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'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea

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Abstract

On 2 April 2015, the full International Tribunal for the Law of the Sea (ITLOS) rendered its first advisory opinion in reply to a request of the Sub-Regional Fisheries Commission regarding illegal, unreported and unregulated fishing. Unlike any other court or tribunal with advisory competence, including the Seabed Disputes Chamber, ITLOS' advisory jurisdiction is not explicitly enshrined in its constituent instrument, but was rather asserted in the Tribunal's, homemade, rules of procedure. In spite of strong objections from various states, ITLOS affirmed a broad advisory jurisdiction *ratione materiae* and *personae*, and found that there were no compelling reasons to exercise its discretionary power to dismiss the request. The request and the Tribunal's handling thereof raise interesting questions regarding the opportunities and risks inherent to, and the outer limits of, the advisory jurisdiction of international courts and tribunals. This contribution takes a look at the advisory jurisdiction of the full Tribunal, having regard to the experiences of other international courts and tribunals.

Key words

International Tribunal for the Law of the Sea; ITLOS; advisory opinion; advisory jurisdiction; UNCLOS

1. Introduction

Over the past 20 years, the exercise by several international courts and tribunals of the advisory jurisdiction conferred on them has attracted renewed academic attention for the use (and possible abuse) of advisory proceedings. Advisory jurisdiction can count on strong believers. It has been claimed to have the 'advantage that it does not stigmatize a government as a violator .... At the same time, however, it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of international legal obligations.'[1] It stands beyond doubt that various Opinions of the International Court of Justice (ICJ) have contributed immensely to

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1 Address by Judge Thomas Buergenthal before a Special Session of the OAS Permanent Council (3 December 1986), 130, available at www.juridicas.unam.mx/publica/librev/rev/iidh/cont/4/pr/pr8.pdf.

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the clarification of international law, e.g. in relation to questions of international legal personality[2] or the permissibility of reservations to treaties.[3] On the other hand, there are also more critical sounds, with some warning against the use of advisory procedures to tackle questions that essentially touch upon contentious disputes and/or highly politicized issues.[4] It is no coincidence that in the procedures preceding the ICJ's advisory opinions on the *Legality of the threat or use of nuclear weapons*,[5] on the *Palestinian wall*,[6] and on the *Unilateral declaration of independence in respect of Kosovo*,[7] – which all dealt with highly sensitive issues – numerous states took the view that the Court did not have jurisdiction, or should use its discretion to dismiss the request for an advisory opinion. Accusations of 'creeping' jurisdiction are never far away.

History suggests that the recourse to advisory proceedings has sometimes functioned as a way to test the quality of a newly established international tribunal.[8] The experience of the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal) follows a different path. Since its inception in 1996–97, the Tribunal has developed a strong track record in contentious proceedings.[9] By contrast, the Tribunal's advisory jurisdiction has come to blossom only recently. It took until May 2010 for the Tribunal to first receive a request for an advisory opinion. In particular, it received a request from the International Seabed Authority (ISA) pursuant to Article 191 of the United Nations Convention on the Law of the Sea (UNCLOS), addressed to the Tribunal's Seabed Disputes Chamber (SBDC), and requesting clarification on the legal responsibilities of states sponsoring deep seabed exploration and exploitation. The Opinion[10] followed eight months later, and was broadly welcomed throughout the international community.[11]

The exercise by the *full* Tribunal of its advisory competence is of an even more recent nature. Contrary to what is the case for the SBDC, this competence is not expressly enshrined in UNCLOS, nor in the ITLOS Statute annexed thereto. Rather,

2 E.g., *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, [1949] ICJ Rep. 174.

3 E.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, [1951] ICJ Rep. 15.

4 See, e.g., A. Aust, 'Advisory Opinions', (2010) 1 *Journal of International Dispute Settlement* 123.

5 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 226.

6 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep. 136.

7 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, [2010] ICJ Rep. 403.

8 Sohn observes that the first four cases brought before the Permanent Court of International Justice were all requests for advisory opinions. *Mutatis mutandis*, the early years of the Inter-American Court of Human Rights and the ICJ reveal a somewhat similar picture. See: L. B. Sohn, 'Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber', in M. H. Nordquist and J. N. Moore (eds.), *Oceans Policy: new institutions, challenges and opportunities* (1999), 61 at 61–2.

9 For an overview, see: A. Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV', (2015) *Revue belge de Droit international*, forthcoming.

10 *Responsibilities and obligations of States with respect to activities in the Area* ('*Seabed Activities AO*'), Advisory Opinion of 1 February 2011, Case No. 17, 2011 ITLOS Reports 10.

11 The Opinion essentially held that sponsoring states are under an obligation of 'due diligence', requiring them to make the best possible efforts to secure compliance by the sponsored contractors. Further, e.g., H. Zhang, 'The Sponsoring State's "obligation to ensure" in the development of the International Seabed Area', (2013) 28(4) *International Journal of Marine and Coastal Law* 681.

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the advisory jurisdiction of the full Tribunal was explicitly asserted and circumscribed when the Tribunal first adopted its Rules of Procedure in 1997 (Art. 138 of the 'Rules').[12] It was affirmed in subsequent years by several individual judges,[13] with some construing it as 'a fallback procedure at a time when there is a lack of cases before international courts and tribunals',[14] and ostensibly received support from a number of states parties to UNCLOS.[15] At the same time, as recently as 2013, Judge Wolfrum stressed that the conditions set by Article 138 of the Rules constituted 'a high threshold which makes it rather unlikely that States may use this option'.[16] In June 2012, however, the seven (West-African) member states of the Sub-Regional Fisheries Commission (SRFC) adopted 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 [SRFC]' (MCA Convention).[17] Article 33 of the MCA Convention explicitly provides that '[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the [ITLOS] for advisory opinion'. Shortly after the MCA Convention's entry into force, the provision was indeed activated, and by letter of 27 March 2013 the SRFC Permanent Secretary submitted a request for an advisory opinion to the Tribunal,[18] thus triggering – for the first time – the advisory procedure before the full Tribunal (Case No. 21).

The SRFC request must be seen against the background of the global problem of 'illegal, unreported and unregulated fishing' (IUU fishing),[19] which creates both environmental damage by destroying fish stocks and the marine environment,[20] as well as economic harm,[21] in addition to creating food scarcity, ultimately threatening the livelihoods of coastal communities. Experts estimate that one in five fish

12 ITLOS, 'Rules of the Tribunal', 17 March 2009, ITLOS/8, available at www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

13 See, e.g., R. Wolfrum, 'Advisory Opinions: are they a suitable alternative for the settlement of international disputes?', in R. Wolfrum and I. Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (2013), 35 at 54; T. M. Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea', (2010) 9(3) *Chinese Journal of International Law* 565, at 580–3; J. L. Kateka, 'Advisory Proceedings before the Seabed Disputes Chamber and before the ITLOS as a full Court', (2013) 17 *Max Planck Yearbook of United Nations Law* 159. But see the more cautious position of former Judge Treves: T. Treves, 'Advisory Opinions under the Law of the Sea Convention', in M. H. Nordquist and J. N. Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001), 81 at 92 ('Whether article 138 is compatible with the Convention might perhaps be debated').

14 Ndiaye, *ibid.*, at paras. 1, 6.

15 See K.-J. You, 'Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, revisited', (2008) 39 *Ocean Development & International Law* 360, at 363–4; Ndiaye, *supra* note 13, at 582–3 (note: Ndiaye refers to various expressions of support by states in the context of the meeting of states parties and elsewhere. Some of the statements nonetheless seem to be made *de lege ferenda*, rather than *de lege lata*. Consider, for instance, the statement by Singapore that '[t]he ITLOS should be empowered to offer advisory opinions, like the [ICJ].' UN Doc. A/60/PV.55 (2005), at 27).

16 Wolfrum, *supra* note 13, at 54.

17 Dakar, 8 June 2012.

18 Sub-Regional Fisheries Commission, 'Request for advisory opinion', 27 March 2013.

19 For a definition of these concepts, see: FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing', Rome, 2001, available at www.fao.org/docrep/003/y1224e/y1224e00.htm, Sections 3.1–3.3.

20 Such damage is caused not only through the direct depletion of a certain fish stocks, but also due to the use of fishing techniques which result in by-catch and cause damage to the seabed habitat.

