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The Legal Basis of the Advisory Function of the International Tribunal for the Law of the Sea as A Full Court: An Unresolved Issue

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ABSTRACT

Under the present provisions of the LOS Convention and the ITLOS Statute, there is no legal basis for the advisory function of the ITLOS as a full court. And the subsequent practice and implied powers doctrine can not provide legal basis for the ITLOS in this respect either. The ITLOS may acquire the advisory function through the amendment of its Statute by the states parties to the LOS Convention. Furthermore, the advisory jurisdiction provided for in article 138 of the ITLOS Rules is not appropriate, for it can be used by states to request opinions as regards the controversy or even disputes between them.

Keywords: advisory jurisdiction, ITLOS, Convention on the Law of the Sea

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1. Introduction

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) and the Statute of the International Tribunal for the Law of the Sea (ITLOS Statute)[1] do not provide advisory function for the International Tribunal for the Law of the Sea (ITLOS) as a full court. And "[t]here is no authority for states parties to the LOS Convention or any institution created by the LOS Convention to request from the ITLOS an advisory opinion on a legal matter" either.[2] In the two instances where the LOS Convention mentions the advisory opinions, the competent organ to give an advisory opinion is the Seabed Disputes Chamber of the ITLOS (Chamber), and the entitled entities to request an advisory opinion from the Chamber are the Assembly and/or the Council of the Authority of the "Area".[3] On the other hand, article 138(1) of the ITLOS Rules provides that "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."[4] And the ITLOS shall apply *mutatis mutandis* the rules that the Chamber shall apply in the exercise of its functions relating to advisory opinions.[5] So, in the view of the ITLOS, it also has advisory jurisdiction as a full court.

However, it is clear that the ITLOS Rules *per se* can not constitute the legal basis for the advisory function of the ITLOS. As a judicial body "established in accordance with Annex VI" of the LOS Convention,[6] the ITLOS "shall function in

1 Opened for signature on 10 December 1982 and entered into force on 16 November 1994, in The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea (United Nations 1983).

2 Ki-Jun You, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited, 39 Ocean Development and International Law (2008), 360.

3 Article 191 of the LOS Convention provides that "The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency." Article 159(10) provides that "Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber. If the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal."

4 The Rules of the International Tribunal for the Law of the Sea, adopted on 28 October 1997 and amended on 15 March and 21 September 2001 and on 17 March 2009 (www.itlos.org/index.php?id=12 (last visited on 15 December 2011)).

5 ITLOS Rules, art. 138 (3). That is, articles 130 to 137 of the ITLOS Rules and "the provisions of the Statute and of these Rules applicable in contentious cases" "to the extent to which it recognizes them to be applicable". Ibid., art. 130(1).

6 LOS Convention, art. 287 (1)(a).

accordance with the provisions of this Convention and this Statute".[7] Thus, the answer to the question what function the ITLOS possesses shall depend on the provisions of the LOS Convention and the ITLOS Statute. The ITLOS Rules are framed by the ITLOS itself "for carrying out its functions" assigned by the LOS Convention and the ITLOS Statute, and in particular, contain "rules of procedure".[8] Although the ITLOS Rules may constitute "the principal source" as regards the interpretation of its Statute,[9] it shall not depart from the provisions of the LOS Convention and the ITLOS Statute. Therefore, where the LOS Convention and the ITLOS Statute do not confer the advisory function upon the ITLOS, the ITLOS Rules cannot validly create such a function for the ITLOS either. Otherwise an international judicial body would have a power to assign itself whatever function it prefers by means of its Rules, and any international tribunal may be tempted to try to extend its jurisdiction as far as possible.[10] For the International Court of Justice (ICJ), article 96 of the UN Charter and articles 65-68 of the ICJ Statute expressly provide the advisory function for the ICJ.[11] For the Permanent Court of International Justice (PCIJ), before the amendment of 1929, its Statute did not expressly provide for giving advisory opinions,[12] but its Rules contained four articles on advisory opinions.[13] Thus, the situation is somewhat similar to the present ITLOS. However, article 14 of the Covenant of the League of Nations,[14] upon which the PCIJ was established,[15] expressly provides that "[t]he Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly". This provision, referred to by article 1 of the Statute of the PCIJ, was considered to grant the PCIJ the authority to give an advisory opinion.

Besides, articles 280 and 288(4) of the LOS Convention do not resolve the issue either. Article 280 provides that "[n]othing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." In the view

7 ITLOS Statute, art. 1.

8 Ibid., art. 16.

9 See Shabtai Rosenne, The Law and Practice of the International Court, 1920−1996 (Martinus Nijhoff 1997), 86.

10 Ki-Jun You, above n. 2, 368.

11 Both the UN Charter and the Statute of the ICJ are available at www.icj-cij.org/documents/index.php?p1=4 (last visited on 15 December 2011).

12 See the Statute of the PCIJ, adopted on 16 December 1920, PCIJ Series D, No. 1. After the amendment of 1929, articles 65-68 contain the provisions about the advisory opinions.

13 See the Rules of the PCIJ, adopted on 24 March 1922, PCIJ Series D, No. 1, arts. 71-74.

14 Adopted on 28 June 1919 and entered in force on 10 January 1920 (http://avalon.law.yale.edu/20th_century/leagcov.asp (last visited on 1 December 2011)).

