

Minutes of Public Sitings – Procès-verbal des audiences publiques

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 2 TO 5 SEPTEMBER 2014

*Request for an Advisory Opinion submitted
by the Sub-Regional Fisheries Commission (SRFC)
(Request for Advisory Opinion submitted to the Tribunal)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 2 AU 5 SEPTEMBRE 2014

*Demande d'avis consultatif soumise par la
Commission sous-régionale des pêches (CSRP)
(Demande d'avis consultatif soumise au Tribunal)*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the corrected verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux corrigés.

Note by the Registry: The corrected verbatim records are available on the Tribunal's website at www.itlos.org.

Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : www.tidm.org.

**Minutes of the Public Sitings
held from 2 to 5 September 2014**

**Procès-verbal des audiences publiques
tenues du 2 au 5 septembre 2014**

2 September 2014, p.m.

PUBLIC SITTING HELD ON 2 SEPTEMBER 2014, 3.00 P.M.

Tribunal

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, KELLY, ATTARD, KULYK; *Registrar* GAUTIER.

List of delegations:

Sub-Regional Fisheries Commission (SRFC)

H.E. Mr Lousény Camara, Chairman-in-Office of the Conference of Ministers of the SRFC

Mr Hassimiou Tall, Director of Fisheries, Republic of Guinea, Chairman-in-Office of the Coordinating Committee of the SRFC

Mr Sebastiao Pereira, Director-General for Industrial Fisheries, Republic of Guinea-Bissau
Mr Doudou Gueye, Legal Adviser, Ministry of Fisheries and Maritime Affairs, Republic of Senegal

Mr Cheikh Sarr, Director of Fisheries Protection and Surveillance, Republic of Senegal

Ms Marième Diagne Talla, Acting Permanent Secretary of the SRFC

Ms Diénaba Bèye Traoré, Head of the Department for Harmonization of Policies and Legislation of the SRFC

Mr Hamady Diop, Head of the Department of Research and Information Systems of the SRFC

Mr Babacar Ba, Head of the Department for Fisheries Monitoring, Control, Surveillance and Planning of the SRFC

Ms Mame Fatou Toure, Head of the Communication and Public Relations Service of the SRFC

Mr Demba Yeum Kane, Regional Coordinator of the RFMO

Mr Abdou Khadir Diakhate, Programme Assistant, Department for Harmonization of Policies and Legislation of the SRFC

Mr Baïdi Diene, Deputy Secretary-General of the Guinea-Bissau/Senegal Management and Cooperation Agency (AGC)

Mr Sloans Chimatrio, African Union/NEPAD

Mr Racine Kane, Head of Mission, Office of the International Union for the Conservation of Nature (IUCN), Dakar, Senegal

Mr Ahmed Senhoury, Director of the Mobilization and Coordination Unit, Regional Partnership for the Preservation of the Coastal and Marine Zone in Western Africa

Mr Papa Kebe, Expert, Specialist in pelagic resources

Mr Aboubacar Fall, Lawyer, Bar of Dakar, Senegal

Mr Ibrahima Ly, Legal Counsel, Professor at the Université Cheikh Anta Diop de Dakar, Dakar, Senegal

Mr Adilson D. Djabula, Legal Counsel

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

Germany

Mr Martin Ney, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office

Mr Christian Schulz, Deputy Head of Division Law of the Sea, Space Law, Antarctica, Federal Foreign Office

Argentina

Mr Holger F. Martinsen, Deputy Legal Adviser, Office of the Legal Adviser, Ministry of Foreign Affairs and Worship

Mr Manuel Fernández Salorio, Consul General of the Argentine Republic in Hamburg, Federal Republic of Germany

Ms Cecilia María Verónica Quadri, Consul General Adjunct of the Argentine Republic in Hamburg, Federal Republic of Germany

Australia

Mr William McFadyen Campbell QC, General Counsel (International Law), Office of International Law, Attorney-Generals' Department

Ms Stephanie Ierino, Principal Legal Officer, Office of International Law, Attorney-Generals' Department

Ms Amanda Annamalay, Second Secretary, Embassy of Australia, Berlin, Federal Republic of Germany

Chile

Mr Eduardo Schott S., Consul-General of Chile, Hamburg, Federal Republic of Germany

Ms Katherine Bernal S., Lawyer, Sub-Secretariat for Fisheries

Spain

Mr José Martín y Pérez de Nanclares, Director of the International Law Department, Ministry of Foreign Affairs and Cooperation

Mr Eduardo Ramón Merino de Mena, Legal Advisor at the International Law Department, Ministry of Foreign Affairs and Cooperation

Micronesia (Federated States of)

Mr Clement Yow Mulalap, Esq., Legal Adviser, Permanent Mission of the Federated States of Micronesia to the United Nations, New York, United States of America

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New Zealand

Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade

Ms Elana Geddis, Barrister, High Court of New Zealand

United Kingdom of Great Britain and Northern Ireland

Ms Nicola Smith, Assistant Legal Adviser, Foreign and Commonwealth Office
Sir Michael Wood, member of the International Law Commission, member of the English Bar

Thailand

Mr Kriangsak Kittichaisaree, Executive Director, Thailand Trade and Economic Office (Taipei), member of the International Law Commission

European Union

Mr Esa Paasivirta, Member of the Legal Service, European Commission

Mr André Bouquet, Legal Advisor, Legal Service, European Commission

Mr Daniele Nardi, Member of the Legal Service, European Commission

Ms Valérie Lainé, Head of Unit - Fisheries Control Policy, Directorate-General for Maritime Affairs and Fisheries, European Commission