21 Such harm occurs when low-cost pirate vessels sailing flags of convenience outcompete regulated fisheries.

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caught is linked to illegal activity, which equates to up to US$23.5 billion in worth annually.[22] Developing countries are most plagued but lack the capabilities to effectively monitor fishing activities and enforce their fisheries regulations. West Africa in particular has been described as an 'IUU hot spot'.[23]

The SRFC request listed four questions. The first two related respectively to the obligations, and the liability, of flag states in relation to IUU fishing activities (within the EEZ of third party states) by vessels sailing their flag. The third question raised the issue of liability of a flag state or international organization for the violation of the fisheries legislation of a coastal state by a vessel holding a fishing licence issued within the framework of an international agreement with that flag state or international organization. The fourth and last question concerned the rights and obligations of the coastal state in ensuring management of shared stocks and stocks of common interest.

Inasmuch as the full Tribunal's advisory competence was explicitly asserted by the Tribunal in its Rules of Procedure, and was subsequently defended by several individual judges, it hardly comes as a surprise that the Opinion that was eventually adopted on 2 April 2015 rejected the objections to ITLOS' jurisdiction.[24] Still, the request and the Tribunal's handling thereof raise interesting questions regarding the opportunities and risks inherent to, and the outer limits of, the advisory jurisdiction of international courts and tribunals. The present contribution takes a closer look at the advisory jurisdiction of the full Tribunal, having regard to the experiences and approaches of other international courts and tribunals. Sections 2 to 4 deal consecutively with the legal basis of the full Tribunal's advisory jurisdiction, with the limits to that jurisdiction and with questions of judicial propriety. Section 5 briefly looks at the merits of Case No. 21 and the organization of the procedure. Section 6 spells out some concluding remarks.

2. The legal basis of the full Tribunal's advisory jurisdiction

A variety of international courts and tribunals have been granted the competence to render advisory opinions. Such competence is commonly enshrined expressly in the judicial body's constituent instrument(s) (or a Protocol thereto). This is the case for the ICJ, the SBDC, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human Rights

22 See: www.nmfs.noaa.gov/ia/iuu/faqs.html; 'One in five fish linked to illegal activity', *Deutsche Welle*, 28 January 2015.

23 OECD, 'Fishing for development - background paper for session 4: the challenge of combatting illegal, unreported and unregulated (IUU) fishing', 20 March 2014, TAD/FI(2014)9, at para. 27. See also: www.nmfs.noaa.gov/ia/iuu/faqs.html (suggesting that total catches in West Africa are estimated to be 40 per cent higher than reported catches).

24 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) ('Request for Advisory Opinion submitted to the Tribunal')*, Advisory Opinion of 2 April 2015, Case No. 21. Note: already in 2008, You wrote that '[i]t appears that the ITLOS is ready to consider positively its advisory jurisdiction if it is challenged.' You, *supra* note 15, at 361.

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and Peoples' Rights (AfCtHR).[25] The obvious exception to this practice is Article 138 of the Rules of the Tribunal.

In light of the 'odd'[26] genesis of the Tribunal's advisory competence, and given that this was the first request for an Advisory Opinion addressed to the full Tribunal, the issue of jurisdiction was hotly debated during the written and oral procedures in Case No. 21. A considerable number of states, including the United States, the United Kingdom, China, Australia, France, Spain, Ireland, Thailand, and Portugal, effectively challenged the advisory competence of the Tribunal head-on.[27] The main objections can be summarized as follows. First, inasmuch as the Tribunal cannot, by adopting its Rules of Procedure, confer upon itself broader powers than do the 1982 Law of the Sea Convention and its annexes, the validity of Article 138 of the Rules depends on whether it is consistent with the provisions of the Convention and the ITLOS Statute annexed thereto (Annex VI).[28] Second, as mentioned before, neither the Convention, nor the ITLOS Statute expressly provide for advisory jurisdiction on the part of the full Tribunal. Third, neither Article 288(2) UNCLOS, nor Article 21 ITLOS Statute can be interpreted as conferring upon the full Tribunal any advisory competence.[29] The former provision deals with 'disputes' concerning the interpretation or application of an international agreement related to the purposes of UNCLOS, and is included in Section 2, Part XV UNCLOS, entitled 'compulsory procedures entailing binding decisions', thus clearly signalling that it is exclusively concerned with contentious procedures. The latter provision is admittedly phrased more broadly, inasmuch as it refers to jurisdiction, not only over 'all disputes and all applications submitted to it in accordance with this Convention', but also over 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'. However, it would be erroneous to interpret the word 'matters' as extending to requests for advisory opinions, since: (1) the French version of Article 21 ITLOS Statute suggests a more restrictive reading;[30] (2) the negotiation history of this

25 See: Art. 65 ICJ Statute, Arts. 159(1) and 191 UNCLOS, Art. 47 of the European Convention of Human Rights (ECHR) (introduced by Protocol 2 to the ECHR), Art. 64 of the American Convention on Human Rights (ACHR) and Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. See also Art. 14 of the Covenant of the League of Nations in respect of the PCIJ.

26 Ndiaye, *supra* note 13, para. 60.

27 Written Statement of the United States, 27 November 2013, paras. 9ff; Written Statement of the United Kingdom, 28 November 2013, at 4–20; Written Statement of the United Kingdom, 5 March 2014; Written Statement of the People's Republic of China, 26 November 2013; Comments presented by France, 29 November 2013, at 3; Written Statement of Australia, 28 November 2013, at 5ff; Written Statement of Ireland, 28 November 2013, paras. 2.1ff; Written Statement by the Kingdom of Spain, 29 November 2013, at 4–8; Written Statement of Thailand, 14 March 2014, paras. 4ff; Written Statement of the Portuguese Republic, 27 November 2013, paras. 4–14. Consider also: Written Statement of the Argentine Republic, 28 November 2013, at 4ff.

28 Written Statement of the United States, 27 November 2013, para. 11; Written Statement of the United Kingdom, 5 March 2014, paras. 4, 6; Written Statement of Australia, 28 November 2013, para. 37.

29 Also in this sense: You, *supra* note 15, at 362–3.

30 The French text refers to '*tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal*.' The phrase '*et toutes les fois que cela . . .*' could be understood as further qualifying the Tribunal's jurisdiction over '*différends*'/'disputes' and '*demandes*'/'applications'. In this sense: Written Statement of the United Kingdom, 28 November 2013, at 12–14. See also the Declaration of Judge Cot, at para. 3. Note: the Spanish version ('*y a todas las cuestiones expresamente previstas . . .* ') nonetheless suggests that the two phrases could be read disjunctively.

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provision and of the Convention indicates a reluctance on the part of states to confer advisory jurisdiction upon the Tribunal;[31] (3) one might have expected that, if states wished to confer advisory jurisdiction upon the full Tribunal, they would have done so expressly, and would have clearly delineated the contours of that jurisdiction, which is exactly what they did with regard to the advisory competence of the SBDC; and (4) Article 21 ITLOS Statute is mirrored after Article 36(1) ICJ Statute, where the phrase 'all matters' has been understood as referring to contentious procedures submitted to the Court pursuant to the consent of the parties involved.[32] Fourth, reliance on the doctrine of 'inherent powers' is unconvincing. Such doctrine only applies for powers/competences that are merely 'ancillary' in nature and that are essential to the fulfilment of the primary competences of the organization concerned. Accordingly, it cannot serve to create a new form of jurisdiction. Again, practice reveals that all major international courts and tribunals that have rendered advisory opinions have done so pursuant to express authority found in a statute or other governing legal document. Such an approach is crucial since it allows the founding states to define the advisory jurisdiction *ratione personae* and *ratione materiae* – which they have moreover done in very divergent ways (there is indeed no single blueprint for advisory jurisdiction). Nor is there support in legal doctrine that judicial tribunals can have an 'inherent' advisory jurisdiction absent an express grant of jurisdiction.[33]

On the other hand, a number of states expressed support for the advisory competence of the full Tribunal in their written statements (albeit several refrained from elaborating on the exact legal basis).[34] Germany, for instance, the host country of the Tribunal and uncoincidentally one of the main supporters of the Tribunal's advisory competence, stressed that neither the Convention nor the Statute 'explicitly [indicated] that such jurisdiction shall be excluded'.[35] According to Germany, these were 'living instruments'. The reference to 'all matters' in Article 21 ITLOS Statute provided an 'implicit' legal basis for the competence of the full Tribunal to issue advisory opinions, and should be interpreted '[in] light of a general movement amongst

31 E.g., Written Statement of the United Kingdom, 28 November 2013, at 5–6; Written Statement of the United Kingdom, 5 March 2014, at para. 6; Written Statement of the United States, 27 November 2013, at para. 18; Written Statement of Australia, 28 November 2013, at para. 26; Written Statement of the People's Republic of China, 26 November 2013, at para. 36. It was also observed that the well-known University of Virginia Commentary to the 1982 Convention on the Law of the Sea, finds that the Tribunal itself has no advisory jurisdiction. M. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea, 1982: a Commentary*, Vol. 5, at 416, Vol. 6, at 643–4. See also: Sohn, *supra* note 8, at 66.

