5 March 2014

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

Dear M. Gautier,

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

1. I refer to the Order of the President of the Tribunal dated 20 December 2013. The United Kingdom is grateful for this further opportunity to comment on the issues raised by the request of the Sub-Regional Fisheries Commission (SRFC).

2. The points made in this short second Written Statement of the United Kingdom are intended to supplement those made in the Written Statement sent to you under cover of my letter dated 28 November 2013 ("first Written Statement").

3. The overwhelming majority of States who commented on the jurisdiction and admissibility issues have urged the Tribunal to proceed with caution in deciding whether to accede to the request of the SRFC. The United Kingdom would strongly echo this concern.

4. As was made clear in its first Written Statement, the United Kingdom considers that article 138 of the Tribunal’s Rules of Procedure is not within the powers conferred upon the Tribunal by States under the United Nations Convention on the Law of the Sea. Nothing
that has been said in any of the other Written Statements made to the Tribunal has altered
the United Kingdom’s firm view in this respect. The following comments on points made by
other States are not intended to be exhaustive.

5. Although some reliance has been placed on the words “all applications” in Article 21
of Annex VI to the Convention, it is submitted that this is much too slender a basis upon
which to build a substantive jurisdiction for the Tribunal to give advisory opinions. And in
any event the presence of those words is readily explicable on other grounds (see
paragraphs 20 to 23 of the first Written Statement).

6. It is also said that there is nothing in the Convention to exclude the jurisdiction of the
Tribunal to give an advisory opinion in circumstances such as those of the request by the
SRFC. This cannot be a correct approach for the following, briefly stated, reasons:

(a) The Tribunal by adopting rules cannot confer upon itself a jurisdiction that is not
provided for in its constituent instrument (paragraph 10 of the first Written
Statement).

(b) The Tribunal, like any other organisation created by treaty, must act within the
powers conferred expressly or by necessary implication by the treaty (paragraphs 11
and 12).

(c) The negotiating history of, and other provisions in, the Convention strongly point
against the inference that the Tribunal can exercise such an advisory jurisdiction
(paragraphs 13 and 14 of the first Written Statement).

(d) There is no support in other international practice for the proposition that such an
advisory jurisdiction can be created other than expressly by treaty. This practice was
reviewed in paragraphs 29 to 33 of the first Written Statement, and was further
amplified in the Written Statements of Australia and China. In addition, although the
Statute of the Permanent Court of International Justice (PCIJ), as originally adopted,
contained no express provision for advisory opinions, Article 14 of the Covenant of
the League of Nations provided for the advisory jurisdiction of the PCIJ. This is
explained by no less an authority than Hudson (see Manley O Hudson, The
Permanent Court of International Justice, 1920-1942, A Treatise (The Macmillan
Company, New York, 1943), pages 483 and 484, of which copies are annexed).

(e) Nor is there academic support for any other approach; in addition to the statement
by Thirlway, quoted at paragraph 33 of the first Written Statement, another
authority, Chittharanjan F. Amerasinghe, concludes:
“In the international legal system a judicial tribunal does not have inherent advisory jurisdiction unless its constitutive instruments expressly give it that jurisdiction. Equally the advisory jurisdiction, if expressly attributed to a tribunal, will be confined to the express grant of jurisdiction and only to the extent and within the limits expressly established in such grant.” (Chittharanjan F Amerasinghe, Jurisdiction of International Tribunals (Martinus Nijhoff, 2002), page 503).

7. In the perception of the United Kingdom, the views of those few States that support the Tribunal’s jurisdiction seem to be de lege ferenda, rather than based on lex lata.

8. In the event that the above submissions do not find favour with the Tribunal, the United Kingdom would nevertheless repeat its alternative submission that the Tribunal should decline to answer the questions put by the SRFC. As stated in the first Written Statement, the United Kingdom bases the submission that the Tribunal, as a judicial body, will be unable to give appropriate answers to the questions formulated by the SRFC on two principal grounds, first because of the relevance of a number of other international agreements (paragraphs 43 to 47 of the first Written Statement), and second because those questions do not fulfil the conditions to be regarded as “legal questions” (paragraphs 48 to 54 of the first Written Statement). In addition, the United Kingdom shares the view of other States that the Tribunal must not, indeed cannot, enter upon questions concerning the relationship between States members of the SFRC and third States (paragraph 53 of the first Written Statement).

9. The United Kingdom has noted, and was grateful for, the further documentation provided by the SRFC. Nevertheless, this has not altered the United Kingdom’s conclusion as expressed in the preceding paragraph.

