ITLOS Advisory Opinions and International Law

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1. Introduction

Advisory opinions from international courts are relatively rare but in the last years have been gaining the attention of many of the international actors, including some who speculate about their necessity. Allegedly they offer a versatility, in practical terms, that no other jurisdictional procedure could offer, as there is no need for their application to a previously existing dispute. In fact, even though it is not the intention of a Party requesting and advisory opinion, putting one into practice might prevent disputes, because a court or tribunal can make this decision quickly and they are easy to apply if there is no controversy.

In its long history the International Court of Justice (ICJ) has released 27 Advisory Opinions, and the International Tribunal for the Law of the Sea (ITLOS) in more than 25 years of existence, has produced two of them. Both ITLOS opinions cover crucial domains of the

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exploitation of the seas: the vast mineral resources of the Seabed, and fishing activities.[1]

Any prospective applicant before the ITLOS must consider the two options for advisory jurisdiction offered by the Convention: the ITLOS Seabed Disputes Chamber (SDC)[2] or the Tribunal sitting as a full bench, resulting from an interpretation made by the same Tribunal of Article 21 of its Statute in connection with Article 138 of its Rules.[3] Issues that refer to the activities in the Area, mostly related to the exploitation of the resources of the Seabed, are reserved for the Chamber. All other matters, that imply the interpretation and application in general of the UN Convention on the Law of the Sea (UNCLOS) rules, are reserved to the ITLOS as a whole.

The potential applicants to these two bodies are also different. The ITLOS Seabed Chamber will hear requests brought by the authorised organs of the International Seabed Authority (ISA), while the ITLOS as a whole may assert advisory jurisdiction where a group of interested States sign an agreement that includes expressly the possibility of relying on its advisory jurisdiction.[4]

In the last instance, as in the only Case (Case 21) up to now that has been considered by the Tribunal, we can identify mostly developing countries wishing to have certain UNCLOS rules elucidated in relation to questions that are of the utmost importance for their national interests. The trend may be reflected in the fact that, with a letter dated 12 December 2022, the Commission of Small Island States on Climate

1. For the ICJ see <www.ICJ-CIJ.org/en/advisory-proceedings>, the first opinion was delivered in 1948 and the last in 2019. For ITLOS see in *Digest of Jurisprudence 1996-2021*, Case 17 (2011) 83-87 and Case 21 (2015) 109-115.

2. United Nations Convention on the Law of the Sea (Montego Bay, adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396, Article 191.

3. For this interpretation see in *Digest* (n 1) Case 21, ¶ 5-10, 110-111.

4. In the first Case the application was submitted by the Secretary General of ISA, pursuant a decision adopted by the Council; and in the second by the Permanent Secretary of the Sub-Regional Fisheries Commission. See in Digest (n 1) 83, 109.

Change and International Law submitted to the Tribunal a Request for an Advisory Opinion on the obligations of UNCLOS' State Parties to prevent, reduce and control pollution of the marine environment and protect and preserve it.[5]

There is also a striking difference between issues that have been submitted to the ICJ's Advisory jurisdiction and those submitted to the ITLOS. While requests submitted to the ICJ, that are mostly made by the United Nations General Assembly (UNGA), are usually strongly politically biased (and we will examine the objections presented in some cases by interested Parties), requests submitted to the ITLOS are mostly related to technical or legal issues.

One can have the strong impression that the content of the questions, being raised in the respective court, have also influenced the likelihood of a case being heard under a court's advisory jurisdiction. In the case of the ICJ, requests involving issues with a strong legal-political content require sufficient majority among member States to bring them. To invoke ITLOS's Special Chamber there is a complex procedure within the ISA's organs before a request will be made.

In the case of the ITLOS and, in particular, of the application for advisory jurisdiction of the Tribunal, the lack of sufficient information on the procedures for bringing a request for an advisory opinion has also undoubtedly influenced the delay in new submissions.

However, before reflecting further on the ITLOS's advisory opinions, it is important to examine first what is the real nature of an advisory opinion and the real impact they can have in the creation of new rules of international law.

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5. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (ITLOS, Case No. 31), 12 December 2022. Available at <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> accessed on 31 December 2022.

2. The Legal Nature of Advisory Opinions

Advisory opinions by International Courts are not a creation of contemporary international law. They already existed long before the creation of the ICJ or the ITLOS and they were included in Article 14 of the Covenant of the League of Nations, evolving into a generally accepted procedure. Some national legislations had even before incorporated the concept of advisory opinions.[6]

Both, Article 96 of the Charter of the United Nations, and Article 191 of the United Nations Convention on the Law of the Sea, expressly provide for these proceedings to be submitted to the ICJ or the SDC of the ITLOS, respectively. In both cases the authorised applicants for them are the UNGA, the United Nations Security Council (UNSC), and other organs of the United Nations and specialised agencies, in the first instance; and the Assembly or the Council of the Seabed Authority, in the second.