Mr Friedrich Wieland, Head of Unit - Legal Matters, Directorate-General for Maritime Affairs and Fisheries, European Commission

Ms Cristina Olivos, Lawyer - Legal Matters, Directorate-General for Maritime Affairs and Fisheries, European Commission

Caribbean Regional Fisheries Mechanism (CRFM)

Mr Pieter Bekker, Professor of International Law, Graduate School of Natural Resources Law, Policy and Management, University of Dundee, United Kingdom; member of the New York Bar

International Union for the Conservation of Nature (IUCN)

Ms Cymie Payne, J.D., Assistant Professor, School of Law – Camden, Bloustein School of Public Policy, Rutgers University, New Brunswick, USA

Ms Nilufer Oral, Faculty of Law, Istanbul Bilgi University, Istanbul, Turkey

Ms Anastasia Telesetsky, Associate Professor, College of Law, Natural Resources and Environmental Law Program, University of Idaho, United States of America

DEMANDE D'AVIS CONSULTATIF - COMMISSION SOUS-RÉGIONALE DES PÊCHES

AUDIENCE PUBLIQUE TENUE LE 2 SEPTEMBRE 2014, 15 HEURES

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, Mme KELLY, MM. ATTARD, KULYK, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations :

Commission sous-régionale des pêches (CSRP)

S.E. M. Lousény Camara, Président en exercice de la Conférence des ministres de la CSRP

M. Hassimiou Tall, directeur des pêches de la République de Guinée, président en exercice du Comité de coordination de la CSRP

M. Sebastiao Pereira, directeur général de la pêche industrielle de la République de Guinée-Bissau

M. Doudou Gueye, conseiller juridique du Ministère de la pêche et de l'économie maritime de la République du Sénégal

M. Cheikh Sarr, directeur de la protection et de la surveillance des pêches de la République du Sénégal

Mme Marième Diagne Talla, secrétaire permanente par intérim de la CSRP

Mme Diénaba Bèye Traoré chef du Département harmonisation des politiques et législations de la CSRP

M. Hamady Diop, chef du Département recherche et système d'information de la CSRP

M. Babacar Ba, chef du Département suivi, contrôle, surveillance et aménagement des pêches de la CSRP

Mme Mame Fatou Toure, chef du Service communication et relations publiques de la CSRP

M. Demba Yeum Kane, coordonnateur régional du PRAO

M. Abdou Khadir Diakhate, assistant de programme du Département harmonisation des politiques et de la législation de la CSRP

M. Baïdi Diene, secrétaire général adjoint de l'Agence de gestion et de coopération entre la Guinée-Bissau et le Sénégal (AGC)

M. Sloans Chimatrio, Union Africaine/NEPAD

M. Racine Kane, chef de mission du Bureau de l'Union internationale pour la conservation de la nature (UICN) à Dakar (Sénégal)

M. Ahmed Senhoury, directeur de l'Unité de mobilisation et de coordination du PRCM

M. Papa Kebe, expert, spécialiste des ressources pélagiques

M. Aboubacar Fall, avocat au barreau de Dakar (Sénégal)

M. Ibrahima Ly, juriste, professeur à l'Université Cheikh Anta Diop de Dakar, Dakar (Sénégal)

M. Adilson D. Djabula, juriste

2 septembre 2014, après-midi

Allemagne

M. Martin Ney, conseiller juridique, directeur général des affaires juridiques, Ministère fédéral des affaires étrangères

M. Christian Schulz, directeur adjoint chargé du droit de la mer, du droit de l'espace et de l'Antarctique, Ministère fédéral des affaires étrangères

Argentine

M. Holger F. Martinsen, conseiller juridique adjoint, Bureau du conseiller juridique, Ministère des affaires étrangères et du culte

M. Manuel Fernández Salorio, consul général de la République argentine à Hambourg (République fédérale d'Allemagne)

Mme Cecilia María Verónica Quadri, consule générale adjointe de la République argentine à Hambourg (République fédérale d'Allemagne)

Australie

M. William McFadyen Campbell QC, General Counsel (droit international), Bureau du droit international, Attorney-General's Department

Mme Stephanie Ierino, juriste principale, Bureau du droit international, Attorney-General's Department

Mme Amanda Annamalay, deuxième secrétaire à l'ambassade d'Australie, Berlin (République fédérale d'Allemagne)

Chili

M. Eduardo Schott S., consul général du Chili à Hambourg (République fédérale d'Allemagne)

Mme Katherine Bernal S., juriste, Sous-Secrétariat aux pêches

Espagne

M. José Martín y Pérez de Nanclares, directeur, Département du droit international, Ministère des affaires étrangères et de la coopération

M. Eduardo Ramón Merino de Mena, conseiller juridique, Département du droit international, Ministère des affaires étrangères et de la coopération

Micronésie (Etats fédérés de)

M. Clement Yow Mulalap, Esq., conseiller juridique, Mission permanente des Etats fédérés de Micronésie auprès de l'Organisation des Nations Unies, New York (Etats-Unis d'Amérique)

DEMANDE D'AVIS CONSULTATIF - COMMISSION SOUS-RÉGIONALE DES PÊCHES

Nouvelle-Zélande

Mme Penelope Ridings, conseillère pour le droit international, Ministère des affaires étrangères et du commerce extérieur