15 Article 14 of the Covenant of the League of Nations provides that "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice." And article 1 of the Statute of the PCIJ provides that "A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations."

of some scholars, "Therefore, there is no reason to deny to the states parties to the LOS Convention the right to conclude an agreement that 'specifically provides for the submission to the Tribunal of a request for such an opinion' as set out in Article 138 of the ITLOS Rules";[16] and "[t]aking on the agreement path as a basis for conferring advisory jurisdiction to the Tribunal is a more effective route than seeking a legal basis that does not exist in the Convention or the Statute."[17] But the key issue here is not the freedom or rights of the disputant states to choose any peaceful means of their own to "settle a dispute between them", but the powers or functions of an international tribunal. When considering the jurisdiction issue of an international tribunal, we need to examine two aspects: whether the tribunal possesses such a function, and who has the capacity to bring the matter before the tribunal. For example, according to article 292 of the LOS Convention, the application for prompt release of detained vessel or its crew may be submitted to the ICJ, if the parties agreed on it or the detaining state has chosen the ICJ under article 287.[18] However, it is obvious that the ICJ has no competence to deal with such an application because its Statute does not assign this function to the Court.

As regards article 288(4) of the LOS Convention, it provides that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal." This provision reflects a general principle in international adjudication,[19] but it can not be used to argue that the controversy over the legal basis of the advisory function of the ITLOS has been resolved.[20] The principle in article 288(4) is subject to a more fundamental principle in this area, that is, states are free to settle the disputes to which they are parties "by any peaceful means of their own choice"[21] and therefore have options of whether to accept the jurisdiction of an international tribunal.[22] In this context, the PCIJ has

16 Ki-Jun You, above n. 2, 363-364.

17 Tafsir Malick Ndiaye, The Advisory Function of the International Tribunal for the Law of the Sea, 9 Chinese Journal of International Law (2010), 581-582.

18 Article 292 provides that "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree."

19 See also the Statute of the ICJ, art. 36(6).

20 According to Beckman, "If a body were to request an advisory opinion pursuant to article 138 (1), it would be difficult for any State to challenge the authority of the Tribunal to give an Advisory Opinion. In any case, even if such a challenge could be made, article 288(4) of UNCLOS provides in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. Therefore, it would be up to the Tribunal itself to determine whether it has the authority it has vested in itself under its Rules." Robert Beckman, China, UNCLOS and the South China Sea, paper submitted for the Third Biennial Conference of the Asian Society of International Law, Beijing, 27-28 August 2011, 25-26.

21 See LOS Convention, art. 280.

declared that "as a general rule, any body *possessing jurisdictional powers* has the right in the first place itself to determine the extent of its jurisdiction".[23] Here, the PCIJ mentioned two kinds of power or right: "jurisdictional powers" and "the right […] to determine the extent of its jurisdiction". In the view of the PCIJ, once a tribunal possesses the "jurisdictional powers", it will have "the right […] to determine the extent of its jurisdiction". Meanwhile, in order to have "the right […] to determine the extent of its jurisdiction", the tribunal should possess the "jurisdictional powers" in the first place. It is under these conditions that the LOS Convention empowers the tribunal and court under article 287 to make decisions on the matter of their jurisdiction.[24] So, if states parties have opted to accept the jurisdiction of the ITLOS, article 288(4) will apply in the event of a dispute as to whether the ITLOS has jurisdiction in a particular case. However, where the disputant states have not accepted the jurisdiction of the ITLOS, article 288(4) can not be used to establish its jurisdiction in a given case. As far as the advisory jurisdiction of the ITLOS is concerned, the core issue is whether the tribunal possesses the "jurisdictional powers" to give advisory opinions in general, not "the right […] to determine the extent of its jurisdiction" in a given case. Since the LOS Convention and the ITLOS Statute do not provide the advisory function for the ITLOS in their text, it is difficult to argue that as long as a state joins the LOS Convention, it should be considered to have accepted the advisory jurisdiction of the ITLOS. Thus, unless the legal basis of the advisory function of the ITLOS as a full court has been found, article 288(4) will not be applicable with respect to the challenge concerning the authority of the ITLOS to give an advisory opinion.

So, the legal basis of the advisory function of the ITLOS as a full court remains an unresolved issue. This issue involves at least two aspects. First, in view of the absence of the provision regarding the advisory jurisdiction with respect to the ITLOS *per se* in the LOS Convention and the ITLOS Statute, what is the legal ground to say that the ITLOS has advisory jurisdiction as a full court? Second, even if the ITLOS has some kind of advisory function, why should the ITLOS have such an advisory jurisdiction as provided for in article 138 of its Rules?

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22 Ibid., art. 287(1).

23 Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, article IV), Advisory Opinions of 28 August 1928, PCIJ Series B, No. 16, 20 (emphasis added).

24 As for the ICJ, see Sugihara Takane, Kokusai Shiho Saiban Seido (in Japanese)(Yuhikaku Publishing Co. 1996), translated into Chinese by Wang Zhi'an & Yi Ping, International Judicial System (China University of Political Science and Law Press 2006), 224.

2. The Alleged Basis for the Advisory Function of the ITLOS

Until now, article 288(2) of the LOS Convention and article 21 of the ITLOS Statute have been alleged to provide the basis for the advisory function of the ITLOS as a full court.[25] Indeed, the expression of "an international agreement related to the purposes of the Convention" in article 138(1) of the ITLOS Rules repeats article 288(2) of the LOS Convention, while the term of "specifically provides for" apparently comes from the latter part of article 21 of the ITLOS Statute. Besides, the subsequent practice doctrine has also been resorted to, for it is said that there is a positive reaction to the ITLOS exercising the advisory function.