In both cases, the advisory procedure should deal with 'legal questions', with the important difference that in the case of the United Nations it could be 'any' international legal question, for the UNGA and the UNSC requests; but it is restricted to only those legal questions 'arising within the scope of their activities', for the other main United Nations organs and those of the specialised agencies, as well as for those of the Seabed Authority, in the case of UNCLOS. This distinction makes sense because of the diverse and expert functions of those specialised organs, including the ISA.[7]

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6. Helmut Turk, 'Advisory opinion and the Law of the Sea', in Miha Pogačnik (ed.) *Challenges to contemporary International Law and International Relations*, (The European Faculty of Law Nova Gorica 2011) 366; Anthony Aust, 'Advisory opinions' (2010) 1(1) Journal of International Dispute Settlement 123, 124-6.

7. United Nations Charter, Article 96(1) and (2); and UNCLOS, Articles 159(10) and 191.

The exercise by a Court of its contentious and advisory jurisdiction is equally legitimate and both are only different facets of their essential role of dictating ('dicere') the law ('ius'). Both share the same nature, and even in practical terms they are so similar that, for instance in the case of the SDC, the procedural provisions to be applied, 'to the extent to which it recognises them to be applicable', are the same as those in effect in contentious cases.[8]

In a recent Max-Planck Institute publication, advisory opinions are defined very simply as 'judicial statements on legal questions'[9] and we could add, paraphrasing the ICJ, '[with]… the purpose of furnishing to the requesting organ the elements of law necessary for them in their action.'[10] Only indirectly, by the use by the requesting organs of the 'legal elements' furnished by a Court in its advisory opinion, may there be an eventual effect on the settlement or avoidance of an international dispute. An advisory opinion should not be relied upon to circumvent the general principle that a dispute cannot be submitted to judicial settlement without the consent of the State involved.[11]

However, we should not lose sight of the important differences between opinions concluded under advisory jurisdiction, and those under contentious jurisdiction. In fact, advisory opinions: a) do not have a binding force, unless there is a specific agreement on the contrary;[12] b) they are not addressed to a State; and c) there is an expectation that they

8. ITLOS, Rules of the Tribunal, Article 130(1).

9. Teresa F Mayr, Jelka Mayr-Singer, 'Keep the wheels spinning: the contribution of advisory opinions of the ICJ to the development of International Law' (2016) Max-Plank Institute for Comparative Public Law and International Law 425, 427.

10. This was expressed by the ICJ in the *Wall Case*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136; Aust (n 6) 144.

11. Mayr (n 9) 429.

12. Turk (n 6) 366, who also mention some instances of such agreements.

should not be refused to the requesting parties unless the Court, by exercising its discretionary power, decides that the content of the question is not related to a legal issue or the request exceeds the jurisdictional scope of the activities of the requesting organ.

In the case of the ITLOS sitting as a Whole on an advisory opinion, we can recognise the existence of other potential requesting Parties. As a matter of fact, Article 138(1) of the Rules of the Tribunal specifies that advisory jurisdiction is available 'if an *international agreement* related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion' (emphasis added). This is exactly what took place when a group of Coastal States from Western Africa signed and ratified an agreement creating a Sub-Regional Fisheries Commission (SRFC), in which the possibility for the Permanent Secretary of the Commission to submit the request for an advisory opinion was established.[13]

The first procedural step that any Court or Tribunal must take before pronouncing its opinion is to check its own jurisdiction over the particular case submitted; it is at this stage that the capability of the Court or Tribunal to entertain the case could be challenged by some interested Parties. As a matter of fact, in the case of the ITLOS, its Rules provides for the Registrar to give notice of the request for an advisory opinion to all States Parties to the Convention and those international organisations, that the Tribunal has identified as likely to provide information on the question that is the object of the request.[14]

As a consequence, any interested State, within a time limit established by the Chamber or the Tribunal, can present a written statement on the issue under consideration. The content of these statements is variegated and, of course, could include objections to the Tribunal's jurisdiction in

13. See MCA Agreement, Article 33.

14. ITLOS, Rules of the Tribunal, Article 133(1) and (2).

the particular case. In the case of the ICJ it is quite frequent that the State opposing the request could invoke the political nature of the question submitted for an opinion.[15]

However, in almost all cases the ICJ has rejected those objections, considering that any political issue could also inextricably involve a legal question that will be the only object of its pronouncements. This has been the case even when, in practical terms, an advisory opinion is understood to have a potentially important political effect. For instance, in the Wall Case, the UNGA's request to the ICJ for and advisory opinion, even when expressed in legal terms, had an undeniable political intention. That opinion later formed the basis for a UNGA's resolution containing practical recommendations regarding the cessation by Israel of its construction of a wall in the Palestinian occupied territories.[16]

Garcia-Revillo, in a recent paper,[17] identifies three checks that the ITLOS must make before accepting jurisdiction:

- *In abstract*, by checking its own jurisdiction as it appears to be conceded by the Convention.
- For the *particular request*, in light of the appropriate Convention provisions that are applicable to the case; that is to say if the requirements in Article 191, in the case of the SDC, are met or, in the case of the Tribunal in full, if those expressed in Article 138 of the Rules are met.
- If the rendering of an advisory opinion is *appropriate* or not to the case, by using its own discretionary power.