Mme Elana Geddis, avocate auprès de la High Court de Nouvelle-Zélande

Royaume-Uni de Grande-Bretagne et d'Irlande du Nord

Mme Nicola Smith, conseillère juridique adjointe, Ministère des affaires étrangères et du Commonwealth

Sir Michael Wood, membre de la Commission du droit international, membre du barreau d'Angleterre

Thaïlande

M. Kriangsak Kittichaisaree, directeur exécutif du Bureau économique et commercial de la Thaïlande (Taipei), membre de la Commission du droit international

Union européenne

M. Esa Paasivirta, membre du Service juridique, Commission européenne

M. André Bouquet, conseiller juridique, Service juridique, Commission européenne

M. Daniele Nardi, membre du Service juridique, Commission européenne

Mme Valérie Lainé, chef de l'unité Politique de contrôle des pêches, Direction générale des affaires maritimes et de la pêche, Commission européenne

M. Friedrich Wieland, chef de l'unité Affaires juridiques, Direction générale des affaires maritimes et de la pêche, Commission européenne

Mme Cristina Olivos, juriste, unité Affaires juridiques, Direction générale des affaires maritimes et de la pêche, Commission européenne

Mécanisme régional de gestion des pêches des Caraïbes (CRFM)

M. Pieter Bekker, professeur de droit international, Graduate School of Natural Resources Law, Policy and Management, University of Dundee (Royaume-Uni), membre du barreau de New York

Union internationale pour la conservation de la nature (UICN)

Mme Cymie Payne, J.D., professeur, School of Law - Camden, Bloustein School of Public Policy, Rutgers University, New Brunswick (Etats-Unis d'Amérique)

Mme Nilufer Oral, Faculté du droit, Istanbul Bilgi University, Istanbul (Turquie)

Mme Anastasia Telesetsky, professeur, College of Law, Natural Resources and Environmental Law Program, University of Idaho (Etats-Unis d'Amérique)

OPENING OF THE ORAL PROCEEDINGS – 2 September 2014, p.m.

Opening of the Oral Proceedings

[ITLOS/PV.14/C21/1/Rev.1, p. 1–3; TIDM/PV.14/A21/1/Rev.1, p. 1–3]

Le Président :

A sa quatorzième session extraordinaire, tenue les 27 et 28 mars 2013, la Conférence des ministres de la Commission sous-régionale des pêches a voté une résolution par laquelle elle a décidé d'habiliter le Secrétaire permanent de la Commission sous-régionale des pêches à saisir le Tribunal afin qu'il rende un avis consultatif.

Cette résolution a été adoptée conformément à l'article 33 de la Convention du 8 juin 2012 relative à la détermination des conditions minimales d'accès et d'exploitation des ressources halieutiques à l'intérieur des eaux maritimes sous juridiction des Etats membres de la Commission sous-régionale.

Le texte de ladite résolution a été transmis par une lettre du Secrétaire permanent de la Commission sous-régionale des pêches, datée du 27 mars 2013, qui a été reçue au Greffe le 28 mars 2013. Conformément à l'article 131 du Règlement du Tribunal, le Secrétaire permanent de la Commission sous-régionale des pêches a, par lettre du 9 avril 2013, transmis des documents additionnels. Ces documents additionnels ont été placés sur le site Internet du Tribunal.

La demande d'avis consultatif a été soumise sur la base de l'article 21 du Statut du Tribunal et de l'article 138 du Règlement du Tribunal. L'affaire, inscrite au rôle sous le n° 21, porte le titre « Demande d'avis consultatif soumise par la Commission sous-régionale des pêches ».

Je prie maintenant Monsieur le Greffier de bien vouloir résumer la procédure et de lire les questions sur lesquelles le Tribunal est appelé à rendre un avis consultatif à partir de la résolution de la Commission sous-régionale des pêches.

Monsieur le Greffier ?

Le Greffier :

Merci, Monsieur le Président. Ces questions sont ainsi formulées :

1. Quelles sont les obligations de l'Etat du pavillon en cas de pêche illicite non déclarée, non réglementée (INN) exercée à l'intérieur de la Zone économique exclusive des Etats tiers ?
2. Dans quelle mesure l'Etat du pavillon peut-il être tenu pour responsable de la pêche INN pratiquée par les navires battant son pavillon ?
3. Lorsqu'une licence de pêche est accordée à un navire dans le cadre d'un accord international avec l'Etat du pavillon ou avec une structure internationale, cet Etat ou cette organisation peut-il être tenu responsable des violations de la législation en matière de pêche de l'Etat côtier par ce navire ?
4. Quels sont les droits et obligations de l'Etat côtier pour assurer la gestion durable des stocks partagés et des stocks d'intérêt commun, en particulier ceux des thonidés et des petits pélagiques ?

Je précise que le libellé en français de la question 3, que je viens de lire, correspond au texte soumis par la Commission sous-régionale dans ses exposés écrits. Ce libellé a été confirmé par la Commission sous-régionale dans sa lettre du 12 mars 2014.

By an Order dated 24 May 2013, the Tribunal decided that the Sub-Regional Fisheries Commission and the intergovernmental organizations listed in the annex to that Order were

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likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion. By the same Order, States Parties to the Convention, the Sub-Regional Commission and the said organizations were invited to present written statements on the questions submitted to the Tribunal for an advisory opinion. The time-limit for the submission of written statements, initially fixed on 29 November 2013, was extended to 19 December 2013 by an Order of the President dated 3 December 2013.

