherwise, the full bench of the ITLOS would have no jurisdiction at all over the questions brought by the Request.

## *2. Issues of judicial propriety*

81. Even assuming that the full bench of the ITLOS did have advisory competence in Case No. 21, the Chinese Government considers that there are factors that should sway the full bench to decline to exercise that competence in respect of the Request. These are the factors that go to the issue of judicial propriety of the ITLOS to accede to the Request.

82. In the practice of the ICJ, there are circumstances in which the Court will decline to exercise advisory function. In the view of the Court,

<sup>58</sup> ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, para 28 (“the WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions”).

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.<sup>59</sup>

The Court has also observed, in view of the practice of both itself and its predecessor, that “in their advisory jurisdiction, they must maintain their integrity as judicial bodies”.<sup>60</sup>

83. There are, therefore, circumstances in a given case which may persuade the court or tribunal concerned not to exercise advisory competence in order to safeguard its judicial character and where relevant, its status as a judicial organ of an international organization. It is, of course, tentative to suppose that the full bench of the Tribunal may decline to exercise advisory competence, since its Sea-Bed Disputes Chamber does not have that discretion.

84. On the basis of the principle outlined above, and on the basis of the materials currently available in Case No. 21, the *Chinese Statement* will examine below two circumstances that could call for the ITLOS not to exercise advisory competence over the Request, on the hypothesis that its full bench did possess such competence in the present case.

a) Consent of the States concerned in advisory proceedings

85. There is no doubt that advisory competence cannot be utilized to settle a dispute currently pending between two or more States without their consent. As well established in the ICJ's practice,

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to

<sup>59</sup> ICJ, *Peace Treaties*, supra note 29, 72.

<sup>60</sup> 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](http://www.icj-cij.org).

give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.<sup>61</sup>

It is therefore abundantly clear that the existence of the consent of the States concerned to the jurisdiction of a court or tribunal is a fundamental principle of international law.

86. It may be speculative at this point in the proceedings of Case No. 21 to surmise that the questions raised in the Request could involve disputes. Supposing the questions have arisen on the basis of certain particular facts, which might be the case, the ITLOS, in exercising advisory competence, could be faced with the problem of consent of the States concerned. This problem may arise in Case No. 21, since the Request may have been filed on behalf of the SRFC member States rather than of the SRFC itself.

87. Another related consideration is that, while abuse of rights is covered by the terms of Article 300, UNCLOS, it may still be necessary that, were it given advisory competence, the full bench of the ITLOS should have such discretion as the ICJ has under Article 65 of the *ICJ Statute*. That would provide the full bench with the necessary power to ensure respect for the fundamental principle of consent of States in judicial proceedings. Again, this shows the need to provide for relevant procedures whereby the advisory competence of the full bench can be exercised.

#### b) Mootness or vagueness of the questions of the Request

88. This issue is considered on the basis of the materials currently available at this stage of Case No. 21. In respect of the Request, the subject matter of the

<sup>61</sup> ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, para 33.

relevant treaty, ie the *MCA Convention*, is covered by, and closely reflects, a considerable and growing body of treaties, international standard practices, and customary law. The preamble of the *MCA Convention* proclaims the desire of the member States of the SRFC to adapt the original 1993 Convention “to the technical and legal changes that have taken place since its adoption”.<sup>62</sup> The *MCA Convention* “shall repeal and replace” the 1993 Convention.<sup>63</sup> The preamble also reaffirms the commitment of the SRFC member States to the *Code of Conduct for Responsible Fishing* of 1995 of the Food and Agriculture Organization of the United Nations (FAO), and recalls their will to implement the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* of 2001 (International Plan of Action), and the need to incorporate in their national laws the *FAO Agreement on Port State Measure to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* of 2009 (Agreement on Port State Measures).<sup>64</sup> Indeed, the definition of the IUU fishing contained in the *MCA Convention* reflect verbatim that of the *International Plan of Action* approved by the FAO Committee on Fisheries in March 2001.<sup>65</sup>

89. In the light of the preceding observation, there is a *prima facie* case that the Request might have raised questions to which there are already answers. If so, it may result in a concern with the mootness of the questions of the Request.