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15. ITLOS, *A Guide to proceedings* (2021) 33, 35.

16. *Legal consequences of the construction of a Wall in the occupied Palestinian territories*, ¶ 41, where it adheres once more to previous precedents. See also United Nations General Assembly, Resolution ES-10/15, adopted on 7/20/2004, in particular operative paragraphs 1 and 2.

17. Miguel García Garcia-Revillo, 'The jurisdictional debate on the request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission to the International Tribunal for the Law of the Sea' in Angela del Vecchio, Roberto Virzo (ed), *Interpretation of UNCLOS by International Courts and Tribunals* (Springer, 2019) 127-8.

A State that disagrees with the exercise of advisory jurisdiction in a particular case might argue that the ITLOS has failed to meet one of these requirements; for example, if the Tribunal exercises its discretionary power to consider a purely political question. The ITLOS has not yet had to refuse a case based on these three jurisdictional checks.

As a matter of fact, in Case 17, the Chamber concluded that the three requirements established in Article 191 had been fulfilled: '(i) there was a valid request from the Council; (ii) the questions raised by the Council were of a legal nature; and (iii) these legal questions fell within the scope of the activities of the Council since they related to the exercise of its powers and functions…'

In Case 21, however, the jurisdiction of the Tribunal of the Whole was objected *in abstract*, that is to say, on the grounds that no such jurisdiction was ever conceded by the Convention in any of its provisions. The Tribunal was than obliged to justify its own jurisdiction by an extensive interpretation of Articles 21 of its Statute, and 138 of the Rules.[18]

This is not what happens with the ICJ that, considering the high political content of many of the questions presented in advisory opinion requests, has needed in almost all cases to offer long justifications of its jurisdiction, focusing on the appropriateness of the particular request.

At this point we cannot ignore the many criticisms that have been raised that advisory opinions are really a disguised way of resolving disputes and imply a violation of the principle of consent of the Parties involved. As we mentioned, when identifying the main differences between contentious and advisory jurisdiction, the latter are not addressed to any particular country and, as a consequence, will not mandate any direct intervention in a State's ongoing dispute. However, it is also true, that a Tribunal statement on a requested issue can facilitate or influence

18. *Digest* (n 1) 84, for Case 17; 110-111, for Case 21.

the outcome of an international dispute.[19] It could prevent them or even, less frequently and at least theoretically, provoke them by giving enough legal elements for a State or group of States to denounce another for the violation of certain rights. For instance, that could be a possible outcome of an advisory opinion on the responsibility of certain State/s for compensation, as a consequence of the commission of a wrongful act against another State's own rights and legitimate interests.

But the way of thinking behind those criticisms focuses only on unwanted consequences that are not in the intention of any international court or tribunal, and cannot, in any case, jeopardise the legal nature of a decision. Advisory opinions are clearly not intended as a method of settlement of disputes, and at the most could be considered, as the same ICJ characterised them, as means of 'preventive diplomacy.'[20]

3. A Source of International Law?

The ICJ's Statute enumerates the 'judicial decisions' as 'subsidiary means for the determination of rules of law', and the doctrine in general accepts that they are sources of international law, albeit of a subsidiary nature. We also know that 'judicial decisions' could be the outcome equally of contentious or advisory jurisdictions of a court or tribunal. Consequently, we could finally concede that by giving its legal opinion to a requesting organ, the court or tribunal could be acting as a *law developer*.[21]

19. See considerations in Mayr (n 9) 429.

20. Turk (n 6) 366; Mayr (n 9) 427.

21. Statute of the International Court of Justice, Article 38(d). See also in James Crawford, *Brownlies principles of Public International Law* (8th Edition Oxford 2012) 37-41, in particular 39-41, 732.

But how are we to understand that expression? In general, there is an agreement in the Doctrine that there must be a clear difference between 'making the law' and 'developing it'. The most radical position in favour of the first position is that of Kelsen that supported the idea that 'every application of the law amount to the creation of new legal rules…'[22] On the other hand authors, like Professor Ruda, are of the opinion that judicial decisions can only 'contribute to the interpretation and application of existing rules of international law but not to the establishment of new rules.'[23] In between these two opinions I prefer an intermediate position.