Within that time-limit, written statements were filed by 22 States Parties to the Convention. These are, in the order of receipt: Saudi Arabia, Germany, New Zealand, China, Somalia, Ireland, the Federated States of Micronesia, Australia, Japan, Portugal, Chile, Argentina, the United Kingdom, Thailand, the Netherlands, European Union, Cuba, France, Spain, Montenegro, Switzerland and Sri Lanka.

Within the same time-limit, written statements were also submitted by the following seven organizations, in the order of receipt: the Forum Fisheries Agency, the International Union for Conservation of Nature and Natural Resources (IUCN), the Caribbean Regional Fisheries Mechanism, the United Nations, the Sub-Regional Fisheries Commission, the Food and Agriculture Organization of the United Nations and the Central America Fisheries and Aquaculture Organization.

One statement was submitted by a State party to the 1995 Straddling Fish Stocks Agreement: the United States of America.

In addition, one statement was submitted by a non-governmental international organization (the World Wide Fund for Nature), which was informed by a letter of 4 December 2013 that its statement would not be considered part of the documentation in the case.

By an Order dated 20 December 2013, the President fixed 14 March 2014 as the time-limit within which States parties to the Convention and intergovernmental organizations having presented written statements could submit written statements on the statements made. During this second round of statements, written statements were filed, in the order of receipt, by the following five States Parties to the Convention: the United Kingdom, New Zealand, European Union, the Netherlands, and Thailand. In addition, one statement was submitted by the Sub-Regional Fisheries Commission. A further statement was received from the World Wide Fund for Nature, which was not included in the case file.

All the statements have been posted on the website of the Tribunal.

The President:

As indicated, the Tribunal is meeting today to hear oral statements relating to the request for an advisory opinion. In this regard, the Tribunal has been informed that representatives of the following States and organizations wish to take the floor during the current oral proceedings: the Sub-Regional Fisheries Commission, Germany, Argentina, Australia, Chile, Spain, the Federated States of Micronesia, New Zealand, the United Kingdom, Thailand, the European Union, the Caribbean Regional Fisheries Mechanism and the International Union for the Conservation of Nature.

The specific arrangements for the hearing have been made known by the Registry to the participating delegations. The schedule of the hearing has also been made public by a press release.

Le Tribunal va entendre la Commission sous-régionale des pêches. Les autres délégations que j'ai déjà mentionnées prendront la parole mercredi, jeudi et vendredi.

Je donne maintenant la parole au représentant de la Commission sous-régionale des pêches.

Votre Excellence, Monsieur le Ministre Camara, vous avez la parole.

STATEMENT OF MR ODUNTON – 14 September 2010, p.m.

Exposés de la Commission sous-régionale des pêches

EXPOSÉ DE M. CAMARA
COMMISSION SOUS-RÉGIONALE DES PÊCHES
[TIDM/PV.14/A21/1/Rev.1, p. 3–5]

M. Camara :

Monsieur le Président, Madame et Messieurs les membres du Tribunal international du droit de la mer, en ma qualité de président en exercice de la Conférence des ministres de la Commission sous-régionale des pêches et au nom de la délégation qui m'accompagne, composée de représentants des sept Etats membres de la CSRP, à savoir : Cabo Verde, Gambie, Guinée, Guinée-Bissau, Mauritanie, Sénégal et Sierra Leone, tous parties à la Convention des Nations Unies sur le droit de la mer, du Secrétariat permanent de la CSRP, des organisations régionales intergouvernementales, des organisations régionales non gouvernementales et des experts de la sous-région, je vous remercie de l'honneur que vous nous faites de prendre part à l'audience consacrée à la demande d'avis consultatif initiée par la Commission sous-régionale des pêches.

Je voudrais exprimer l'espoir de la Commission sous-régionale des pêches de voir le Tribunal clarifier le droit international afin que chaque acteur impliqué dans l'éradication de ce fléau qu'est la pêche illicite, non déclarée, non réglementée, plus connue sous son sigle « INN », exerce pleinement les droits qui lui sont reconnus entièrement et assume entièrement les obligations qui lui incombent.

D'après les constats qui résultent des activités de surveillance menées dans l'espace de notre sous-région, les zones maritimes des Etats membres de la CSRP, notamment la Sierra Leone, la Gambie, la Guinée et la Guinée-Bissau, sont le théâtre privilégié d'activités de pêche INN. Les pertes attribuées aux activités de pêche non autorisées sont estimées annuellement à quelque 140 millions de dollars pour la Guinée et la Sierra Leone. Le montant de cette perte est énorme puisqu'elle équivaut à un quart de la valeur moyenne de la production des pêches officiellement déclarée dans ces deux pays.

En ce qui concerne le Sénégal, supposé relativement avancé en matière de surveillance, les pertes évaluées sur la seule base des navires de pêche INN réellement arraisonnés en 2011, indiquent une perte de 350 000 tonnes qui représentent une valeur de 292 millions de dollars US¹, sans compter tous les autres effets négatifs induits.

La situation est également préoccupante pour la Mauritanie qui dispose de moyens de surveillance relativement importants, et qui déclare toujours des niveaux d'arraisonnements annuels élevés malgré la sévérité affichée dans la législation de ce pays. En effet, en 2011, plus de 400 infractions de pêche ont été relevées au niveau de la pêche artisanale et industrielle de ce pays.