2.1 Article 288 (2) of the LOS Convention

Article 288, paragraph 2 of the LOS Convention provides that "[a] court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement." In light of the context of this paragraph, article 288(2) seems the legal basis only for the ITLOS's consensual jurisdiction instead of the advisory jurisdiction. According to Ki-Jun You, if article 288(2) extends to an advisory jurisdiction, it would be difficult to address the following two questions:

> "First, Article 288(2) of the LOS Convention provides that not only the ITLOS, but also the International Court of Justice (ICJ) or an arbitral tribunal as provided for in Article 287 of the Convention, may have jurisdiction. Accordingly, the question arises as to why it should be assumed that Article 288(2) grants only the ITLOS advisory jurisdiction and not also the International Court. Second, Article 288(2) is in the section called 'Compulsory Procedures Entailing Binding Decisions'. Article 296 provides for the finality and binding force of '[a]ny decision rendered by a court or tribunal having jurisdiction under this section.' In view of this provision, it seems that Article 288(2) cannot serve as the legal basis for an advisory jurisdiction since it is fundamental to advisory opinions that they are not legally binding."[26]

25 See for example, P. Chandrasekhara Rao & Ph. Gautier (eds.), The Rules of the International Tribunal for the Law of the Sea: A Commentary (Martinus Nijhoff Publishers 2006), 393-394.

26 Ki-Jun You, above n. 2, 361-362. See also Tafsir Malick Ndiaye, above n. 17, 581.

2.2 Article 21 of the ITLOS Statute

Compared with article 288(2), the interpretation of article 21 of the ITLOS Statute is subject to more serious debate.[27] This article provides that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Accordingly, the jurisdiction of the ITLOS consists of two kinds: 1) disputes and applications submitted to it "in accordance with this Convention", including article 288(1) and (2); and 2) "matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". Thus, article 21 of the ITLOS Statute endows a broader jurisdiction to the ITLOS than the provision of article 288 of the LOS Convention. Particularly, the second kind of jurisdiction of the ITLOS refers to "matters", a word with broader meaning than "disputes".[28] So it has been argued that the latter part of article 21 "is broad enough to provide a legal basis for the Tribunal's jurisdiction to entertain advisory opinions conferred upon it by international agreements. Article 138 of the Rules seems to be a legitimate interpretation of article 21 of the Statute".[29]

However, article 21 cannot provide a legal basis on which the ITLOS may render advisory opinions either. According to the 1969 Vienna Convention on the Law of Treaties (VCLT), "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[30] Besides, one may resort to "the preparatory work of the treaty and the circumstances of its conclusion", as supplementary means of interpretation.[31] First, the text of article 21 does not provide that the ITLOS has an advisory function. Some scholars try to argue that while not explicitly providing for an advisory jurisdiction of the ITLOS as a full court, there is nothing in its Statute to exclude such jurisdiction, therefore "it is possible for an organ with a judicial role such as the Tribunal to render an opinion on a point of law."[32] But it is

27 For example, Judge Vukas of the ITLOS said that article 21 of the ITLOS Statute is the "only" possibility for seeking an advisory opinion from the ITLOS. Budislav Vukas, The Law of the Sea-Selected Writings (Martinus Nijhoff Publishers 2004), 309.

28 John E. Noyes, Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf, 42 Vanderbilt Journal of Transnational Law (2009), 1259.

29 P. Chandrasekhara Rao & Ph. Gautier, above n. 25, 394. Budislav Vukas, The International Tribunal for the Law of the Sea: Some Features of the New International Judicial Institution, in P. Chandrasekhara Rao & Rahmatullah Khan (eds.), The International Tribunal for the Law of the Sea: Law and Practice (Kluwer Law International 2001), 67.

30 Vienna Convention on the Law of Treaties, 23 May 1969, in 1155 UNTS 331, art. 31(1).

31 Ibid., art. 32.

32 Tafsir Malick Ndiaye, above n. 17, 581. See also P. Chandrasekhara Rao & Ph. Gautier, above n. 25, 393; Budislav Vukas, above n. 27, 309.

obvious that the function of the ITLOS shall depend upon the positive empowerment of its Statute instead of the negative non-exclusion. Otherwise, the function of the ITLOS will become limitless. Furthermore, the key issue here is not whether the ITLOS possess the capacity to render an advisory opinion although it of course has such a capacity, but whether the ITLOS has been invested with such a function by the states which created it. Indeed, as some experts pointed out, there are many similarities between article 21 of the ITLOS Statute and article 36(1) of the Statute of the ICJ, which provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force", but "Article 36(1) of the ICJ Statute has not been interpreted as endowing the International Court with the jurisdiction to render advisory opinions other than those explicitly provided for in Article 65(1) of the Statute".[33] Second, as regards the "context" of article 21, while article 40(2) of the ITLOS Statute provides that "[i]n the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable", there is no similar provision in respect of the exercise of advisory functions by the ITLOS. As is known to all, in order to maintain its judicial character in advisory proceedings, international tribunal will apply the rules in contentious cases to the extent that it recognizes them to be applicable. And the statute of international tribunal will make a specific provision for that purpose, such as article 68 of the Statute of the ICJ[34] and article 40(2) of the ITLOS Statute as regards the Chamber.[35] So the absence of such a provision in the ITLOS Statute with respect to the ITLOS as a full court indicates that the ITLOS is not expected to exercise any advisory function at all. Third, as far as the *travaux preparatoires* are concerned, the question of endowing the ITLOS to be established with advisory jurisdiction was already raised during the early stages of the Third United Nations Conference on the Law of the Sea (Third Conference). In the working paper on the settlement of law of the sea disputes submitted by the United States et al in 1974, article 9 provides that "[i]f a court of a Contracting Party has been authorized by the domestic law of that Party to request the Law of the Sea Tribunal to give an advisory opinion [a ruling] on any question relating to the interpretation or application of this Convention, the Law of the Sea Tribunal may [shall] give such an opinion [ruling]".[36] And the representative of Germany in 1976 also mentioned that an