The fact is that not all rules of international law are perfectly clear, and by interpreting and applying them, especially in evolving contexts, the courts are, in practical terms, giving to them contents that were not easily foreseen by the original law makers or that are not easily discovered in quick and superficial examination of them. In the particular case of the advisory opinions, these could have a real influence in the creation of new rules of law when the requesting organs, and the States that are part of the corresponding international organisation, effectively incorporate the giving opinions into their general practice. For instance, if the content of an advisory opinion is incorporated into a UNGA resolution by consensus and adopted into the general practice of the States, it could become customary international law.[24]

In a recent study,[25] researchers identified four effects of advisory opinions in the development of the law:

22. Mayr (n 9) 432.

23. ibid., 431.

24. There is an important opinion that support the idea that UNGA Resolutions could represent an important contribution to the formation and 'crystallisation' of new norms of international costumary law or general principles, because they 'offer an indication of the international legal community's *opinio iuris*' See Antonio Augusto Cançado Trindade, *Principios do Direito Internacional contemporaneo* (2a. Ed Fundaçao Alexander de Gusmao Brasilia 2017) 112.

25. Mayr (n 9) 441-448.

1) *Adherence to judicial precedents*, which means that an advisory opinion contributes to the progress of international law by 'maintaining the same legal position on several occasions' or 'ratifying the correctness of previous conclusions',[26] which makes it difficult for States, that do not agree, to argue otherwise. This does not mean that a court or tribunal will only adhere to its own previous decisions, but also that one court may follow the logic of a different court to support its own similar conclusions. As a matter of fact, this is a very common occurrence between the ICJ and the ITLOS decisions, both in contentious and advisory procedures.

2) *Treaty interpretation*, an advisory opinion may have repercussion in the future application of a rule by a State if an opinion: a) attributes new meaning to the terms of a treaty in changing circumstances; or b) reassess a rule of customary international law, in connection with a rule from treaty law, and has a repercussion in the future application of it by the State parties (*opinio iuris sive necessitatis*).

3) *Shaping of customary international law*, when an advisory opinion evaluates the conduct of relevant players in the international community and tries to construct a legal norm from that conduct; or, in other words, tries to identify new or changing norms of international general law from that conduct that impact on the behaviour of those States, to the point to lead to a process of formation of new norms.

4) *Closing gaps* with the court's own statements, in the absence of generally accepted rules. By clarifying ambiguities or bringing to light a rule, that is otherwise implicit or that arises from new developments in the international community or in the legal system, an advisory opinion can impact law development.

In the case of the ITLOS the lack of written or other objections to a request for an advisory opinion by State Parties, could be an indication

26. ibid., 441.

of the later acceptance of the opinion's conclusions or of full agreements with its findings that could lead to the recognition of new rules of customary international law. To that effect, the acceptance must be accompanied by a consistent State practice.[27]

4. The ITLOS Advisory Opinions

The ITLOS has only issued two advisory opinions: Case 17 on *Responsibilities and obligations of States with respect to the activities in the Area*, submitted by the Secretary General of the ISA, pursuant to a decision taken by the ISA's Council, on May 14, 2010; and Case 21, submitted by SRFC, through its Permanent Secretary, on March 27, 2013.[28]

The first case was submitted to the SDC, in conformity with Article 191 of the Convention and Article 138 of the ITLOS's Rules of Procedure, and the second to the Tribunal as a Whole, based on an interpretation made by the same Tribunal of Article 21 of its Statute, in connection with Article 138 of the Rules. We will now proceed to examine each of these cases and try to identify, even if not in an exhaustive manner, their major contributions to the development of the international law.

4.1 Case 17

This case originated on the interests of the States of Tonga and Nauru to engage in UNCLOS' related mining activities in reserved areas of the

27. See the interesting arguments exposed by Garcia - Revillo when referring to Article 38 of the ITLOS Rules, (n 17) 136-7. The same considerations could be extended, mutatis mutandis, to the ITLOS Advisory Opinions.

28. Digest (n 1) 83-87, 109-115.

seabed to be developed by ISA, 'in association with developing countries', under Article 8, Annex III of the Convention, after a license is awarded. The two States were sponsoring two private companies: The Tonga Offshore Mining Ltd., and the Nauru Ocean Resources Co., respectively.[29]

In March 2010, Nauru contacted the ISA's Secretary to request an advisory opinion on the liabilities that a sponsoring State might be subjected to for the activities by their sponsored companies in the Area. Nauru's proposal was accepted by the ISA's Council but reformulated into three general questions:

1. *What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention and the 1994 Agreement related to the implementation of Part IX of the Convention?*
2. *What is the extent of the liability of a State Party for any failure to comply with the provisions of the Convention and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b) of the Convention?*
3. *What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement?*

If we analyse these questions in the light of the effects described above on how an advisory opinion can influence the development of international law, we can conclude that the SDC was called not only to interpret treaties (the Convention and the 1994 Agreement) but also to, eventually, close gaps existing in their provisions on the matter, or shape evolving norms of international customary law.

29. David Freestone, 'Responsibilities and obligations od States sponsoring persons and entities with respect to activities in the Area' (2011) 105 American Journal of International Law 755, 755-6.