Les conséquences désastreuses de la pêche INN sur le tissu socio-économique constatées dans tous les Etats de la sous-région se manifestent notamment par les fermetures d'usines, avec une baisse de productivité due à une raréfaction de produits à traiter et le chômage dans les activités connexes de transformation, de mareyage, de manutention, de consignation et de commerce en général.

Les effets plus visibles de cette pêche INN se manifestent par la baisse des revenus des pêcheurs, la diminution des débarquements dans les ports, la durée plus longue des marées des navires de pêche avec, comme conséquences, des charges d'exploitation supplémentaires, des changements dans la composition des captures qui consistent en la disparition de certaines espèces et, enfin, la diminution des tailles moyennes des individus pêchés. Les

¹ Source : HBC-URI Technical Report 2013, USAID/COMFISH.

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stocks les plus touchés par cette surexploitation sont les pélagiques ciblés par certaines flottilles étrangères.

Dans l'espace de la CSRP, le poisson fournit près de 62 % des protéines animales disponibles. La consommation en poisson per capita est de 21 kilogrammes alors que la moyenne mondiale est de 18 kilogrammes, ce qui représente le double de la moyenne africaine de 9 kilogrammes.

Selon les estimations de la FAO, il est probable que la consommation mondiale de poissons, qui se situe actuellement autour de 91,3 millions² de tonnes par an, augmente sensiblement d'ici 2030, alors que la ressource décline de façon drastique dans toutes les parties du globe et, notamment, dans les pays à faible capacité de protection de leurs ressources.

Cette baisse de la ressource, conjuguée avec une augmentation continue de la demande de poissons sur le marché mondial, favorise une intensification de la pêche INN, particulièrement dans la zone de la Commission sous-régionale des pêches réputée être une des plus poissonneuses au monde.

En outre, il faut noter la dégradation des habitats marins du fait de l'utilisation, par les navires de pêche INN, de techniques destructrices comme le chalutage de fond, la pêche à l'explosif et le rejet massif en mer de poissons jugés non rentables, mais qui auraient pu être consommés par les populations de la sous-région.

Par ailleurs, les avis scientifiques fournis aux gestionnaires au sujet des décisions concernant les aménagements des pêcheries sont assujettis à de grandes incertitudes résultant des évaluations de stocks basées sur des modèles mathématiques qui sont tributaires de la fiabilité des données statistiques, biologiques et socio-économiques sur la pêche. Or, ces données sont souvent faussées par les activités de certains navires qui opèrent illégalement et qui ne sont pas prises en compte.

Enfin, d'autres problèmes liés à la pêche INN dans la sous-région ont été constatés comme les tentatives d'émigration clandestine des jeunes pêcheurs et, parfois, leur implication dans des trafics illicites multiformes (drogues, armes, etc.).

Considérant les difficultés récurrentes que rencontrent les Etats de la CSRP dans leur lutte contre la pêche INN, nous, ministres des Etats membres de la CSRP, avons habilité – je dis bien : avons habilité – le Secrétaire permanent de la Commission à saisir le Tribunal international du droit de la mer pour avis consultatif.

Monsieur le Président, Madame, Messieurs les membres du Tribunal international du droit de la mer, je vous remercie pour votre bien aimable attention.

Monsieur le Président, je vous prie maintenant de bien vouloir appeler à la barre l'agent de la Commission sous-régionale des pêches, Mme Diénaba Bèye Traoré pour développer les arguments de la Commission sous-régionale des pêches.

Je vous remercie.

Le Président :

Merci beaucoup, Monsieur le Ministre Camara.

Avant de donner la parole à l'orateur suivant, je voulais vous informer que certains juges souhaitaient poser des questions à la Commission sous-régionale. J'invite à présent M. le juge Cot à prendre la parole.

Monsieur le juge Cot.

² Rapport Sofia, FAO, 2014, La situation mondiale des pêches et de l'aquaculture – Possibilités et défis – ISBN 978-92-5-208275-0.

QUESTIONS DES JUGES – 2 septembre 2014, après-midi

QUESTION DE M. LE JUGE COT
[TIDM/PV.14/A21/1/Rev.1, p. 5–6]

M. le juge Cot :

Merci Monsieur le Président.

Monsieur le Président, Monsieur le Ministre, la Commission sous-régionale des pêches se fonde sur la Convention CMA du 8 juin 2012 pour saisir le Tribunal d'une demande d'avis consultatif. Elle a posé quatre questions. La Commission sous-régionale des pêches peut-elle nous donner la référence du ou des articles de la Convention CMA correspondant à chacune des quatre questions ?

Je vous remercie.

Le Président :

Je vous remercie, Monsieur le juge Cot.

I will now give the floor to Judge Pawlak.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

QUESTION FROM JUDGE PAWLAK

[ITLOS/PV.14/C21/1/Rev.1, p. 5]

Judge Pawlak:

Thank you, Mr President.

Mr President, distinguished Judges, distinguished representatives of the Sub-Regional Fisheries Commission, I am of the view that in order to understand better the request for an advisory opinion it would be advisable to have the following information: Is the term “flag State” used in the first question intended to encompass all flag States or only those whose fishing vessels are operating in the exclusive economic zones within the framework of the MCA Convention?

Thank you, Mr President.

The President:

Thank you, Judge Pawlak.

I now invite Judge Gao to take the floor.