32 See in this sense: S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (1977), 659; C. Tomuschat, 'Article 36', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 633 at 641 ('The concept of jurisdiction as employed in Art. 36, para. 1 denotes the authority of the ICJ to make binding determinations by adjudication on disputes between States').

33 See, e.g., H. Thirlway, 'Advisory Opinions of International Courts' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), para. 4 ('Such power is not inherent in its judicial status so that a tribunal cannot give an advisory opinion unless the power to do so is conferred on it by its constituent instrument'); C.F. Amerasinghe, *Jurisdiction of International Tribunals* (2002), 503.

34 E.g., Written Statement of the Federal Republic of Somalia, 27 November 2013, Section I, para. 3; Written Statement of the Federated States of Micronesia, 29 November 2013, paras. 4–7; Written Statement of the Democratic Socialist Republic of Sri Lanka, 18 December 2013, at 3; Written Statement of New Zealand, 27 November 2013, at 3ff; Written Statement of Japan, 29 November 2013, para. 5.

35 Written Statement by the Federal Republic of Germany, 18 November 2013, paras. 8–9.

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states in favor of the Tribunal's jurisdiction' to this end.[36] Germany suggested that this more favourable attitude amongst states had superseded the initial reluctance on the part of some member states to explicitly confer advisory competence to the Tribunal.

The outcome of the procedure in this respect was an entirely predictable self-fulfilling prophecy – it would have been rather surprising indeed had the Tribunal suddenly made a *mea culpa* and acknowledged that it had acted *ultra vires* by adopting Article 138 of the Rules. Still, the brevity with which the Tribunal does away with the objections to its jurisdiction is regrettable. In only a handful of paragraphs (paragraphs 52–9), the Tribunal confirms that the inclusion of the phrase 'all matters' in Article 21 ITLOS Statute implies that it must mean something more than 'disputes' or 'applications', this something including requests for advisory opinions.[37] According to the Tribunal, Article 21 ITLOS Statute is not subordinate to Article 288 UNCLOS, but stands on its own. Furthermore, the Tribunal dismisses the suggestion that the expression 'all matters' in Article 21 ITLOS Statute should have the same meaning as in the relevant provisions of the PCIJ and ICJ Statutes (after which the provision was modelled). In this context, the Tribunal quotes from its Order in the *Mox Plant* case, where it held that:

> the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires.[38]

The quote rings hollow, however, as the Tribunal makes no effort whatsoever to justify its interpretation of Article 21 ITLOS Statute by reference to the preparatory works, to the context or to subsequent practice. Instead, the Tribunal merely finds that Article 21 ITLOS Statute constitutes an enabling provision which makes it possible for 'other international agreements related to the purposes of UNCLOS' to confer advisory jurisdiction upon it. Article 138 of the Rules in turn does not

36 *Ibid.*, para. 8. Also in this sense: You, *supra* note 15, at 363–4. But see, e.g., Written Statement of the United Kingdom, 28 November 2013, at 16 (suggesting that statements to the effect that it might be desirable to confer upon the Tribunal a wider jurisdiction to give advisory opinions were made *de lege ferenda*, and did not command sufficient support).

37 In a similar vein, e.g., Written Statement of the Federal Republic of Somalia, 27 November 2013, Section I, para. 3; Written Statement of New Zealand, 27 November 2013, para. 10.
In 2013, Judge Kateka took the view that Art. 288(2) UNCLOS does not constitute a sufficient legal basis for the advisory jurisdiction of the full Tribunal. By contrast, the 'generally accepted view – by representatives of States Parties to the Convention and by other commentators' is said to be Art. 21 of the ITLOS Statute. See: Kateka, *supra* note 13, at 168–9 (no further references provided, however). Note, however, that in an article published in 2010, Judge Ndiaye had previously taken the view that neither Art. 288 UNCLOS, nor Art. 21 of the ITLOS Statute could be relied upon or interpreted as a basis for the advisory jurisdiction of the Tribunal 'oddly' introduced by Art. 138 of the Rules. Ndiaye, *supra* note 13, paras. 60–2. Judge Ndiaye ultimately accepts that the Tribunal has advisory jurisdiction. The author finds that 'taking the agreement path as a basis for conferring jurisdiction to the Tribunal is a more effective route than seeking a legal basis that does not exists in the Convention or the [ITLOS] Statute' (*Ibid.*, para. 64). Emphasis is also placed on the existence of a general movement among states in favour of the advisory jurisdiction of the Tribunal (*Ibid.*, paras. 65–9). Eventually, Judge Ndiaye voted in favour of the Tribunal's jurisdiction in Case No. 21, without elaborating on his position in an individual Declaration.

38 *MOX Plant* (*Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, at 106, para. 51.

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'establish' the jurisdiction of the Tribunal, but 'furnishes the prerequisites that need to be satisfied before the Tribunal can exercise' its advisory jurisdiction (paragraph 59).

Upon reading paragraphs 52–9 of the Opinion, it is difficult to suppress a feeling of unease. This is all the more so inasmuch as several states raised a range of objections against the Tribunal's advisory competence – arguments which Judge Lucky labelled as 'cogent, clear and articulate, as well as considerably persuasive',[39] which the Tribunal summarizes (paragraphs 40–7), without, however responding thereto, and inasmuch as individual judges had previously acknowledged the reluctance at the time of the drafting of the Convention to endow the full Tribunal with advisory jurisdiction.[40] Judge Lucky merits praise for his effort to remedy the silence on the part of the Tribunal, by giving a more elaborate reasoning in his Separate Opinion – although the arguments put forward remain ultimately unconvincing. In essence, Judge Lucky adopts the view that the Convention and ITLOS Statute are 'living instruments' that can 'grow' and 'adapt' in light of changing circumstances and advances in technology.[41] Against this background, Article 21 ITLOS Statute must allegedly be interpreted having regard to the fact that no state has asked the Rules, and specifically Article 138, to be amended, since their adoption in 1997.[42] Yet, it remains difficult to see what 'changes in circumstances' or technological advances would justify the creation of a separate (advisory) procedure before the Tribunal which the drafters of the Convention were initially unwilling to accept. A reliance on the acquiescence of states, and the support of some, vis-à-vis Article 138 of the Rules to justify the creation of a new procedural avenue originally not foreseen is similarly hard to follow. Apart from the fact that this indeed strikes as a peculiar application of the concept of 'subsequent practice' as a tool for treaty interpretation (Art. 31(3)(b) Vienna Convention on the Law of Treaties), one cannot ignore that on the first occasion when Article 138 was actually applied, a considerable number of states contested the Tribunal's advisory competence.[43]

3. The limits of the full Tribunal's advisory jurisdiction

Leaving aside the existential debate over the Tribunal's advisory competence, numerous states took the view that the SRFC request exceeded the boundaries of that competence and/or insisted that the request be dismissed due to considerations of judicial propriety. Article 138 of the Rules states that the Tribunal 'may' give an advisory opinion if the following three requirements are met: (1) there is an international agreement 'related to the purposes of the Convention' which specifically provides for the submission to the Tribunal of a request for an advisory opinion; (2) the request must be transmitted to the Tribunal by a 'body' authorized by or in accordance

39 Separate Opinion of Judge Lucky, para. 1. See also Declaration Judge Cot, para. 3.
40 See, e.g., Wolfrum, *supra* note 13, at 55. See also Declaration Judge Cot, para. 3 (acknowledging that the preparatory works do not support the Tribunal's interpretation of Art. 21 ITLOS Statute).
41 Separate Opinion of Judge Lucky, paras. 18–19.
42 *Ibid.*, at para. 21. The same argument is put forward by Judge Cot in his Declaration (para. 4).
43 Consider also: Written Statement of Thailand, 14 March 2014, para. 6.