What were the answers given by the Chamber to these questions?

A) Regarding the *first question*, it clarified the extent of the concept of 'activities in the Area', specifying that even though they could refer to 'all possible activities in the Seabed' they are limited to only those expressly mentioned in the Convention or in the Agreement.[30] It also, in reference to the responsibilities and obligations of the States sponsoring such activities, identified, among others, two main sets of due diligence obligations: (i) to *ensure* that a sponsored contractor should carry out its activities in the Area in conformity with the provisions, not only of its contract but also of the Convention, the Agreement and other related instruments; and (ii) *independently* of the first obligation, to assist the Authority in its controlling functions related with the activities by the sponsored contractors taking place in the Area.[31]

Regarding the first obligation, the Chamber also clarified that it is one of *conduct* and not of *results*. The sponsoring State was only responsible when it did not take the necessary legal, administrative, and practical measures, within the framework of its own legislation and the applicable international law, to ensure that its contractor always behaved in conformity with the Convention and the Agreement. The sponsoring State would not be liable if its contractor acted in infringement of those measures.[32]

A very important contribution to the development of the international environment law was that the 'obligation to ensure' was also qualified by the Chamber to be one of *due diligence*, expanding its content at the same time to include, as a legal obligation, the *precautionary approach*

30. ibid., 757.

31. In conformity with Article 153(4) of UNCLOS. See Digest (n 1) 84-5; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, ¶ 82-97, 34-38.

32. Freestone (n 29) 757-8. Opinion, ¶ 110-11, 41.

as defined in Principle 15 of the Rio Declaration. In fact, the Chamber stated that the approach 'set out in the Nodules Regulations and the Sulphides Regulations […] is also to be considered an integral part of the due diligence obligation of the sponsoring State and applicable beyond the scope of the two Regulations.'[33] In this part of the advisory opinion the Chamber closed an important gap existing between the activities contemplated in those regulations and all other activities possible under the Convention and the Agreement.

The Chamber also recognised that the sponsoring State's *due diligence* obligation required the State to ensure that the contractor conduct an environmental impact assessment (EIA). As a general obligation under customary international law, this part of the advisory opinion supported the existence of a general norm of international law in the seabed mining context.[34]

It is important to notice here that the existence of a duty to conduct an EIA in similar cases was previously pronounced by the ICJ in its *Pulp Mills* case;[35] however, in a very revealing sample of the factual coordination existing between the two judicial bodies, the ITLOS not only confirmed the precedent established by the ICJ, but expanded the content of the ruling, improving the scope, content and correct implementation of the provision.[36] By corroborating the same legal position as the ICJ, the advisory opinion contributed to the consolidation of an emerging

33. Digest (n 1) 85. Order, ¶ 125-135, 45-47.

34. ibid., 85. Opinion, ¶ 141-150, in particular ¶ 145, 49-52.

35. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, 14.

36. See more in Laura Pineschi, 'The duty of Environmental Impact Assessment in the First ITLOS Chamber Advisory Opinion: Towards the supremacy of the general rule to protect and preserve the marine environment as a common value', in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea and Chiara Ragni (ed.), *International Courts and the development of International Law* (Springer Milano 2013) 427.

norm of international general law. The opinion further clarified that the performance of this obligation applied equally to both developed and developing countries.[37]

B) Regarding the *second question*, the Chamber stated that the sponsoring State was not to be liable for the unlawful conduct of the contractor when it 'has taken all the necessary and appropriate measures to secure its effective compliance.' It was enough for the sponsoring State not to be held liable if, in light of the State's own existing legislation, it took 'reasonable' measures to ensure compliance by its contractor.[38]

In a long set of paragraphs, the Opinion also gave useful details on the scope and prerequisites for the existence of the liability, clarifying the content of the Convention's provisions in the matter and closing important gaps in the respective regulations.[39]

C) Finally, the Chamber answered the *third question* by stating that the required measures to be taken by a State, within its own legal system, could include the adoption of laws, regulations, or administrative orders with two functions: (i) to ensure compliance by the contractor with its obligations and (ii) to exempt the sponsoring State from liability. The State would not be considered in compliance with its obligations simply by entering into a contractual agreement with the Contractor, but only if it had taken the necessary legal measures.[40]

The Chamber than described the characteristic that those measures should have:

- An enforcement mechanism for active supervision of the activities performed by the contractor.

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37. Digest (n 1) 85. Opinion, ¶ 158-159, 53-54.

38. ibid., 86; Freestone (n 29) 759.

39. ibid., 85-86. Opinion, ¶ 165-177, 55-58.

40. ibid., 86. Opinion, ¶ 218-222, 68-69.

- Mechanism for coordination of the activities of the sponsoring State and the Authority.
- Continued enforcement of these measures while a contract with the Authority is in force.
- Post-exploration coverage for any outstanding obligations of the contractor.