QUESTIONS FROM JUDGES – 2 September 2014, p.m.

QUESTION FROM JUDGE GAO
[ITLOS/PV.14/C21/1/Rev.1, p. 5-6]

Judge Gao:

Thank you, Mr President.

Your Excellency, my question is relatively straightforward. Would it be possible for the Sub-Regional Fisheries Commission to provide the Tribunal with additional information and materials upon which the four questions are formulated and put forward for an advisory opinion? This further relevant documentation may include the following categories:

- international agreements concluded with the flag States and other relevant international agencies;
- national reports on IUU fishing activities and damages and losses suffered from these activities;
- and last but not least, existing regulatory and enforcement measures against IUU fishing.

Thank you, Minister.

The President:

Thank you, Judge Gao.

Bien entendu, le texte écrit de ces questions vous sera communiqué. Si vous le souhaitez, vous pouvez répondre à ces questions pendant l'audience ou transmettre votre réponse par écrit dans un délai d'une semaine, à savoir jusqu'au mardi 9 septembre à midi. Le texte de votre réponse sera communiqué aux Etats et organisations qui participent à l'audience et sera placé sur le site Internet du Tribunal.

Madame Bèye Traoré, je vous invite à prendre la parole.

DEMANDE D'AVIS CONSULTATIF - COMMISSION SOUS-RÉGIONALE DES PÊCHES

Exposés de la Commission sous-régionale des pêches (suite)

EXPOSÉ DE MME. BÈYE TRAORÉ
COMMISSION SOUS-RÉGIONALE DES PÊCHES
[TIDM/PV.14/A21/1/Rev.1, p. 7–25]

Mme Bèye Traoré :

Merci, Monsieur le Président.

Monsieur le Président du Tribunal, Madame et Messieurs les membres du Tribunal international du droit de la mer, c'est pour moi un insigne honneur de comparaître aujourd'hui devant votre illustre juridiction, au nom de la Commission sous-régionale des pêches.

Il faut dire que malgré les efforts de renforcement des cadres juridiques aux niveaux national, sous-régional, continental et international pour combattre la pêche INN ; malgré le fait que les Etats membres de la CSRP aient tous ratifié la Convention des Nations Unies sur le droit de la mer, cadre déterminant qui fonde les actions juridiques de la CSRP dans sa quête d'avis consultatif devant votre Tribunal ; malgré le fait que les Etats membres de la CSRP ne s'opposent ni aux instruments juridiques internationaux de lutte contre la pêche INN¹ ni aux instruments dits non contraignants, si nous nous référons au Préambule de la Convention sur les conditions minimales d'accès de la CSRP ; en dépit de l'adoption de décisions par les organisations régionales de pêche pour renforcer la gouvernance des pêches en termes de réformes profondes apportées dans les politiques nationales de pêche, d'amélioration du cadre législatif et réglementaire sur la pêche, de développement d'un système d'information sur les pêcheries et de renforcement de la recherche halieutique, et malgré l'appui institutionnel et opérationnel des partenaires techniques et financiers en matière de suivi, de contrôle et de surveillance des zones de pêche, notamment par le développement des capacités humaines et matérielles, et l'organisation régulière d'opérations conjointes de surveillance, les Etats membres de la Commission sous-régionale des pêches font toujours face à des problèmes de pêche INN de plus en plus sérieux, sans pouvoir compter sur une coopération efficace et fructueuse de l'Etat du pavillon des navires en infraction.

Ce sont là les constats de la CSRP qui justifient sa demande d'avis consultatif au Tribunal fondée sur : la Convention relative à la détermination des conditions minimales d'accès et d'exploitation des ressources halieutiques à l'intérieur des zones économiques de la CSRP, communément appelée la Convention sur les conditions minimales d'accès ou la Convention CMA. On se fonde également sur la Convention des Nations Unies sur le droit de la mer et les textes constitutifs du Tribunal.

Nous allons maintenant aborder les points sur la compétence, la recevabilité et le droit applicable.

Sur la compétence du Tribunal, le fondement et l'étendue de la compétence du Tribunal par rapport à notre demande d'avis consultatif sont à rechercher, non seulement dans le Statut et le Règlement du Tribunal, mais également dans la Convention et la Convention CMA de la CSRP.

S'il est vrai que la Convention et le Statut du Tribunal ne font pas expressément état de la compétence du Tribunal pour le cas qui nous occupe, en revanche, la combinaison des dispositions du Statut et du Règlement du Tribunal, de la Convention et de la Convention CMA permet indiscutablement de fonder cette compétence.

¹ La Sierra Leone a signé l'Accord sur les mesures du ressort de l'Etat du port pour la lutte contre la pêche INN le 23 novembre 2009.

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Il s'agit notamment des dispositions suivantes : l'article 21 du Statut du Tribunal ; l'article 16 du Statut ; l'article 138 du Règlement du Tribunal ; l'article 33 de la Convention CMA et les articles 287 et 288, paragraphe 4, de la Convention.

Examinons d'abord la compétence du Tribunal conformément à l'article 21 du Statut du Tribunal.

La fonction consultative du Tribunal est fondée sur l'article 21 de son Statut qui dispose que :

Le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention [CNUDM] et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal.

Il convient d'observer que, dans la version française de l'article 21, il est clairement opéré une distinction entre le mot « différends », qui se réfère à une situation contentieuse, et le mot « demande », qui fait référence à une situation non contentieuse. Le mot « et », conjonction de coordination entre les mots « différends » et « demandes », indique la compétence du Tribunal dans les deux situations parfaitement distinctes.

