

(a) *States Parties - Etats Parties*

Written Statement of the United Kingdom, with annex



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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

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