33 Ki-Jun You, above n. 2, 362.

34 Article 68 of the ICJ Statute provides that "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

35 See also ITLOS Rules, art. 130(1).

36 The working paper on the settlement of law of the sea disputes, 27 August 1974, Third United Nations

arbitral tribunal would be empowered to request an advisory opinion of the law of the sea tribunal where questions of general international law or general interpretation of the law of the sea convention might have to be decided on, in order to maintain the desirable continuity of jurisprudence in law of the sea matters.[37] However, since the Informal Single Negotiating Text (ISNT) of 1975, the Chamber has been determined as the body eligible to render advisory opinions, and the Authority has been determined as the organ eligible to request advisory opinions.[38] Thus, the ITLOS as a full court has never been assigned with the function to render advisory opinions, though some states on the Third Conference expressed clear suggestions in this regard. It means that the absence of the provisions concerning the advisory function of the ITLOS in both the LOS Convention and its Statute was due to the intention of the states on the Third Conference instead of their negligence.

Since there was little discussion on the question of advisory opinions on the Third Conference,[39] it is difficult to figure out the considerations behind the choice of states. However, according to some scholars, empowerment of advisory function to the Chamber seems to be due to the close relationship between it and the Authority. Indeed, the Chamber had been designed to be one of the principal organs of the Authority to be created.[40] Without actually being an organ of the Authority, the Chamber is nevertheless closely linked to it.[41] This explanation has also been accepted by the Chamber. It states that its "advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority. The Authority is the international organization established by the Convention […]. In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber."[42] In this

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Conference on the Law of the Sea, 1973-82, volume III, Documents of the Conference, Second Session, A/CONF.62/L.7, 91. These states include Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and the US.

37 Third United Nations Conference on the Law of the Sea, 1973-82, volume V, Summary Records of the Plenary, Fourth Session: 58th meeting, A/CONF.62/SR. 58, 5 April 1976, 12. See also the statements of the representative of Venezuela of 7 April 1976, Third United Nations Conference on the Law of the Sea, 1973-82, volume V, Summary Records of the Plenary, Fourth Session: 62th meeting, A/CONF.62/SR. 62, 42.

38 See document A/CONF.62/WP.8, arts. 33 and 62.

39 See Report of the Chairman of the group of legal experts on the settlement of disputes relating to part XI of the informal composite negotiating text, 26 April and 23 May 1979, Third United Nations Conference on the Law of the Sea, 1973-82, volume XI, Documents of the Conference, Eighth Session, A/CONF.62/C.1/L.25 AND ADD.1, 110.

40 See L. Dolliver M. Nelson, The International Tribunal for the Law of the Sea: Some Issues, in P. Chandrasekhara Rao & Rahmatullah Khan, above n. 29, 51.

41 Tafsir Malick Ndiaye, above n. 17, 569.

42 Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Chamber, Advisory Opinion, 1 February 2011(www. itlos.org/start3_en.html(last visited on 1 March

context, it is worth noting that the advisory jurisdiction of the Chamber provided for in article 191 of the LOS Convention is somewhat special compared with the advisory jurisdiction of, for example, the ICJ. First, while article 65, paragraph 1, of the Statute of the ICJ states that the Court "may give" an advisory opinion,[43] the Chamber "shall give" advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. It seems that once the Chamber has established its jurisdiction, the rendering of an advisory opinion may be considered a duty.[44] So, contrary to the discretionary powers of the ICJ, the Chamber has no discretion to decline a request for an advisory opinion on grounds of non-admissibility.[45] Second, according to article 191, the Chamber shall give its opinions "as a matter of urgency", but there is no similar provision as regards the advisory jurisdiction of the ICJ. The reasons behind these provisions are the close connection between the Chamber and the activities of the Authority. By contrast, the ITLOS is neither an organ of an international organization like the ICJ nor has it been conceived like the Chamber as a legal advisor to such an organization as the Authority.

2.3 Subsequent practice

The VCLT provides that when interpreting a treaty, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account, together with the context.[46] Some scholars argue that the ITLOS has asserted its jurisdiction to render advisory opinions on a number of occasions, but there appears to have been little or no resistance by the international community to the assertion; furthermore, there were several positive

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2011)), para. 26.

43 See also article 1(1) of Protocol No. 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 6 May 1963 and entered into force on 21 Sep. 1970(www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited on 1 August 2012)), which provides that "The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto." Article 47 of Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 11 May 1994 and entered into force on 1 Nov. 1998(www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited on 1 August 2012)), provides that "The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto."

44 See Satya N. Nadan et al. (vol. ed.), United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI (Martinus Nijhoff Publishers 2002), 641.

45 See Responsibilities and Obligations of the Sponsor States, above n.42, para. 47. While noting the difference between the wording of article 191 of the LOS Convention and article 65 of the Statute of the ICJ, the Chamber did not consider it necessary to pronounce on the consequences of that difference with respect to admissibility in the case. Ibid., para. 48.