10. Finally, the United Kingdom reiterates the offer made in its letter dated 28 November 2013, covering its first Written Statement, that it would be happy to consider a request by the SRFC for the engagement of consultants to advise on the issues raised by the SRFC’s questions.

Yours sincerely,

Chris Whomersley

C A Whomersley
Deputy Legal Adviser
THE PERMANENT COURT
OF
INTERNATIONAL JUSTICE
1920–1942

A TREATISE

BY

MANLEY O. HUDSON
JUDGE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE
MEMBER OF THE PERMANENT COURT OF ARBITRATION

NEW YORK
THE MACMILLAN COMPANY
1943
CHAPTER 22

ADVISORY JURISDICTION

§465. Legal Basis of Advisory Jurisdiction. The general nature and powers of the Court depend upon a single international instrument, viz., the Protocol of Signature of December 16, 1920 and the annexed Statute. Historically this instrument is due to the provisions in Article 14 of the Covenant of the League of Nations; but it is not to be thought that for this reason the Court derives character directly from the Covenant. Indeed the Protocol of Signature of December 16, 1920 was open to signature by States not parties to the Covenant of the League of Nations, and, therefore, not bound by the provisions in Article 14 of the Covenant: if any such State had become a party to the Protocol of Signature, it would not thereby have agreed to provisions in the Covenant except to the extent that such provisions had been incorporated into the Statute.

The original Statute made no express reference to advisory opinions. The 1920 Committee of Jurists had proposed an article concerning advisory opinions, but its proposal was rejected in the First Assembly of the League of Nations. The opinion was expressed at that time that as "the Covenant, in Article 14, contained a provision in accordance with which the Court could not refuse to give advisory opinions," it "was therefore unnecessary to include a rule to the same effect in the Constitution of the Court," but no explanation was offered as to the way in which Article 14 of the Covenant was to be made applicable.

Article 1 of the Statute states that the Court was established "in accordance with Article 14 of the Covenant of the League of Nations"; 1

1 Article 36 of the draft-scheme of the 1920 Committee of Jurists provided:

"The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

"When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

"When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision."

2 Records of First Assembly, Committees, p. 407. This opinion was expressed at a meeting of a subcommittee held on December 4, 1920, before a decision had been taken as to the way in which the Statute of the Court should be launched.
this had the effect of incorporating into the Statute the third sentence in Article 14 of the Covenant, which provided that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly." Hence in spite of the absence of an express provision, the original Statute did provide for the Court’s giving advisory opinions. This conclusion is reinforced by the reference to Article 14 of the Covenant in the title given to the Statute, though the reference in the title might not by itself be a sufficient basis for saying that the Court has the powers envisaged for it in Article 14 of the Covenant. A contention has also been made that the provision in Article 14 of the Covenant is a matter specially provided for in a treaty or convention in force, within the meaning of that phrase in paragraph 1 of Article 36 of the Statute; but it would seem unnecessary to place this strained construction on the text of Article 36.

From the beginning the Court entertained no doubt as to its power to give advisory opinions; this is evidenced by the procedural provisions in Articles 71–74 of the Rules of 1922, 1926, and of 1931. The legal situation was clarified when the amendments to the Statute entered into force on February 1, 1936, for they added four articles concerning advisory opinions (Articles 65–68), consisting chiefly of the procedural provisions formerly included in the Rules.

§466. Advisory Jurisdiction of Other International Bodies. Prior to 1920 several international bodies possessed a competence to give opinions which were advisory in nature. Article 15 of the Universal Postal Convention of October 9, 1874 provided that the International Bureau of the Universal Postal Union should give opinions on questions in dispute at the request of the parties concerned, and this provision had been maintained in the later conventions of the Union. To similar effect, with reference to the International South American Postal Bureau, was Article 12 of the Montevideo Convention of February 2, 1911. The International Commission for Air Navigation was empowered by Article 34 of the Aerial Navigation Convention of October 13, 1919 to give opinions on questions which the States might submit for examination.

1 In 1923 President Loder stated that by virtue of Article 2 of the Statute, Article 14 of the Covenant "forms an integral part" of the Statute. Series D, No. 2, p. 502. To the same effect, see Judge de Visscher in 26 Recueil des Cour (1926), p. 29. See also the statements by Judge Negulesco in Minutes of the 1926 Conference of Signatories, pp. 43–44, and in Series D, No. 2 (1926), p. 679.
4 Mora, Conventions Diplomatiques (2d ser.), p. 567.