90. Furthermore, it could be very helpful if further clarification of the factual background of the Request as well as the scope of its questions were provided by the SRFC in the proceedings of Case No. 21. The importance of this point is clear, since the Tribunal would need before it “sufficient information and

<sup>62</sup> *Technical Note*, 6. The reference was to the *Convention on the Determination of the Conditions for Access and Exploitation of Marine Resources off the Coasts and the Member States of the SRFC*, 14 July 1993.

<sup>63</sup> Art. 41, *MCA Convention*.

<sup>64</sup> See [www.fao.org](http://www.fao.org).

<sup>65</sup> *International Plan of Action*, para 2.

evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character".<sup>66</sup> In addition, regarding the facts underlying the Request, it is equally inexpedient, in terms of procedure, for those interested States Parties to UNCLOS to speculate on such facts, while drafting written statements in pursuance of the Tribunal's order of 24 May 2013. The vagueness of the questions of the Request in their present form could therefore amount to a concern for the judicial propriety of the Tribunal to deal with them.

## **VII. Conclusion and Submissions**

91. For various reasons, there may be sympathetic views among the States Parties to UNCLOS towards the broadening of the advisory competence of the ITLOS. The *Chinese Statement* expresses the hope that, through constructive and creative efforts by the States Parties to UNCLOS, a solid foundation be established to empower the Tribunal in the desired direction, which would be spared the unenviable task to concretise this jurisdictional expansion by itself. It is always a principle of high importance that a court or tribunal does not assume the role of a legislator in international law,<sup>67</sup> unless it is given that power expressly or as a matter of inherent jurisdiction. This note of caution is especially pertinent with regard to the creation of such a substantive jurisdiction as the advisory competence of the full bench of the Tribunal.

92. In parallel to the judicial proceedings in Case No. 21 or any possible amendment process, the Chinese Government considers that the SRFC member States' concerns with IUU fishing activities may better be addressed

<sup>66</sup> ICJ, *Western Sahara*, supra note 61, para 46.

<sup>67</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, supra note 21, para 18 ("It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so.").



through enhanced cooperation with other States or regional and international organizations, including the FAO, since IUU fishing is a global issue, and technical, too. Paragraphs 28-31 of the *International Plan of Action* are relevant in this respect. But there are more rules that can assist the SRFC member States in the design of an effective system to combat the IUU fishing activities in question.

93. In Part VII, UNCLOS, Articles 116 and 117 of section 2, entitled "conservation and management of the living resources of the high seas", provide an example of the way for inter-state cooperation in offshore fisheries. Furthermore, the SRFC member States may also derive assistance from the provisions of the *Agreement on Port State Measures*. In short, the SRFC member States can certainly consider to avail themselves of the measures as recognised under relevant international agreements in order to effectively combat the IUU fishing activities in maritime zones under their jurisdiction.

94. The *Chinese Statement* is concluded with the following submissions:

- a) That the conferment of advisory competence upon an international court or tribunal, and subsequent variation of the competence, are to be based in agreement of the States Parties to the constituent treaty of the court or tribunal;
- b) That there is, at present, no provision in UNCLOS that can serve as a basis for the advisory competence of the full bench of the ITLOS;
- c) That the applicability of the doctrine of inherent jurisdiction is confined to such competence that is both ancillary in nature and incidental to the primary jurisdiction of an international court or tribunal based in the constitutive instruments, and advisory competence belongs to the category of primary

jurisdiction;

- d) That the advisory competence of the full bench of the ITLOS may be acquired by way of amendment of UNCLOS;
- e) That, supposing the full bench of the ITLOS had advisory competence, the Request still falls outside that competence; otherwise, there are still factors in Case No. 21 that would require the full bench to decline to exercise its competence over the Request;
- f) That there is much room for enhanced international cooperation to deal with the questions of the Request;
- g) That the SRFC member States may also consider to avail themselves of measures recognised in relevant international agreements; and
- h) That the Chinese Government hereby reserves the right to make further comments in the proceedings of Case No. 21.



Huang Huikang  
Director-General

Department of Treaty and Law  
Ministry of Foreign Affairs  
The People's Republic of China  
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