46 VCLT, art. 31(3)(b).

reactions and expressions of support from the states parties to the LOS Convention. In their view, "It can be argued that a positive view of the 'creeping' jurisdiction of the ITLOS is emerging, which can be seen as the 'subsequent practice' as provided for in Article 31(3) of the VCLT."[47]

However, according to the provision of article 31(3) of the VCLT, in order to be taken into account, the subsequent practice should satisfy two conditions: a) the practice occurs in the application of the treaty; b) the practice has established the agreement of the parties regarding the interpretation of the treaty. Until now, no request for advisory opinions has been submitted to the ITLOS as a full court, so states parties to the LOS Convention have no motives to express their views on this issue. It is doubtful whether the silence of the states parties by now could be construed as establishing some "agreement of the parties regarding the interpretation" of the LOS Convention, as required by article 31(3) of the VCLT.

2.4 Implied powers

Finally, the so-called implied powers doctrine still needs to be examined. According to this doctrine, "[u]nder international law the organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[48] The test of validity for such powers is that they are deemed necessary for fulfillment of the functions of the particular organization.[49] As far as an international judicial body is concerned, the ICJ has held that it

> "possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' […]. Such inherent jurisdiction […] derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded".[50]

47 See Ki-Jun You, above n. 2, 363.

48 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, 174, 182.

49 Malcolm N. Shaw, International Law, 5 edition (Cambridge University Press 2003), 1307.

50 Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, 457, para. 23.

However, to argue that the ITLOS could derive an advisory function from the implied powers doctrine will go too far, for such an argument means that the advisory function is deemed necessary for the fulfillment of its functions. But it is not the case for the international judicial body in general or for the ITLOS in particular. For example, the International Criminal Court has not been considered to have any advisory jurisdiction.[51]

In conclusion, at present, there is no legal basis for the exercise of advisory function by the ITLOS as a full court. However, it is possible to amend the ITLOS Statute to contain such provisions that can assign the ITLOS with this function. According to article 41 of the ITLOS Statute, the amendments to the Statute may be adopted in accordance with article 313 of the LOS Convention[52] or by consensus at a conference convened in accordance with the LOS Convention,[53] and the ITLOS may propose such amendments as it may consider necessary to the states parties for their consideration. In this context, it is worth noting that the states parties postponed in 1995 the election of judges to the ITLOS, thus amending the provisions of article 4, paragraph 3, of the Statute.[54]

51 See Rome Statute of the International Criminal Court, adopted on 17 July 1998, as corrected by the procés-verbaux of 10 November 1998 and 12 July 1999, entered into force on 1 July 2002 (www.icc-cpi-.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm (last visited on 1 December 2011)).

52 Article 313 "Amendment by simplified procedure" provides that "1. A State Party may, by written communication addressed to the Secretary-General of the United Nations, propose an amendment to this Convention, other than an amendment relating to activities in the Area, to be adopted by the simplified procedure set forth in this article without convening a conference. The Secretary-General shall circulate the communication to all States Parties. 2. If, within a period of 12 months from the date of the circulation of the communication, a State Party objects to the proposed amendment or to the proposal for its adoption by the simplified procedure, the amendment shall be considered rejected. The Secretary-General shall immediately notify all States Parties accordingly. 3. If, 12 months from the date of the circulation of the communication, no State Party has objected to the proposed amendment or to the proposal for its adoption by the simplified procedure, the proposed amendment shall be considered adopted. The Secretary-General shall notify all States Parties that the proposed amendment has been adopted."

53 Article 319, para. 2(e) of the LOS Convention provides that, in addition to being the depositary of the LOS Convention, the Secretary General of the United Nations shall "convene necessary meetings of States Parties in accordance with this Convention".

54 See SPLOS/4, Report of the second meeting (15-19 May 1995) (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/222/69/PDF/N9522269.pdf?OpenElement (last visited on 1 December 2011)), para. 38. Article 4(3) of the ITLOS Statute provides that "The first election shall be held within six months of the date of entry into force of this Convention." See also SPLOS/201 of 26 June 2009, which decides the arrangement for the allocation of seats on the ITLOS (www.un.org/Depts/los/meeting_states_parties/nineteenthmeetingstatesparties.htm (last visited on 1 December 2011)).

3. The Advisory Jurisdiction in Article 138 of the ITLOS Rules

The second aspect as regards the advisory function of the ITLOS is what the legal basis for the provisions of article 138 of the ITLOS Rules is. In other words, even if the ITLOS as a full court may come to have some kind of advisory function through the amendment of the ITLOS Statute, why should the ITLOS possess such an advisory jurisdiction as provided for in article 138?