In adopting these measures, the sponsoring State does not have absolute discretion, because it must act in good faith 'taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.'[41]

For the protection of the marine environment, in particular, the measures taken could not be less stringent than those adopted by the Authority or less effective than international rules, regulations and procedures.[42]

The Chamber also insisted on the necessity that the involved States, as due diligence obligations, check, *inter alia*, the financial liability and technical capacity of its sponsored contractors as well as ensuring that all the obligations in the contract with them are enforceable.[43]

A very interesting conclusion was the emphasis on the provision of Article 39 of the ITLOS Statute prescribing that 'decisions of the Chamber shall be enforceable in the territories of the State Parties in the same manner as judgments and orders of the highest court of the State Party in whose territory the enforcement is sought.'[44]

This Opinion could have an historic character, not only for being the first such opinion delivered by the SDC but also for the impact it will have on the development of the international environmental law in the issue, in at least three aspects: the requirements of due diligence,

41. ibid., 86. Opinion, ¶ 230, 71.

42. Digest (n 1) 86. Opinion, ¶240, 73.

43. Digest (n 1) 87. Opinion, ¶ 234, 72 and ¶ 238, 73.

44. Digest (n 1) 86-87. Opinion, ¶ 235, 72; Freestone (n 29) 659.

recognition of the trend towards considering the precautionary approach as general customary law, and identifying a set of direct obligations for sponsoring states. One first consequence of this opinion was that in a few years' time, in the opinion of one source, 'most Tuna [regional fisheries management organisations (RFMOs)] have adopted procedures that can be precautionary in nature…'[45]

4.2. Case 21

On March 28, 2013 (date the letter was received), the Permanent Secretary of the SRFC of North Western Africa (Cabo Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone) requested that the ITLOS render an advisory opinion, in accordance with Article 138 of the Rules, and pursuant to the authority granted to it by the Convention on the definition of minimum access conditions and exploitation of fisheries resources within the maritime zones under the jurisdiction of the SRFC Member States (Minimal Conditions for the Access to Marine Resources (MCA) Convention, signed in Dakar on June 8, 2012).[46]

The question posed to the Tribunal were:

1. *What are the obligations of the flag State in cases were illegal, unreported and unregulated fishing activities are conducted within the Exclusive Economic Zone of a third-party State?*
2. *To what extent shall the flag State be held liable for [illegal, unreported, and unregulated (IUU)] fishing activities conducted by vessels sailing under its flag?*

45. Freestone (n 29) 760. Text extracted from Paul De Bruyn, Hilario Murua and Martin Aranda, 'The precautionary approach to fisheries management: How this is taken into account by Tuna regional fisheries management organisations (RFMOs)' (2013) 38 Marine Policy 9.

46. Digest (n 1) 109. Opinion, ¶ 230, 71.

3. *Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?*
4. *What are the rights and obligations of the coastal Sate in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?*[47]

The Tribunal as a Whole answered the questions in the following manner:

A) *First question*. Regarding the obligations of the flag State in cases of IUU fishing, the Tribunal identified five obligations, including to:

1. Take all necessary measures: (i) to ensure compliance by vessels flying its flag with the law and regulations enacted by the SRFC Member States; (ii) to assure that those vessels are not engaged in IUU fishing activities or (iii) in activities which undermine the flag State responsibilities under Article 192 of the Convention (preservation of the marine environment and of the marine living resources).
2. Cooperate with SRFC States.
3. Investigate the alleged IUU fishing.
4. Perform the necessary actions to remedy the consequences of those activities.
5. Inform SRFC Members of those actions.[48]

These obligations were recognised by the Tribunal to be of 'due diligence' in nature, which implies that the flag States should comply with them in conformity with what is generally, in the practice of the States, considered the 'common standard of conduct' applicable to those concrete cases. As the concept's extension was clearly defined by the ICJ, in its *Pulp Mills* case, it comprises not only the obligation to enact norms

47. id.

48. Digest (n 1) 111. Opinion ¶ 121-129, 37-40.

and regulations, but to exercise a certain degree of vigilance over the fishing activities taking place and an administrative control over the operators.[49] Furthermore, the Tribunal considered this due diligence obligation to be one of conduct and not of results.[50]

The Tribunal also clarified the connections existing with this prohibition of IUU fishing with the provisions in Article 58, paragraph 3 (regarding the duty of *due regard* for the rights and duties of Coastal States), Article 62, paragraph 4 (the obligation of fisherman to comply with conservation measures, terms and conditions established by coastal States) and Article 192 (the general obligation of all States to protect and preserve the marine environment), among others.[51]

This was a very well received outcome of the Opinion because in UNCLOS there are not explicit provisions on IUU fishing activities, and the advisory opinion contained very specific clarifications on the rights and obligations of coastal and flag States on the matter.[52]

The Tribunal also contributed to the definition of IUU fishing activities by adopting the one provided by the MCA Convention in its Article 4, that includes a clear identification of its three elements: *illegality*, in the sense that it is carry out without authorisation, in contravention of the conservation and management measures adopted and in infringement of national and international law; *undeclared*, to the competent national authorities or to those established by the RFMO, such as the SRFC; and *unregulated*, referring to activities carried out by

49. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14; Opinion, ¶ 131, 197, ¶ 131-133, 41-42.