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with the agreement mentioned above; and (3) the request must relate to one or more 'legal' questions. The questions should also be unrelated to the international seabed regime (which is the *domaine réservé* of the SBDC).[44]

Several ITLOS judges have asserted that the requirements of Article 138 are 'quite strict'.[45] When comparing it to the scope of the advisory competence of other international courts and tribunals, it may, however, be questioned whether that is correct. By way of illustration, the ICJ Statute provides for a broad advisory competence *ratione materiae*, which may ultimately concern any domain of international law. This is, however, counterbalanced by a crucial limitation *ratione personae*. Requests for advisory opinions can indeed only be brought by the UN General Assembly (UNGA) and the UN Security Council, or – subject to the speciality principle – by other UN bodies or specialized organizations duly authorized by the UNGA.[46] The possibility for states to bring requests for advisory opinions was deliberately excluded,[47] since this was perceived as a recipe for circumventing the consensual basis of contentious proceedings. In several other settings, requests for advisory opinions can be brought only by international institutions. Thus, only the Committee of Ministers can request an advisory opinion from the ECtHR, and then only on 'legal questions concerning the interpretation of the Convention and the Protocols thereto' (Art. 47 ECHR). Pursuant to Article 47(2) ECHR, opinions shall moreover not deal with any question relating to the content or scope of the rights and freedoms enshrined in the Convention, or with any other question which might come up in a contentious case. The result is that the ECtHR's advisory competence is essentially limited to so-called 'housekeeping' issues.[48] In turn, requests for an advisory opinion from the SBDC can be submitted only by (1) the Assembly and Council of the ISA, on questions arising within the scope of their activities (Art. 191 UNCLOS), or (2) the ISA Assembly, pursuant to a request sponsored by at least one fourth of the members, on the conformity with UNCLOS of a proposal before the Assembly (Art 159(1) UNCLOS). The IACtHR and the AfCtHR both have a broad advisory jurisdiction *ratione personae*, in that requests can be submitted not only by various organs of the Organisation of American States (OAS)[49] and the African

44 You, *supra* note 15, at 365; Ndiyae, *supra* note 13, para. 81.

45 Treves, *supra* note 13, at 91; Wolfrum, *supra* note 13, at 54. In a similar vein: You, *supra* note 15, at 365.

46 Art. 96 of the UN Charter. Five UN organs and 16 agencies of the UN family in total can ask for an advisory opinion. The full list can be found in the International Court of Justice Handbook, 2013, 6th edition, 83, available at www.icj-cij.org/publications/en/manuel_en.pdf. The ICJ's jurisdiction *ratione personae* has already expanded in comparison to its predecessor: only the League Council and Assembly could request advisory opinions from the PCIJ (Art. 14 Covenant League of Nations).

47 K. Oellers-Frahm, 'Article 96', in B. Simma et al. (eds.), *The Charter of the United Nations. A Commentary* (2012), 1975, at 1979.

48 In 2004, the ECtHR dismissed a first request for an advisory opinion on the basis of Art. 47(2) ECHR. Since then, it has adopted only two advisory opinions, both related to the election of judges for the Court. *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*, Advisory Opinion, ECtHR Grand Chamber, 12 February 2008; *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*, No. 2, Advisory Opinion, ECtHR Grand Chamber, 10 January 2010.

49 Art. 64 ACHR refers to the organs listed in Chapter X of the Charter of the Organization of American States.

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Union (AU),[50] but also by the organizations' respective member states. In the last two cases, however, the jurisdiction *ratione materiae* is generally limited to the protection of human rights in American and African states respectively. Comparing the three regional human rights courts, the IACtHR has the broadest *ratione materiae* scope,[51] followed by the AfCtHR,[52] with the ECtHR dangling at the bottom. Overall, a broad *ratione materiae* scope is rare, and will normally be hinged on limited *ratione personae* scope, and *vice versa*.

By contrast, Article 138 of the Rules does not impose stringent limitations to the full Tribunal's advisory jurisdiction whether *ratione personae* or *ratione materiae*. On the one hand, the provision does not pre-determine 'who' can request an advisory opinion. Some, such as (former) Judge Treves, have suggested that the reference to a 'body' in Article 138 of the Rules indicates that advisory opinions are an instrument at the disposal of international organizations, and not of states.[53] Others, including Judge Jesus, have suggested that whoever is indicated in an 'agreement related to the purposes of UNCLOS' as being empowered to request an advisory opinion would qualify as a 'body' in the meaning of said provision.[54] This would imply that any agreement related to the purposes of UNCLOS concluded between at least two parties having the requisite international legal personality (e.g. two states, or a state and an international organization), and specifically providing for it, could serve as the jurisdictional basis for the advisory competence of the Tribunal.[55] The latter interpretation is arguably more convincing: if one accepts a broad interpretation of Article 21 ITLOS Statute to serve as the enabling provision underlying the full Tribunal's advisory competence, it seems illogical and legally dubious to subsequently curtail the scope of Article 21 ITLOS Statute (*in fine*) via a (restrictive reading of) the subordinate rule enshrined in Article 138 of the Rules. The Tribunal's Advisory Opinion of 2 April 2015 does not give any further indications in this context. Yet, the Opinion does confirm that, even upon a restrictive reading of the word 'body', it remains possible for states (*in casu* a group of seven African states) to indirectly seek an advisory opinion by making use, through an agreement (whether multilateral or bilateral), of an existing 'body'.[56]

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50 Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights refers to the AU itself, any of its organs, or any African organization recognized by the AU.

51 Art. 64(1) ACHR refers to questions '[r]egarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states'. On the concept of 'other treaties', see also *infra*. Pursuant to Art. 64(2) ACHR, OAS member states may also request an opinion on the compatibility of any of their domestic laws with the aforesaid instruments.

52 Art. 4 of the Protocol to the ACHPR on the Establishment of the African Court on Human and Peoples' Rights refers to 'any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'.

53 Treves, *supra* note 13, at 92. A similar view was expressed by Judge Ndiaye: Ndiyae, *supra* note 13, para. 70. Consider also the position of Judge Kateka: Kateka, *supra* note 13, at 170–1 (rejecting the view that the advisory jurisdiction is available to 'individual States' and warning that 'the issue of bilateral agreements must be looked at with caution').

54 J. L. Jesus, 'Article 138' in P. Chandrasekhara Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: a Commentary* (2006), Part III, at 394. Also, implicitly, Wolfrum, *supra* note 13, at 54.

55 Consider also: Written Statement by the Federal Republic of Germany, 18 November 2013, paras. 11–12.1 ('"[B]ody" may be any organ, entity, institution, organization or State.').

56 In this sense: You, *supra* note 15, at 365. Consider also: Ndiayae, *supra* note 13, para. 70.

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On the other hand, Article 138 of the Rules does not impose express limitations on the Tribunal's advisory jurisdiction *ratione materiae*, other than the fact that the international agreement conferring jurisdiction should be 'related to' one or more of the manifold 'purposes of UNCLOS'.[57] Two scenarios can be discerned. First, states might well conclude an agreement with no other aim but to trigger an advisory procedure before the full Tribunal and identifying the questions to be raised. As long as the questions themselves are related to UNCLOS, one might argue that it meets the requirement of Article 138 of the Rules. Judge Wolfrum for one seems to accept that a request pursuant to such agreement would be admissible[58] – although several states criticized this possibility in their written statements to the Tribunal.[59] The second scenario is that where states have concluded an agreement setting forth certain rights and obligations related (*inter alia*?) to the scope of UNCLOS – consider e.g., a maritime delimitation agreement, or a fisheries agreement – and containing a clause providing for the possibility to request an advisory opinion to the full Tribunal. In this scenario – which is also the one the Tribunal was confronted with pursuant to the SRFC request – the separate question arises whether the legal questions themselves must relate to UNCLOS[60] and/or to the interpretation and application of the provisions of the international agreement conferring advisory jurisdiction upon the full Tribunal. This sensitive issue finds no explicit answer in Article 138 of the Rules, and, as will be seen below, proved a source of much debate in the context of Case No. 21.

Having a closer look at the SRFC request, it is obvious that the four questions submitted to the Tribunal qualified as 'legal questions' – especially when considering the flexible interpretation of that concept in the case law of the ICJ (see *supra*).[61] By the same token, there is no reason why the SRFC Conference of Ministers should not qualify as a 'body' in the sense of Article 138 of the Rules. It is also hard to disagree with the Tribunal's finding (paragraph 63) that the MCA Convention constitutes an international agreement 'closely related to the purposes of the Convention'.[62] Indeed, as stated in its preamble, the objective of the MCA Convention is especially to implement the UNCLOS provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector, and to ensure that the

57 As Judge Ndiaye explains, the purposes of the Convention include 'biological resources of the sea; general conservation; environment and ecosystem; marine scientific research; pollution; maritime navigation; piracy and maritime safety; maritime claims and responsibilities; shipping'. Ndiaye, *supra* note 13, paras. 71ff.