3.1 Interpretation of article 138

According to article 138(1) of the ITLOS Rules, the advisory jurisdiction of the ITLOS depends on "an international agreement", which has to satisfy two conditions: "relate[s] to the purposes of the Convention" and "specifically provides for the submission to the Tribunal of a request for [advisory] opinion". Within the context of the LOS Convention, the term "international agreement" means treaty in international law. But the exact meaning of the term in article 138 of the ITLOS Rules may be up to the determination of the legal basis for the advisory function of the ITLOS in the first place. If the term "international agreement" is considered as repeating the counterpart of article 288(2) of the LOS Convention- in fact, the expression of "an international agreement related to the purposes of the Convention" in article 138 comes from the provision of article 288(2), then the following consequences will be produced. First, the term "an international agreement" means "a treaty within the meaning of" the VCLT,[55] that is, the agreement between states, "because Article 288 had to be phrased restrictively to accommodate the more limited jurisdiction of the International Court of Justice, for only states may be parties in contentious cases before the Court."[56] Second, the provision of article 288(2), especially "the interpretation or application of an international agreement related to the purposes of this Convention" indicates that the international agreements in question should be "substantive agreements related to the law of the sea",[57] and therefore do not include the special agreements whereby the parties simply agreed to ask for advisory opinions. Third, in such a case, the "legal question" on which the ITLOS could render advisory opinions according to article 138 should concern the interpretation or application of the international agreement upon which the states request advisory opinions.[58] Forth, it also follows that states cannot request advisory opinions

55 Tafsir Malick Ndiaye, above n. 17, 585.
56 John E. Noyes, above n. 28, 1260, note 241.
57 Ibid., 1260.
58 See also Ki-Jun You, above n. 2, 368.

concerning the application or interpretation of the LOS Convention, for the "international agreement" here does not include the LOS Convention because article 138 (1) mentions them side by side, and the LOS Convention itself does not "specifically [provide] for the submission to the Tribunal of a request for such an opinion". However, if article 21 of the ITLOS Statute is argued as the basis of the advisory function of the ITLOS, then the above restrictions would no longer exist. First, the term "international agreement" may encompass interstate agreements as well as agreements between states and international organizations,[59] because article 21 uses the term "any other agreements," a term that could even encompass private party agreements or mixed, state-private party agreements.[60] Second, while it can be agued that the special agreement could be said to be related to the LOS Convention, but it may be hard to say that it is related to "the purposes of the Convention". However, it remain possible to interpret the term "related to the purposes of the Convention" in such a way as to include the special agreement into the scope of the international agreement in the sense of article 138. Third, the scope of the "legal question" on which the ITLOS could render advisory opinions will therefore depend on the specific provisions of the international agreement in question. However, taking the specialized character of the ITLOS into account, the relevant legal question should relate to the law of the sea.[61]

Pursuant to article 138(2) of the ITLOS Rules, the request for an advisory opinion "shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal". First of all, there is no qualification concerning the nature of the "body" in article 138(2), so it seems groundless to argue that the term "body" should be interpreted to mean an international organization or an organ of an international organization.[62] The situation is therefore different from that of the ICJ. As regards the ICJ, article 65(1) of the Statute of the ICJ provides that the Court may give an advisory opinion on any legal question at the request of "whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The "body" in article 65(1) means an international organization because according to article 96 of the UN Charter, only organs of the UN and specialized agencies authorized by the

59 P. Chandrasekhara Rao & Ph. Gautier, above n. 25, 394.

60 John E. Noyes, above n. 28, 1259-1260. However, in order to authorize private party to request advisory opinions from the ITLOS, the ITLOS would have to revise article 138 to allow advisory opinion requests pursuant to "agreements" rather than "international agreements." Ibid., 1260.

61 According to article 2 of the ITLOS Statute, the judges of the ITLOS shall be "of recognized competence in the field of the law of the sea".

62 For the opposite view, see Tullio Treves, Advisory Opinions under the Law of the Sea Convention, in Myron H. Nordquist & John Norton Moore (eds.), Current Marine Environmental Issues and the International Tribunal for the Law of the Sea (Martinus Nijhoff Publishers 2001), 92.

General Assembly may request advisory opinions. So, article 65(1) of the Statute of the ICJ cannot be used to argue that the term "body" should always mean an organization or an entity other than a state. Indeed, the scope of the "body" in article 138 is determined by the provisions of the international agreement in paragraph 1, and "whatever body is authorized by or in accordance with" the international agreement is entitled to transmit the request to the ITLOS. Thus, "it appears that any organ, entity, institution, organization or State that is indicated in such an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a 'body' within the meaning of article 138, paragraph 2, of the Rules".[63] Second, even if the word "body" does not include states, this condition can hardly constitute a threshold which blocks states from requesting options as long as the states concerned have the political will to do so. Therefore, for those scholars who argue that the body must be an organ of an international organization, they also admit that "[t]his does not mean that States will never be able to institute advisory proceedings before the Tribunal, but that they will have to find and use the appropriate procedure".[64]

Thus, under the current mechanism laid down by article 138 of the ITLOS Rules, it is possible for states to request advisory opinions on legal questions from the ITLOS on the basis of an international agreement, though the scope of the legal questions may vary according to the meaning of the "international agreement". In the view of Shunji Yanai, the President of the ITLOS, the "advisory proceedings before the Tribunal may prove an attractive alternative for States seeking an opinion on a disputed point of law."[65]

3.2 The question of states' requesting advisory opinions

Considering the international judicial practice, the advisory jurisdiction prescribed by article 138 for the ITLOS as a full tribunal is "unusual"[66] or an "innovation".[67] Generally speaking, there are mainly two kinds of advisory jurisdiction in international judicial procedures. The typical one is represented by the PCIJ and the ICJ, which is open to international organizations only[68] and "depends on requests

63 P. Chandrasekhara Rao & Ph. Gautier, above n. 25, 394

64 Tafsir Malick Ndiaye, above n. 17, 584.

65 Judge Shunji Yanai addressed the General Assembly of the United Nations on the occasion of its annual consideration of the agenda item "Oceans and the Law of the Sea" on 6 December 2011 (www.itlos.org/index.php?id=2&L=0 (last visited on 15 December 2011)), para. 9.