Par ailleurs, il y a lieu de noter une équivoque dans les différences de sens entre la version française et la version anglaise de l'article 21.

Cette dernière se lit comme suit :

La compétence du Tribunal porte sur des différends et toutes les demandes qui lui sont soumises conformément à la Convention CNUDM et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal.

Le terme anglais « applications » signifie-t-il application au sens des dispositions de la Convention, c'est-à-dire « demandes », « requêtes » ? Ou bien, est-ce une attribution de la compétence du Tribunal pour les situations autres que celles où il existe un différend ?

Les termes « toutes les demandes », mentionnés dans l'article 21 en français, ouvre la compétence du Tribunal à des procédures autres que la fonction contentieuse qui, elle, est reflétée par les mots « tous les différends ». La compétence consultative du Tribunal est ainsi exprimée.

Une simple lecture de l'article 21 du Statut dans ses deux versions, anglaise et française, fait apparaître clairement la compétence du Tribunal pour donner un avis consultatif.

Concernant la compétence du Tribunal conformément à l'article 16 du Statut du Tribunal, aux termes de l'article 16 du Statut du Tribunal, il appartient – je cite – « au Tribunal de déterminer, par un règlement, le mode suivant lequel il exerce ses fonctions ». Cet article se réfère explicitement au Règlement du Tribunal pour définir la procédure d'exercice de ses fonctions telles que définies par la Convention et son Statut. L'article 16 justifie l'adoption de l'article 138 du Règlement du Tribunal, mentionné sous la section H (procédure consultative).

Pour ce qui est de la compétence du Tribunal, conformément à l'article 138 du Règlement du Tribunal, aux termes de l'article 138 du Règlement – je cite :

Le Tribunal peut donner un avis consultatif sur une question juridique dans la mesure où un accord international se rapportant aux buts de la Convention (CNUDM) prévoit expressément qu'une demande d'un tel avis lui est soumise (paragraphe 1)

Cette demande doit être communiquée au Tribunal par l'organe habilité à cet effet par l'accord dont il s'agit (paragraphe 2).

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Trois conditions semblent ici être laissées à l'appréciation exclusive du Tribunal par l'article 138 du Règlement pour pouvoir accueillir une demande d'avis consultatif :

- l'existence d'un accord international se rapportant aux buts de la convention ;
- une question juridique déterminée au sens de l'article 138 ;
- l'autorisation de la saisine par l'organe de décision de l'institution requérante.

Examinons l'existence d'un accord international se rapportant aux buts de la CNUDM.

En l'espèce, la compétence du Tribunal se fonde sur la Convention sur les conditions minimales d'accès de la CSR.P.

Nous rappelons que la Convention CMA est un instrument juridique régional portant sur la réglementation des activités de pêche et qui, dans ses buts, se réfère aux instruments juridiques internationaux pertinents tels que :

- la Convention des Nations Unies sur le droit de la mer, notamment dans le paragraphe 4 de son préambule ;
- les dispositions internationales relatives à la sécurité maritime et à la protection de l'environnement marin édictées par l'Organisation maritime Internationale ;
- les principes et normes énoncés dans le Code de conduite pour une pêche responsable ;
- le Plan d'action International visant à prévenir, à contrecarrer et à éliminer la pêche INN, adopté en 2001 par la FAO.

En outre, l'article 3, paragraphe 1, de la Convention CMA est une reprise pure et simple de l'article 62, paragraphe 2, de la Convention. En outre, l'article 3, paragraphe 3, de la Convention CMA est un fidèle reflet du paragraphe 7.5 du Code de conduite pour une pêche responsable.

De même, le titre IV sur les mesures du ressort de l'Etat du port reprend l'essentiel de l'Accord de 2009 de la FAO sur les mesures qui sont du ressort de l'Etat du port et du Plan d'action International visant à prévenir, à contrecarrer et à éliminer la pêche INN.

En conséquence, il s'infère de ce qui précède que la Convention CMA est indiscutablement un accord international se rapportant aux buts de la Convention tels que prévus aux articles 61 à 64 et 116 à 119 relatifs à la conservation et à la gestion des ressources biologiques de la ZEE et de la haute mer.

En ce qui concerne le fondement de la saisine du Tribunal par la CSR.P, le moyen se trouve dans l'article 33 de la Convention CMA qui est ainsi libellé : « La Conférence des ministres de la CSR.P peut habiliter le Secrétaire permanent de la CSR.P à porter une question juridique déterminée devant le Tribunal international du droit de la mer pour avis consultatif. »

Comme le texte de l'article 33 l'indique, le Tribunal doit s'assurer que les conditions suivantes sont satisfaites :

- a) une autorisation de la saisine du Tribunal par l'organe de décision de l'institution demanderesse, ce qui a été fait par une résolution de la Conférence des ministres de la CSR.P ;
- b) une demande portant sur une question juridique, ce qui est le cas en l'espèce.

Ensuite, la deuxième condition posée par l'article 138, c'est-à-dire une question juridique déterminée.

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Conformément à l'article 138, paragraphe 3, du Règlement qui renvoie à l'application *mutatis mutandis*, entre autres, de l'article 131, paragraphe 1, du Règlement : « Une demande d'avis consultatif sur les questions juridiques contient l'énoncé précis de la question. »

La Cour internationale de Justice apporte des orientations sur la notion de « question juridique » dans son avis consultatif sur l'*Affaire du Sahara Occidental*.