58 Wolfrum, *supra* note 13, at 54.

59 E.g., Written Statement of Ireland, 28 November 2013, para. 2.11; Written Statement of Japan, 29 November 2013, para. 12 (implicitly).

60 Answering in the affirmative: You, *supra* note 15, at 368.

61 See paras. 64–5 of the ITLOS Opinion, where the Tribunal confirmed that the questions were 'framed in terms of law'. Note that the Tribunal referred to the relevant passages of the prior Advisory Opinion of the SBDC of 2011, which in turn cited the established case-law of the ICJ. Several states expressly accepted that the SRFC questions were clearly 'legal questions' (e.g., Written Statement by the Federal Republic of Germany, 18 November 2013, para. 10; Written Statement of New Zealand, 27 November 2013, at para. 13). But see, for a critique of the 'legal' nature of the questions concerned: Written Statement of the United Kingdom, 28 November 2013, paras. 48–51.

62 Taking the same view, e.g., Written Statement by the Federal Republic of Germany, 18 November 2013, at 8–9; Written Statement of New Zealand, 27 November 2013, paras. 14–15; Written Statement of Japan, 29 November 2013, para. 12.

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policies and legislation of its member states are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under their respective jurisdictions.

In spite of the foregoing, several states argued that the SRFC request should nonetheless be deemed inadmissible because the questions were not related to the interpretation or application of the MCA Convention itself. Rather, these questions, concerning the obligations and liability of flag states in relation to IUU fishing and the corresponding rights and obligations of coastal states, were of a much more general nature, touching upon a variety of international instruments, such as the 1995 Fish Stocks Agreement or the 2009 Port State Measures Agreement. Ireland, for instance, took the view that a request for an advisory opinion pursuant to an international agreement related to the purposes of UNCLOS should necessarily be limited to the interpretation of the terms of that agreement, or to the application between the parties *inter se*, or to the consistency of that agreement with the terms of UNCLOS.[63] A similar position was voiced by the EU, as well as by many other states.[64] Such limitation was deemed to be the expression of a general principle of law governing judicial functions, pertinent also to advisory opinions.[65] It was reflected in Article 288(2) UNCLOS, which refers to jurisdiction over any dispute 'concerning the interpretation or application of an international agreement related to the purposes of this Convention'.[66] This interpretation was also said to find support in academic scholarship.[67] If, by contrast, Article 21 ITLOS Statute were interpreted as imposing no restrictions *ratione materiae*, this would lead to the absurd result that the Tribunal could theoretically have jurisdiction over questions completely unrelated to the international law of the sea (e.g. questions of human rights law, or law of armed conflict etc.).[68]

On the other hand, Germany, for instance, while noting that 'the Tribunal by its very nature would only deal with questions arising from the Law of the Sea', stressed that there were no grounds to demand that questions be 'directly derived' from the international agreement allowing for the request to the Tribunal.[69] At the same time,

63 Written Statement of Ireland, 28 November 2013, para. 2.11.

64 Written Statement by the European Commission on behalf of the European Union, 29 November 2013, paras. 8–16. In a similar vein: Written Statement of Thailand, 29 November 2013, at 3/6; Written Statement of Thailand, 14 March 2014, paras. 8–9; Written Statement of Australia, 28 November 2013, paras. 27–32; Written Statement of the Argentine Republic, 28 November 2013, paras. 17–18; Written Statement of the Kingdom of the Netherlands, 29 November 2013, paras. 2.3–2.9; Written Statement of the United States, 27 November 2013, paras. 21–8; Written Statement of the United Kingdom, 28 November 2013, para. 46; Written Statement of the People's Republic of China, 26 November 2013, paras. 77–9.

65 Written Statement by the European Commission on behalf of the European Union, 29 November 2013, para. 10.

66 See, e.g., Written Statement of the United States, 27 November 2013, paras. 24–6.

67 *Ibid.*, at para. 26 (referring to J. E. Noyes, 'Judicial and arbitral proceedings and the outer limits of the continental shelf', (2009) 42 *Vand. J. Transnat'l L.* 1211; Y.-H. Song, 'The International Tribunal for the Law of the Sea and the possibility of judicial settlement of disputes involving the fishing entity of Taiwan – taking CCSBT as an example', (2006) 8 *San Diego Int'l L.J.* 37, at 53–4).
Remark: Judge Wolfrum has suggested that the competence of the full Tribunal to render an advisory opinion 'is limited to the interpretation of the Convention'. Wolfrum, *supra* note 13, at 63.

68 See, e.g., Written Statement of the United States, 27 November 2013, para. 25.

69 Written Statement by the Federal Republic of Germany, 18 November 2013, at 9. In a similar vein: Written Statement of Japan, 29 November 2013, paras. 16–17.

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it stressed that the questions raised by the SRFC were 'not formulated solely with regard to international instruments other than the MCA Convention … but [were] connected to the MCA Convention as well as to the [UNCLOS] Convention'.[70]

The Tribunal eventually held that the SRFC request satisfied all requirements of Article 138 of the Rules (paragraph 61). It asserted that the questions posed should constitute matters 'which fall within the framework of' the international agreement conferring jurisdiction upon the Tribunal (here the MCA Convention) (paragraph 67). On the other hand, it unequivocally dismissed the suggestion that the questions should 'necessarily be limited to the interpretation or application of any specific provision of' the MCA Convention. Instead, it was 'enough if these questions have … a "sufficient connection" … with the purposes and principles of the MCA Convention' (paragraph 68). This approach was ostensibly borrowed from the ICJ advisory opinion *Legality of the use by a State of nuclear weapons in armed conflict*, where the Court held inadmissible the request for an advisory opinion of the World Health Organization (WHO) because the questions raised, did not have 'a sufficient connection with' the WHO's functions.[71] In the latter case, the 'sufficient connection' test was, however, used in a rather different context, notably to verify whether the particular request brought by the WHO was compatible with the principle of speciality. In spite of the rather different setting in the case brought before it, the Tribunal's Opinion does not further explain its relatively flexible – or 'generous' as Judge Cot would have it[72] – approach *ratione materiae*. *In extremis*, this approach does not exclude the submission of a request for an advisory opinion that is as such unrelated to the law of the sea.[73] Yet one may assume that in a such unlikely scenario the Tribunal would wisely insist that questions themselves must also have a 'sufficient connection' to the law of the sea.

4. Considerations of judicial propriety

Most international judicial bodies that have been granted the competence to render advisory opinions also enjoy a discretionary power to dismiss requests for an advisory opinion as a matter of judicial propriety[74] if there are 'compelling'[75] or 'specific'[76] reasons. States have frequently invoked a variety of arguments, such as the lack of factual elements, the alleged harmful consequences of an advisory opinion, or the

70 Written Statement by the Federal Republic of Germany, 18 November 2013, at 9–10.

71 *Legality of the Use by a State of nuclear weapons in armed conflict*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 66, at 77, para. 22.

72 Declaration Judge Cot, para. 12.

73 Under the Tribunal's approach it would be sufficient (1) for the international agreement conferring advisory jurisdiction upon the Tribunal to be related to the purposes of UNCLOS; and (2) for the actual questions themselves to be connected to the (possibly multiple) purposes and principles of the former agreement.

74 See, e.g., Art. 14 of the League Covenant; Art. 65 ICJ Statute; Art. 47 ECHR; Art. 4 of the Protocol to the ACHPR; Art. 64 ACHR; Art. 159(10) UNCLOS. But see Art. 191 UNCLOS, according to which the SBDC 'shall' give advisory opinions at the request of the ISA Assembly or Council, and which would seem to suggest that the SBDC enjoys no discretion.

75 *Nuclear Weapons*, *supra* note 5, para. 19.

76 *'Other Treaties' Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, 24 September, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 1 (1982), dispositif.