66 John E. Noyes, above n. 28, 1259.

67 Rosenne S., International Tribunal for the Law of the Sea: 1996-97 Survey, 13 International Journal of Marine and Coastal Law (1998), 507.

from an international organization".[69] The other one is open to individual member states or the municipal courts of member states of an international organization, with the view to maintain the integrity of the relevant legal system. For example, the 1969 American Convention on Human Rights provides that, at the request of a member state of the Organization of American States, the Inter-American Court on Human Rights "may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."[70] And according to the Treaty Establishing the European Economic Community, where the court of one of the member states is confronted with the question concerning the interpretation of the Treaty, it may request the European Court of Justice to give a preliminary ruling thereon.[71] When the US and the other states suggested on the Third Conference that the ITLOS should be endowed with the advisory function, what they proposed was the second kind of advisory jurisdiction. Clearly what article 138 of the ITLOS Rules created for the ITLOS as a full court is an advisory jurisdiction different from both of the advisory jurisdiction mentioned above.

Notably, the question whether states should be permitted to request advisory opinions from the international courts has always been a controversial issue. During the discussion prior to the establishment of the PCIJ, Argentina proposed that states should be entitled to request advisory opinions from the court, but this proposal was refused.[72] Consequently, although article 14 of the Covenant of the League of Nations permitted the PCIJ to render advisory opinions upon "question" as well as "dispute", according to the PCIJ, its competence to *arbitrage consultatif* should be based on two conditions. First, the request for such opinions must be referred to it "by the Council or by the Assembly" of the League of Nations,[73] whose decision on this

68 Tafsir Malick Ndiaye, above n. 17, 565.

69 John E. Noyes, above n. 28, 1259.

70 American Convention on Human Rights, adopted on 22 November 1969 and entered into force on 18 July 1978, 1144 UNTS 123, article 64 (2). See also Article 4(1) of Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' rights, adopted on 10 June 1998 and entered into force on 25 January 2004 (www.au.int/en/treaties (last visited on 1 December 2011)), provides that "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on 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."

71 Treaty Establishing the European Economic Community, signed on 25 March 1957 and entered into force on 1 January 1958, 298 UNTS 11, art. 177. Besides the interpretation of the Treaty, the questions that the European Court shall have jurisdiction to give rulings include: the validity and interpretation of measures taken by the institutions of the Community; and the interpretation of the statutes of bodies set up by a formal measure of the Council, where those statutes so provide. Ibid.

72 League of Nations, Records of the First Assembly, Meetings of the Committee, I, 401, cited in Sugihara Takane, above n. 24, 329.

73 Article 14 of the Covenant of the League of Nations, article 65 of the Statute of the PCIJ, and article 72 of the Rules of the PCIJ.

matter "shall require the agreement of all the Members of the League represented at the meeting".[74] Second, where the questions for an advisory opinion are related to matters which form the subject of a pending actual dispute between states, the court shall not render any advisory opinion without the consent of the interested states. In other words, the consent of the interested states was taken as one prerequisite for giving advisory opinions by the PCIJ. This is the so-called Eastern Carelia Principle. For under these circumstances, "Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[75] During the discussion concerning the advisory jurisdiction of the ICJ in 1943, the informal Inter-Allied Committee suggested that states should be permitted to request advisory opinions under certain conditions.[76] But this proposal was not accepted once again. According to the UN Charter, the object of the advisory opinion is restricted to the "legal question" submitted by qualified organs of the UN and specialized agencies,[77] and the "legal disputes should as a general rule be referred by the parties to the International Court of Justice".[78] In the recent years, during the talks about broadening the advisory jurisdiction of the ICJ, a similar proposal was put forward again.[79] However, the proposal still has not been welcomed by states. By contrast, some opposite practices arose. For example, according to the 1998 Protocol to the African Charter on Human and Peoples' Rights, the African Court on Human and Peoples' Rights may give an advisory opinion at the request of, *inter alia*, "a Member State of the OAU" upon "any legal matter relating to the Charter or any other relevant human rights instruments",[80] but this provision disappeared in the 2008 Protocol on the Statute of the African Court of Justice and Human Rights, which replaced the 1998 Protocol.[81] According to the 2008 Protocol, the African Court of Justice and Human Rights may give an advisory opinion on any legal question at the request of the organs of the African Union.[82]

74 Covenant of the League of Nations, art. 5.

75 Status of Eastern Carelia, Advisory Opinion of 23 July 1923, PCIJ Series B, No. 5, 27-29.

76 See United Nation: Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 10 Feb. 1944, 39 AJIL 1945(Supplement: Official Documents), 1-56, paras. 64-75.

77 See UN Charter, art. 96.

78 Ibid., art. 36(3).

79 See Louis B. Sohn, Broadening the Advisory Jurisdiction of the International Court of Justice, 77 AJIL (1983), 125.

80 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, art. 4.

81 Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008 and has not entered into force by 15 December 2011 (www.au.int/en/treaties), art. 1.