50. Digest (n 1) 112. Opinion, ¶ 129, 40.

51. ibid. Opinion, ¶ 133-139, 42-43.

52. Guillaume Le Floch, 'Le premiere avis de la formation pleniere du Tribunal International du Droit de la Mer: entre prudence et audace' (2015) LXI Annuaire Francaise du Droit International 672-3. He mentions the source of this definition: the 2001 FAO Plan of Action to prevent, deter and eliminate IUU fishing, paragraph 3.

vessels without a flag, or with the flag of a State that is not part of the RFMO agreement or against the regulations of that organisation, or in areas or affecting fish stocks outside the realm of the applicable measures or in a way contrary to the State conservation responsibilities under international law.[53]

B) *Second question.* In reference to the liability of the flag State in the case of a wrong doing of a vessel carrying its flag, the Tribunal took into consideration the articles of the International Law Commission on the responsibility of States for internationally wrongful acts, and concluded: (i) that any wrongful act generates a responsibility and (ii) that in order to assign that responsibility to the flag State certain conditions must be satisfied, namely:

- The act or omission must be attributable to the flag State.
- The act or omission must have a wrongful effect on other State's rights.
- They should constitute a breach of a legal and international obligation.

In the case, the flag State wrongful act could be that it failed to fulfil its due diligence obligations concerning IUU fishing by a vessel carrying its flag. As these are obligations of conduct, the flag State is not liable if it has taken all the necessary and appropriate measures identified in the answer to the first question.[54]

C) *Third question*. The Tribunal in this case first clarified that under Articles 305 and 306 of UNCLOS there could be a possibility for an international organisation to become Party to it, and that under the constitutional agreement establishing that international organisation there could be a provision by which certain competences were transferred from the Member States to the organisation. Only one such organisation, the

53. ibid., 673. See also Digest (n 1). Opinion, ¶ 90, 28-29.

54. Digest (n 1) 112-1133; see also considerations in Le Floch (n 52) 689. Opinion, ¶ 144, 44 and ¶ 146-148, 44-45.

European Union (EU), is a Member of the Convention and signed fisheries access agreements with State Parties to the SRFC. Because the administration of fisheries activities has been transferred to the EU, the obligations of the flag State become the obligations of the international organisation. Consequently, only the organisation will be held liable for any breach of its obligation deriving from the fisheries access agreement and not its member States.[55]

These obligations, as well as in the case of any flag State, are of 'due diligence' in nature, and the 'common standard of conduct' is upheld for fisheries management.[56]

D) *Fourth question.* As this question affected mainly the SRFC Members, the Tribunal recognised however the duty of any third State whose vessels were operating in their exclusive economic zones to cooperate with the Sub-Regional Commission and its Members. This duty to cooperate, for SRFC's Member States and third States, contains different obligations, including (i) to avoid overexploitation; (ii) to use the best scientific evidence to establish the permissible catch and when such evidence is insufficiently clear, to apply the precautionary approach; (iii) to maintain or restore stocks at levels which can produce the maximum 'sustainable' yield; (iv) to seek to agree (under Article 63, paragraph 1 of the Convention) in order that the consultations conducted for the purpose to reach agreements could lead to meaningful and substantial results, by permitting the application of effective measures; and (v) to cooperate, under Article 64 of the Convention, among themselves or/and with the support of any competent international organisation, such as the Food and Agriculture Organization of the United Nations. The Tribunal considered all these obligations to be of 'due diligence.'[57]

55. Digest (n 1) 113. Opinion, ¶ 168, 172-73, 49, 51.

56. ibid., 113. Opinion, ¶ 168, 49.

57. ibid., 113-114. Opinion, ¶ 205-210, 58-59.

It can be also concluded that this opinion confirmed the trend to consider the precautionary approach as a rule of customary international law, as well as filled important gaps exiting in the UNCLOS provisions related to IUU fishing and the character of the duties (due diligence) and liabilities of the flag States and international organisations in the matter.[58]

5. Conclusion

There is no doubt that between the Tribunal's contentious and advisory jurisdiction exist a relation of complementarity because they support each other as precedents; or because the latter expands the conceptual content of the provisions to be applied by the former in the concrete case presented to their attention; or when the latter considers *at large* a relevant issue presented by its applicant. But we cannot support those subjective interpretations that consider this complementarity to be *experimental*, in the sense, for example, that advisory opinions are mere experiments conducted by inexperienced jurists or by judicial bodies that have not yet reached that level of authority that a contentious jurisdiction requires. Advisory opinions are not mere *consolatory* exercise for young and inexperienced organisations.[59]

The truth is that advisory jurisdiction responds to a real necessity of the international community, not only of the States but also of other subjects of international law, like international organisations and even qualified

58. ibid., 114, (ii). Opinion, ¶ 208 (ii), 59.