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existence of an underlying contentious dispute, to secure the dismissal of the request – albeit such attempts have mostly been unsuccessful.[77]

Article 138 of the Rules similarly states that the (full) 'Tribunal *may* give an advisory opinion' (emphasis added) when so requested.[78] In light thereof, several states appealed to the Tribunal's discretionary powers, to urge (in vain) that it decline the SRFC request. Various arguments were raised, including, for instance, the SRFC's alleged failure to substantiate its request with the requisite documents and factual elements,[79] or the fact that the request would allegedly place ITLOS in the role of international legislator.[80] The central argument related to the *erga omnes* character of the SRFC's questions, in that they undeniably touched upon the rights and obligations of third states not members of the SRFC.[81] Reference was made[82] inevitably to the *Eastern Carelia* case, where the PCIJ essentially found that the Council of the League of Nations was not competent to request an advisory opinion, since the questions bore on an actual dispute between Finland and the Soviet Union, and the Soviet Union was not a member of the League.[83] Others referred to the *Western Sahara* case, where the ICJ affirmed that 'the lack of consent of an interested state may render the giving of an advisory opinion incompatible with the Court's judicial character', in particular when this 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'.[84] It was also observed that the SRFC request obliged the Tribunal to look at a variety of legal instruments, such as the 2009 Port State Measures Agreement, which did not themselves provide for any form of advisory

77 The ICJ in particular has rejected arguments relying on the motives of the states sponsoring a request for an advisory opinion, or on the alleged harmful consequences of an Advisory Opinion. See in particular: *Kosovo*, *supra* note 7, paras. 29ff; *Wall*, *supra* note 6, paras. 59–62. It has agreed in principle that a request may be rejected where it is a contentious dispute in disguise (*Western Sahara*, Advisory Opinion, 16 October 1975, [1975] ICJ Rep. 12, paras. 32–3). At the same time, this exception was ostensibly interpreted narrowly in the *Wall* Opinion, where the Court held (somewhat circularly) that the question concerned was not of a merely 'bilateral' nature, since it had 'arisen during the proceedings of the General Assembly'. *Wall*, *supra* note 6, paras. 46–50. At times, requests for an advisory opinion have, however, been dismissed. See e.g., *Status of Eastern Carelia*, Advisory Opinion, PCIJ Rep Series B No 5, at 27–9 (see also *infra*); *Compatibility of Draft Legislation with Article 8(2)(h) IACHR* (requested by Costa Rica), Advisory Opinion OC-12/91, 6 December 1991, Inter-Am. Ct. H.R. (Ser. A) No 12 (1991), para. 28 (where the IACtHR dismissed a request that 'could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court . . . ').

78 Consider, e.g., Written Statement of the United States, 27 November 2013, at 9, footnote 22, where the US 'assumed' that Art. 138 is a valid interpretation of Art. 21 ITLOS Statute to the extent that it states that the Tribunal 'may' use an advisory opinion, without being obliged thereto.

79 Written Statement of the Argentine Republic, 28 November 2013, paras. 24ff; Written Statement by the European Commission on behalf of the European Union, 29 November 2013, para. 13; Written Statement of the United Kingdom, 28 November 2013, paras. 52, 57; Written Statement of Australia, 28 November 2013, para. 59.

80 Written Statement of the Argentine Republic, 28 November 2013, paras. 20–3; Written Statement by the European Commission on behalf of the European Union, 29 November 2013, paras. 9–12; Written Statement of Australia, 28 November 2013, para. 54.

81 E.g., Written Statement of Thailand, 29 November 2013, at 3–5/6; Written Statement of Australia, 28 November 2013, paras. 43ff. But see: Written Statement by the Federal Republic of Germany, 18 November 2013, at 10–11.

82 E.g., Written Statement of the United States, 27 November 2013, para. 31; Written Statement of the United Kingdom, 28 November 2013, para. 53.

83 *Eastern Carelia*, *supra* note 77, at 27–9.

84 *Western Sahara*, *supra* note 77, paras. 32–3.

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jurisdiction.[85] Some explicitly warned that if the Tribunal did not dismiss the SRFC request, this might serve as an incentive for states to enter into new (bilateral or multilateral) agreements, with the sole purpose of conferring advisory jurisdiction to the Tribunal 'over a matter under another agreement that does not confer such jurisdiction'.[86]

The Advisory Opinion gives short shrift to the abovementioned pleas. Citing the case-law of the ICJ, the Tribunal first asserts that a request for an advisory opinion should not be refused except for 'compelling reasons' (paragraph 71). Objections that the SRFC request would force the Tribunal into a 'lawmaking' role are dismissed.[87] As far as the relevance of third-state consent is concerned, the Tribunal confines itself to referring to the ICJ's 1950 *Peace Treaties* advisory opinion.[88] By reference to the latter opinion, it is concluded that the consent of states not members of the SRFC is not required, since the advisory opinion 'has no binding force' for the latter, but merely seeks to offer guidance to the SRFC in respect of the performance of its own activities and the implementation of the MCA Convention (paragraphs 76–7).

Even though the boundary between the abstract and the concrete is not clear-cut and is always subjective to some extent, the questions in the SRFC request are arguably legal questions of a more abstract and general nature, rather than questions related to, or inspired by, a concrete and actual dispute between individual states. Put differently, the SRFC request can hardly be regarded as an attempt to circumvent the limits of contentious jurisdiction (in the sense of the *Western Sahara* opinion).[89] On the other hand, the Tribunal's observation that its Advisory Opinion has no 'binding force', and is 'given only to the SRFC' is not entirely persuasive (paragraph 76).[90] Such argument – which admittedly has also been invoked by the ICJ[91] – ignores that advisory opinions may carry significant legal weight and offer an authoritative interpretation of (sometimes vague or divergently interpreted) norms of international law – especially when the court or tribunal is not 'regional' but truly 'global' in nature – and thus undeniably carry a legal effect that reverberates beyond the author of the request.

What is more, the Tribunal's reliance on the ICJ case-law overlooks two important differences between the advisory competence of the ICJ, on the one hand, and that of ITLOS, on the other hand. First, in the case of the ICJ, advisory jurisdiction is conferred directly by the UN Charter, i.e., a multilateral instrument all UN member states

85 Written Statement of the United States, 27 November 2013, at 11.
86 *Ibid.*, para. 38.
87 This position is understandable, since it is not so much the acceptance of the request for an Advisory Opinion, but rather the way in which the questions are tackled that ultimately determines whether or not a judicial body remains within the boundaries of its judicial function. Consider in this context: Written Statement of New Zealand, 27 November 2013, paras. 19–20.
88 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, 30 March 1950, [1950] ICJ Rep. 65, at 71–2.
89 Still, some states suggested that the questions posed by the SRFC involved issues more appropriate for settlement by means of a case under contentious jurisdiction. E.g., Written Statement of Thailand, 29 November 2013, at 4/6; Written Statement by the Kingdom of Spain, 29 November 2013, at 13–14 (holding that the questions posed were 'of a wide enough nature as to give rise to controversies between States').
90 This argument is also criticized by Judge Cot, para. 11.
91 E.g., *Interpretation of Peace Treaties*, *supra* note 88, at 71.

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have consented to be bound by. Acceptance of the ICJ's broad advisory competence thus follows directly from the ratification of the UN Charter and the ICJ Statute. By contrast, if one follows the Tribunal's own reasoning, its advisory competence does not directly originate from Article 21 ITLOS Statute (which is only an enabling provision), but rather from the other 'international agreement related to the purposes of UNCLOS', which may well be accepted by a far lower number of states parties than UNCLOS itself (as in the case of the MCA Convention). Second, one should not ignore that a request for an advisory opinion from the ICJ must stem from the UN General Assembly or UN Security Council, or a duly authorized UN specialized organization. In other words, requests necessarily stem from an organization with quasi-universal membership and which carries a certain international legitimacy (within the confines of the competences it holds). These requests must be adopted with the requisite majority within the organization, pursuant to a procedure in which all interested parties in principle have an opportunity to be heard and weigh in. No such legitimacy or involvement of interested states is guaranteed in the context of requests for an advisory opinion to the full Tribunal under Article 138 of the Rules. This point was also emphasized by Judge Cot, who was the only member of the bench to hold that the Tribunal should not have taken up the SRFC request.[92]

One might object that, in the end, the Tribunal's approach is no different from the one adopted by the IACtHR. Indeed, pursuant to Article 64 IACHR, the Inter-American Court can issue advisory opinions pursuant to requests thereto from either OAS member states or OAS organs (see *supra*). Such requests may relate not only to the interpretation of the ACHR, but also to the interpretation of 'other treaties concerning the protection of human rights in the American States'.[93] In an Advisory Opinion from 1982, the Court affirmed that it could exercise its advisory jurisdiction:

> with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.[94]

In subsequent opinions, the Inter-American Court has effectively proceeded to interpreting multilateral instruments to which numerous non-American states are parties, but that were deemed to 'concern the protection of human rights in the American States'. Examples include the Vienna Convention on Consular Relations and the Convention on the Rights of the Child.[95] This broad approach *ratione materiae* has been justified in a manner echoing the ICJ's case-law. Thus, it was stressed that advisory opinions are 'intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the

92 Declaration of Judge Cot, paras. 5–9.

93 Note: The advisory jurisdiction of the African Court on Human and Peoples' Rights similarly extends to 'any legal matter relating to the Charter *or any other relevant human rights instruments*' (emphasis added). See *supra*, note 52.