82 Article 53(1) of the Protocol on the Statute of the African Court of Justice and Human Rights provides that "The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the

One important reason why states were reluctantly permitted to directly request advisory opinions from the international tribunal is that advisory opinions "usually concern directly or indirectly with matters of inter-state controversy" or even "relate to legal disputes between states",[83] so the advisory proceeding may be abused by the requesting states to "[circumvent] the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[84] Although in principle the advisory opinions are not binding, "[t]here is little distinction between judgments and opinions in terms of their doctrinal authority."[85] Besides, "it would discredit the international tribunal if states were free to treat as only advisory an opinion that they had voluntarily solicited".[86] Obviously, the advisory jurisdiction provided for in article 138 of the ITLOS Rules does not eliminate these concerns. Furthermore, article 138 is not open to the Commission on the Limits of the Continental Shelf (CLCS) due to the absence of "an international agreement", and as mentioned above, it cannot be used to request advisory opinions as regards the provisions of the LOS Convention where the term "international agreement" has the same meaning as in article 288(2) of the LOS Convention. In light of these, it is reasonable to argue that even if the ITLOS as a full court has advisory function, it is deeply doubtful whether the tribunal should have such an advisory jurisdiction as article 138 provides for.

4. Conclusion and suggestions

The functions of the ITLOS should come from the positive assignment of its Statute and the LOS Convention. However, under the present provisions of the LOS Convention and the ITLOS Statute, there is no legal basis for the advisory function of the ITLOS as a full court. Article 288(2) of the LOS Convention and article 21 of the ITLOS Statute concern the consensual jurisdiction instead of the advisory jurisdiction, and the subsequent practice and implied powers doctrine can not provide

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Assembly".

83 J.G. Merrills, International Dispute Settlement, 4th ed. (Cambridge University Press 2005), 146.

84 Western Sahara, Advisoty Opinion, ICJ Reports 1975, 12, para. 33. And the ICJ emphasizes that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction". East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, 90, para.26; see also Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1995, 6, para. 43.

85 Charles de Visscher, Aspects récents du droit procédural de la Cour internationale de justice (Pédone, Paris 1966), 195, cited in Tafsir Malick Ndiaye, above n. 17, 579, note 52.

86 Louis B. Sohn, above n. 79, 125.

legal basis for the ITLOS in this respect either. In fact, in view of the circumstances on the Third Conference, it may be argued that the states intended not to invest the ITLOS as a full court with such a function, though the tribunal possesses the capacity to render an advisory opinion. Furthermore, even if the ITLOS is endowed with the advisory function in the future through the amendments of its Statute by the states parties, the advisory jurisdiction provided for in article 138 of its Rules may be inappropriate. The international community has always been cautious about allowing states to directly request advisory opinions from international tribunals, because the requesting states may abuse the advisory proceeding to evade the fundamental principle in the area of international disputes settlement, that is, a state is not obliged to submit its disputes to judicial settlement without its consent. However, under the present provisions of article 138, it is possible that states can submit disputes involving other states before the ITLOS for its opinions on the relevant legal questions with or without the consent of the other states concerned.

As is known to all, one of the reasons behind the creation of the ITLOS was to safeguard the integrity of the provisions of the LOS Convention, therefore the legal questions upon which the ITLOS may render an advisory opinion should include those concerning the interpretation or application of the LOS Convention. According to Part XV of the LOS Convention, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute" to the compulsory procedures entailing binding decisions under section 2.[87] Thus it seems no necessary to endow the states parties with the right to request advisory opinions from the ITLOS. On the other hand, although the ITLOS is not an organ of an international organization, many provisions of the LOS Convention mention the functions of international organizations, whether subregional, regional or global,[88] so the works of these organizations have much to do with "the purposes of the Convention". Besides, the practice of the CLCS until now shows that it will face some legal questions in the fulfillment of its functions assigned by the LOS Convention. Given the technical nature of the CLCS, it would be very helpful if the commission can obtain necessary legal opinions from the ITLOS.[89] In light of these

87 LOS Convention, art. 286.

88 For example, as regards the sea lanes and traffic separation schemes, article 22(3), article 41(4) and (5), article 53; as regards artificial islands, installations and structures in the exclusive economic zone, article 60 (3) and (5); as regards conservation of the living resources, article 61(2) and (5), articles 63-66, articles 118-119; as regards the protection of marine environment, many provisions in Part XII; as regards ships flying the flag of international organizations, article 93; as regards the constitution of the special arbitral tribunal, Annex VIII, articles 2-3.

89 Note that in the twenty-first Meeting of States Parties of 2011, some delegation raised the question whether the CLCS had the ability to refer the matter to the ITLOS for an advisory opinion and, if not, whether it should be given that ability. On the other hand, converse view was expressed. SPLOS/231, Report of the

considerations as well as the practice of the ICJ,[90] when amending the ITLOS Statute, the advisory jurisdiction of the ITLOS as a full court may be phrased as follows:

> Tribunal may give advisory opinions at the request of the CLCS and the international organizations mentioned in this Convention on legal questions related to the purposes of this Convention and arising within the scope of their activities.

twenty-first Meeting of States Parties (13-17 June 2011) (http://daccess-dds-ny.un.org/doc/ UNDOC/GEN/N11 /393/68/PDF/N1139368.pdf?OpenElement (last visited on 1 December 2011)), paras. 88-89. Meanwhile, on its twenty-eighth session held from August-9 September 2011, the CLCS discussed the matter as regards the "[m]echanism to seek advice on matters of interpretation of certain provisions of the Convention other than those contained in its article 76, and annex II, as well as in the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea", and decided to continue considering the item in the next session. CLCS/72, Statement by the Chairperson of the CLCS on the Progress of work in the CLCS- Twenty-seventh Session (16 Sep. 2011) (www.un.org/Depts/los/clcs_new/commission_ home.htm (last visited on 1 December 2011)), paras. 37-40.

90 Particularly, article 96 (2) of the UN Charter provides that "Other organs of the United Nations and specialized agencies [···] may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

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