59. Jean Pierre Margueraud, 'Rapport introductive : La fonction consultative des jurisdictions internationales', Observatoire des mutations institutionnelles et juridiques de Limoges (2009 Pédone, Paris) 14.

persons, in cases related to human rights. As we tried to demonstrate, we hope successfully, and paraphrasing the ICJ Statute, advisory opinions are efficient 'subsidiary means for the determination of law' that can be applied in contentious jurisdiction cases.[60]

It is also true that judiciary bodies have been created mainly for the purpose of the peaceful settlement of disputes and their main activity consists in exercising its contentious jurisdiction, but as history demonstrates it there is a long list of advisory opinions been given by national or international courts over many years that support the idea, today, that they are not useless. The consistent practice of Sates demonstrates to the contrary.

The fact that the UNCLOS Convention expressly mentioned advisory jurisdiction, however in a limited way, when referring only to the SDC, is not conclusive of the idea that there should be a limited use of that jurisdiction. Treaties are the result of long and complex negotiations and are relative to changing conditions and times, giving way to an extensive exercise of constant interpretation. Consequently, it should not be a surprise that when confronting new challenges or needs of States Parties, an exercise of interpretation of the Convention must be done, to close gaps or expand the scope of the provisions.

However, this is not an unconditioned or unlimited exercise, because any effort of interpretation must start from solid ground. The Vienna Convention on the Law of Treaties, in its provisions on treaty interpretation, establishes the importance of the agreement of State Parties in the matter, among other elements to be taken into account.[61] In the case, for example, of the ITLOS's advisory jurisdiction those same parties could directly participate in the proceedings or give their reaction, when the

60. Statute of the International Court of Justice, Article 38(d).

61. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) Article 31(3)(a).

Tribunal's report, containing detailed information on the judicial activity of the Tribunal, is presented by its President for their consideration in the Annual Meeting of the States Parties.[62]

The eventual consent, expressed in most cases in an implicit way, as there is no record of a massive objection to any of the activities by the Tribunal, could be a decisive element to the consolidation of new rules or change of rules in international law. Particularly considering that UNCLOS States Parties represent a large majority of the international community, the Tribunal's advisory jurisdiction can effectively contribute to the development of international rules and regulations.

References

• Aust A, 'Advisory opinions' (2010) 1(1) Journal of International Dispute Settlement 123.

• Cançado Trindade AA, *Principios do Direito Internacional contemporaneo* (2ª. Ed Fundaçao Alexander de Gusmao Brasilia, 2017).

• Crawford J, *Brownlie's principles of Public International Law* (8th Edition Oxford 2012).

• De Bruyn P, Murua H, Aranda M, 'The precautionary approach to fisheries management: How this is taken into account by Tuna regional fisheries management organisations (RFMOs)' (2013) 38 Marine Policy 9.

• Freestone D, 'Responsibilities and obligations od States sponsoring persons and entities with respect to activities in the Area' (2011) 105 American Journal of International Law 755.

• Garcia-Revillo MG, 'The jurisdictional debate on the request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission to the International Tribunal for the Law of the Sea' in del Vecchio A, Virzo R (ed), *Interpretation of UNCLOS by International Courts and Tribunals* (Springer, 2019).

• ITLOS, *A Guide to proceedings* (2021).

• ITLOS, *Digest of Jurisprudence* 1996-2021.

62. García García-Revillo (n 17) 136-137; ITLOS, Rules of the Tribunal, Article 133 (1) and (3).

• Le Floch G, 'Le premiere avis de la formation pleniere du Tribunal International du Droit de la Mer: entre prudence et audace' (2015) LXI Annuaire Francaise du Droit International 672-3.

• Margueraud JP, 'Rapport introductive: La fonction consultative des jurisdictions internationales', Observatoire des mutations institutionnelles et juridiques de Limoges (2009 Pédone, Paris).

• Mayr TF, Mayr-Singer J, 'Keep the wheels spinning: the contribution of advisory opinions of the ICJ to the development of International Law' (2016) Max-Plank Institute for Comparative Public Law and International Law 425.

• Pineschi L, 'The duty of Environmental Impact Assessment in the First ITLOS Chamber Advisory Opinion: Towards the supremacy of the general rule to protect and preserve the marine environment as a common value', in Boschiero N, Scovazzi T, Pitea C and Ragni C (ed.), *International Courts and the development of International Law* (Springer Milano, 2013).

• Turk H, 'Advisory opinion and the Law of the Sea', in Pogačnik M (ed.) *Challenges to contemporary International Law and International Relations* (The European Faculty of Law Nova Gorica, 2011).