94 *Other Treaties*, *supra* note 76.

95 See: *The right to information on consular assistance in the framework of guarantees of the due process of law*, Advisory Opinion OC-16/99, 1 October, 1999, Inter-Am. Ct. H.R. (Ser. A) No 16 (1999); *Juridical status and human rights of the Child*, Advisory Opinion OC-17/2002, 28 August, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002).

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inter-American system to carry out the functions assigned to them in this field'.[96] Against this background, the Inter-American Court's approach could be seen as supporting that of ITLOS in its Opinion of 2015.

Again, however, two reservations are due. First, the broad jurisdiction *ratione materiae* of the Inter-American Court is explicitly enshrined in Article 64 IACHR.[97] The Inter-American Court has moreover consistently emphasized that, in contrast to the advisory competence of other international tribunals, Article 64 was framed in a uniquely broad manner, and that the preparatory work of the Convention indicates that this was done deliberately.[98] It is clear that the same cannot be said for Article 21 ITLOS Statute. Secondly, the Inter-American Court accepts that there may be 'specific reasons' why it may decline to comply with a request for an advisory opinion.[99] In particular, it has stressed that the principal purpose of a request for an advisory opinion ought to relate to the implementation or scope of international obligations assumed by a member state of the inter-American system.[100] Conversely, the Court held that it lacks jurisdiction to render an opinion 'if the issues raised deal mainly with international obligations assumed by a non-American state or with the structure or operation of international organs or bodies outside the inter-American system'.[101] There have so far been no cases where the IACtHR has dismissed a request for an advisory opinion on the grounds that it essentially dealt with the international obligations of non-American states. Still, if one were to transplant the Court's reasoning to the SRFC request, one may wonder if at least some of the questions were not related primarily to the international obligations of non-SRFC members, rather than to assisting the SRFC to carry out its functions.

5. Cursory observations on the merits and procedure in Case No. 21

An in-depth assessment of the substantive aspects of the SRFC request and the Advisory Opinion is beyond the remit of the present contribution. Instead, we will confine ourselves to three observations.

First, insofar as the participation of interested parties in the oral and written procedure is sometimes considered to compensate for the absence of consent on

96 *Other Treaties*, *supra* note 76, para. 25.

97 Note that the Court's advisory competence not only with regard to states parties to the Convention, but also with regard to OAS and all of its member states, was confirmed by the OAS General Assembly when it adopted the Statute of the Court. T. Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', (1985) 79(1) *American Journal of International Law* 1, at 2. General Assembly of the Organization of American States, Statute of the I/A Court, Resolution No. 448, La Paz, October 1979, Art. 2.

98 See, e.g., *Other Treaties*, *supra* note 76, paras. 15–17; *The right to information on consular assistance in the framework of guarantees of the due process of law*, *supra* note 95, para. 64; *Juridical status and human rights of the Child*', *supra* note 95, para. 34.

99 See, *Other Treaties*, *supra* note 76, paras. 20ff.

100 *Ibid.*, para. 38.

101 *Ibid.*, dispositif. See also paras. 21, 38, 49 ('if a request for an advisory opinion has as its principal purpose the determination of the scope of, or compliance with, international commitments assumed by States outside the inter-American system'). To this end, the Court indicated that it was necessary to verify the purpose of each request for an advisory opinion on a case-by-case basis.

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the part of third states to the initiation of an advisory procedure,[102] the balance in Case No. 21 is rather positive. In its Order of 24 May 2013, the Tribunal identified no less than 48 intergovernmental organizations which it thought could contribute valuable information.[103] All were invited to submit written statements, along with the SRFC and all UNCLOS states parties. All in all, some 22 UNCLOS states parties (including the EU) submitted written statements, as did the United States (as a state party to the 1995 Straddling Fish Stocks Agreement) as well as seven intergovernmental organizations (albeit that a number of states commented only on the Tribunal's jurisdiction, but not on the merits[104]). In this context, the case illustrates the potential of advisory proceedings as a useful tool to tackle abstract legal questions through a participatory process in which interested actors are given the opportunity to present and exchange their legal views, in a setting (largely) removed from the caprices of political negotiations.

Second, while the Tribunal did not regard the absence of consent of third states as an obstacle to take on the case, it took care of construing the questions restrictively as relating only to the rights and obligations of coastal and flag states with regard to IUU fishing *within the EEZ of the SRFC member states*.[105] This is a sensible approach. Still, it does not hide the obvious fact that the answers given are of a general nature and can be taken to reflect the Tribunal's views on the rights and obligations of states in relation to IUU fishing *tout court*. As such, the impact of the Opinion reverberates well beyond the EEZs of the SRFC member states.

Third, and last, fears that the Tribunal might engage in judicial law-making have proven unfounded. While the Advisory Opinion refers, for instance, to the definition of IUU fishing in the Plan of Action of the Food and Agriculture Organization (FAO) to prevent, deter and eliminate IUU fishing (paragraph 91), it refrains from making bold statements on this or other instruments. Instead, the Opinion largely confines itself to restating the relevant provisions of the UNCLOS, and to interpreting these provisions in light of general international law (specifically the law of state responsibility).[106] In all, the Advisory Opinion clarifies the provisions of the UNCLOS in relation to IUU fishing, without fundamentally breaking new (legal) ground.

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102 See, e.g., Wolfrum, *supra* note 13, at 66 ('The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected … by the opportunity accorded it [*sic*] under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the legal norms to be interpreted and any jurisdictional objections it might have …'). Consider also: You, *supra* note 15, at 367.

103 *Request for an advisory opinion submitted by the sub-regional fisheries commission*, Order 2013/2, 24 May 2013.

104 See, e.g., Written Statements of Spain and Germany.

105 Advisory Opinion, paras. 87 ('the first question in terms of geographical scope relates only to the exclusive economic zones of the SRFC Member States…'), 89, 179. Consider also: Written Statement by the Federal Republic of Germany, 18 November 2013, para. 18.

106 Thus, referring to the Opinion of the SBDC of 2011 as well as the ICJ judgment in the *Pulp Mills* case (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, [2010] ICJ Rep. 14, at 79, para. 197), the Tribunal concludes that flag states have a 'due diligence obligation' to take all necessary measures to prevent IUU fishing by fishing vessels flying its flag (paras. 129–30). Conversely, states will be liable (only) when they fail to comply with this obligation of 'due diligence' (paras. 146–8). In cases where an international organization (such as the EU), in the exercise of its exclusive competence in fisheries matters, concludes a

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6. Concluding observations

ITLOS' Opinion of 2 April 2015 provides useful guidance in relation to the rights and obligations of coastal and flag states with regard to IUU fishing. It deals with a global problem that threatens ocean ecosystems and sustainable fisheries, and which has proven particularly harmful to the members of the SRFC. It offers a sensible and reasoned interpretation of the relevant UNCLOS provisions, and 'may allow SRFC member states, and other states affected by IUU fishing, to exert greater pressure on flag states, particularly flag states of convenience, that do not live up to their responsibilities under UNCLOS'.[107] Numerous states and international organizations participated in the proceedings, sharing their legal positions with one another and with the Tribunal. As such, the Opinion attests to the value of advisory proceedings as a highly useful tool to tackle legal questions and increase legal certainty. At the same time, however, the Opinion illustrates the risks of 'creeping' advisory jurisdiction of international courts and tribunals.

In spite of careful cherry-picking from the ICJ's case-law, the Tribunal's handling of the questions of jurisdiction, admissibility and judicial propriety, is not fully persuasive. The Tribunal's affirmation of its advisory jurisdiction on the basis of Article 21 ITLOS Statute is regrettably succinct, and does not substantively engage with the 'cogent, clear and articulate' (*dixit* Judge Lucky)[108] objections of several states. It cannot hide that the advisory competence of the full Tribunal was essentially created out of the blue by the Tribunal itself through the introduction of Article 138 of the Rules, 15 years after the signing ceremony in Montego Bay. One might object that, regardless of the interpretation of Article 288 UNCLOS or Article 21 ITLOS Statute, no fundamental problems arise, since the advisory jurisdiction of the full Tribunal is in any case 'based upon the consensus of the parties' to the 'international agreement related to the purposes of UNCLOS' (Wolfrum speaks of a 'consensual solution'),[109] and since the procedure in Case No. 21 illustrates that interested third states have ample opportunity to participate in the oral and written proceedings. Yet, this suggestion is difficult to reconcile with the Tribunal's position that it need not limit itself to the interpretation and application of the international agreement

fisheries access agreement, which provides for access by vessels flying the flag of its member states to fish in the EEZ of that state, the obligations of the flag state become the obligations of the international organization (para. 172). It follows that, in such a scenario, it will be the international organization that may be held liable for any breach of its 'due diligence' obligations, and not its member states (para. 173). In relation to the fourth question, the Tribunal concludes, inter alia, that the obligations 'to seek to agree' on measures for the conservation and management of fish stocks under Arts. 63(1) and 64(1) UNCLOS are 'due diligence' obligations which require the states concerned to consult with one another in good faith (para. 210).

107 T. Stephens, 'ITLOS Advisory Opinion: coastal and flag state duties to ensure sustainable fisheries management', (2015) 19(8) *ASIL Insights*, 16 April 2015, available at www.asil.org/insights/volume/19/issue/8/itlos-advisory-opinion-coastal-and-flag-state-duties-ensure.

108 Separate Opinion of Judge Lucky, para. 1.

109 Wolfrum, *supra* note 13, at 54 ('The probably most convincing answer … is that Art. 138 of the Rules establishes a consensual solution. If the jurisdiction of international courts and tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction.'). See also in this sense: Ndiaye, *supra* note 13, paras. 63–4 (referring to 'the agreement path'). But see: Written Statement of the United Kingdom, 28 November 2013, paras. 25–8.

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conferring jurisdiction, but may directly pronounce on the rights and obligations of third states.

But then why should the Tribunal impose limitations on its own advisory jurisdiction *ratione materiae* if the ICJ has not done so either? As mentioned earlier, the reason is twofold. First, in the case of the ICJ, the broad advisory jurisdiction was directly accepted by all UN member states through the adoption of the UN Charter and the ICJ Statute. In the words of Lauterpacht: 'There seems to be no decisive reason why the sovereignty of States should be protected from a procedure, to which they have consented in advance as Members of the United Nations . . .'.[110] No such direct consent can be distilled from Article 21 ITLOS Statute (which, in the view of ITLOS, only constitutes an enabling provision). Second, the broad advisory jurisdiction of the ICJ *ratione materiae* can only be triggered by an international organization with quasi-universal membership. Let us assume, for the sake of argument, that the ICJ had similarly interpreted the reference to 'all matters specifically provided for . . . in treaties and conventions in force' in Article 36 ICJ Statute as a legal basis conferring a broad advisory jurisdiction *ratione personae*. This would imply that *any* two states concluding an agreement between them could ask for an advisory opinion from the primary judicial organ of the UN on essentially *any* question of international law. This may seem a state of affairs devoutly to be wished for from a scholarly perspective, as it would theoretically make it possible to clear legal uncertainties in numerous domains of international law. Yet, this is not necessarily how the actual members of the international community want it. When negotiating new treaties, states frequently hold conflicting interpretations of the provisions introduced, and may choose to keep matters deliberately vague, possibly leaving the exact meaning of the respective rights and obligations to be clarified through subsequent practice. They may not necessarily be willing to accept the prospect of an international court or tribunal pronouncing in an authoritative manner on the interpretation and application of the agreements concerned (save as a by-product of a consensual contentious procedure). Furthermore, inasmuch as there is no clear-cut line between legal questions of an abstract and general nature, and questions more closely related to contentious disputes between states, this poses the risk of highly politicized requests for advisory opinions. It is one thing to accept such requests from one of the two main political bodies of the UN (which, by their nature and membership, are endowed with an unparalleled international legitimacy). It is quite another to accept that such requests can be made by only a handful of states – and in fact the *travaux* of the ICJ Statute make clear that states were not ready to accept this.[111] The foregoing should not be read as a plea against the advisory jurisdiction of international courts and tribunals, the value of which is not in dispute. Rather, it is a notice of caution against a broad advisory jurisdiction that rests on a murky base.

Against this background, it is perhaps regrettable that the Tribunal did not further define the contours of its advisory competence. It remains to be seen whether it will do so in future cases. A comparison to the case-law of other international courts

110 H. Lauterpacht, *The development of international law by the International Court* (1958), 357–8.
111 Oellers-Frahm, *supra* note 47, at 1979.

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and tribunals endowed with advisory competence does not provide unequivocal answers, since the nature of these bodies, and the scope of their jurisdiction, are so diverse. Still, one might expect the Tribunal to limit its advisory competence to questions related to the law of the sea (*sensu lato*). On a different note, the Tribunal could find inspiration in the case-law of the IACtHR to exclude advisory jurisdiction in relation to requests dealing 'mainly with international obligations assumed by'[112] third states (not parties to the international agreement conferring jurisdiction).

In the end, the affirmation by the full Tribunal of its advisory jurisdiction has let the genie out of the bottle. This does not mean that one should expect an abundance of requests for advisory opinions from the full Tribunal – certainly not in the near future. With the exception of the MCA Convention, there seem to be no agreements specifically providing for advisory jurisdiction on the part of the full Tribunal at present.[113] In the words of Judge Ndiaye, this is 'because the agreements existed prior to the establishment of the Rules of the Tribunal, or because states could not foresee that the advisory jurisdiction clause would be introduced by an organ they established'.[114] Nevertheless, the Tribunal's Opinion may serve as an inspiration for the inclusion in other bilateral or multilateral agreements of provisions similar to Article 33 of the MCA Convention. It is worth recalling in this context that the questions posed by the SRFC were not particularly sensitive or politically controversial. It is telling that several states that objected to the full Tribunal's advisory competence, recognized the challenges posed by IUU fishing and expressed sympathy for the SRFC request.[115] Yet, future requests may well deal with more politically sensitive issues and/or with questions that are more closely related to actual inter-state disputes (think, for instance, of questions concerning controversial shipping interdiction practices, military activities in the EEZ, the obligations of states with regard to persons in distress at sea, or with regard to the exercise of sovereignty over contested waters). Judge Ndiaye, for one, has hinted at the possibility of an advisory opinion on the legal status of islands and rocks under Article 121(3) UNCLOS, which has 'become one of the main sources of maritime disputes between States'.[116] Other judges have ostensibly expressed sympathy for the use of advisory proceedings as a means to directly or indirectly settle disputes among states.[117] Future requests may thus prove a more severe test for the Tribunal's frail advisory jurisdiction and the scope thereof.

On a final note, it is worth observing that a number of states contesting the advisory jurisdiction of the full Tribunal in Case No. 21 expressed themselves favourably over a possible amendment of UNCLOS with a view to explicitly incorporating,

112 *Other Treaties*, *supra* note 76, paras. 21, 38, 49.

113 Cf. Australia, Written Statement of 28 November 2013, at 20: '[W]ith the exception of Article 33 of the MCA Agreement, Australia is not aware of any international agreement that purports to confer advisory jurisdiction on the Tribunal'.

114 Ndiaye, *supra* note 13, para. 79.

115 See, e.g., Written Statement of the People's Republic of China, 26 November 2013, para. 64.

116 Ndiaye, *supra* note 13, para. 88. Consider also the statement by (then) ITLOS President Jesus before the UN General Assembly in 2008, at para. 9, available at www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/general_assembly_051208_eng.pdf.

117 Wolfrum, *supra* note 13, at 63; Kateka, *supra* note 13, at 163.

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and defining, an advisory competence for the full Tribunal.[118] A similar suggestion was made by Judge Lucky.[119] An amendment of the Convention would be a useful way to clear the fog over the full Tribunal's 'creeping' advisory jurisdiction. It could moreover provide an opportunity to clearly empower the UNCLOS meeting of states parties, but also, for instance, the FAO, the International Maritime Organization (IMO) and/or the Commission on the Limits of the Continental Shelf (CLCS), to submit requests for an advisory opinion to the full Tribunal. This would remedy the current anomaly whereby a group of seven states can trigger the full Tribunal's advisory competence, but relevant international bodies such as the IMO or the CLCS cannot.

118 E.g., Written Statement of the Argentine Republic, 28 November 2013, para. 31. More neutral: Written Statement of the People's Republic of China, 26 November 2013, paras. 64–5.

119 Separate Opinion of Judge Lucky, para. 28.

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