Elle considère en effet que « [I]es questions libellées en termes juridiques et qui soulèvent des problèmes de droit international [...] sont, par leur nature même, susceptibles de recevoir une réponse fondée en droit ... »².

Cette jurisprudence a été confirmée par la Chambre des fonds marins du Tribunal dans l'avis consultatif rendu dans l'affaire n° 17. En effet, dans le paragraphe 39 de cet avis, la Chambre rappelle que la Cour internationale de Justice a souligné que « des « questions... libellées en termes juridiques et soul[evant] des problèmes de droit international... sont, par leur nature même, susceptibles de recevoir une réponse fondée en droit »³.

Les quatre questions posées par la CSRP portent, en résumé, sur les droits et obligations de l'Etat du pavillon en cas de pêche INN, la responsabilité des Etats ou organisations internationales signataires d'accord de pêche et les droits et obligations des Etats côtiers en matière de gestion durable des stocks partagés.

Ces questions, qui sont précises, libellées en termes juridiques et soulevant des problèmes de droit international, sont parfaitement susceptibles de recevoir une réponse fondée en droit.

Les réponses aux questions posées par la CSRP permettront à la Commission d'obtenir les éléments à caractère juridique nécessaires au bon déroulement de ses activités, notamment la mise en œuvre effective de la Convention CMA.

S'agissant maintenant de la troisième condition découlant de l'article 138, c'est-à-dire l'autorisation de saisine du Tribunal par l'organe de décision de l'institution demanderesse.

La Conférence des ministres de la CSRP, organe de décision, a habilité le Secrétaire permanent, par une Résolution adoptée pendant sa 14^e session extraordinaire (tenue les 27 et 28 mars 2013 à Dakar au Sénégal), à saisir le Tribunal pour avis consultatif. Cette Résolution a été transmise par lettre en date du 27 mars 2013 comme figurant dans l'Ordonnance 2013/2 du Tribunal. Cette procédure est en adéquation avec l'article 33 de la Convention CMA.

Il ne fait dès lors aucun doute que la décision de demande d'avis consultatif résulte bien d'une résolution de l'organe suprême de décision de la CSRP qu'est la Conférence des ministres.

Enfin, toujours sur la compétence, examinons maintenant la compétence conformément aux articles 287 et 288, paragraphe 4, de la Convention.

L'article 287 de la Convention prévoit plusieurs choix de procédure pour l'interprétation et l'application de la Convention. Parmi ceux-ci figurent le Tribunal international du droit de la mer, conformément à l'annexe VI a) de la Convention.

Bien que l'article 287 fasse référence à une situation de règlement des différends, l'article 288, paragraphe 4, donne une ouverture au Tribunal pour décider lui-même de sa compétence dans le cas d'une demande d'avis qui lui est soumise (*competens competens*).

En effet, l'article 288, paragraphe 4, de la Convention se lit comme suit : « En cas de contestation sur le point de savoir si une cour ou un tribunal est compétent, la cour ou le tribunal décide. »

² *Sahara occidental, avis consultatif [du 16 octobre 1975], C.I.J. Recueil 1975, p. 12.*

³ *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo, avis consultatif [du 22 juillet 2010], C.I. J. Recueil 2010, p. 403, par. 25 ; Sahara occidental, avis consultatif [du 16 octobre 1975], C.I.J. Recueil 1975, p. 12, par. 15).*

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Par conséquent, le Tribunal est habilité à examiner l'étendue de sa compétence en cas de contestation⁴, mais en se conformant aux dispositions de la Convention, de son Statut et de son Règlement, notamment les articles 21 et 27 du Statut et les articles 130, 131 et 138 du Règlement.

Par ailleurs, suivant la doctrine sur la compétence consultative du Tribunal, il faut noter que la question de cette compétence a été soulevée à plusieurs occasions pendant la réunion des Etats Parties et lors des débats de l'Assemblée générale des Nations Unies. Il apparaît qu'aucune objection ferme ne lui a été opposée et plusieurs Etats ont abondé dans le sens de l'application de l'article 138⁵.

En outre, les différents présidents du Tribunal ont toujours confirmé, dans leurs interventions, la compétence consultative du Tribunal plénier⁶. Cette compétence vient compléter la fonction judiciaire⁷ attribuée au Tribunal par la Convention et les instruments constitutifs.

Sur la recevabilité de la demande de la CSRP, en acceptant d'examiner et de donner un avis sur les quatre questions posées par la CSRP, le Tribunal permettra aux Etats membres de la Commission de mieux apprécier et d'appliquer les différents instruments juridiques régionaux et internationaux pertinents de lutte contre la pêche INN⁸. Cela contribuera alors à renforcer le cadre de bonne gouvernance des mers et des océans en donnant, en particulier, son avis sur les obligations qui, en droit international, doivent reposer sur l'Etat du pavillon en cas de pêche INN.

En ce qui concerne le régime juridique de la pêche dans la zone économique exclusive et en haute mer⁹, les avis du Tribunal auront une haute portée juridique et pratique considérable. En effet, ces avis pourront également être utilisés en tant que de besoin par d'autres Etats Parties à la Convention ou organisations régionales qui font face à la problématique de la pêche INN.

Il faudrait rappeler également qu'un avis consultatif reste un conseil et concerne principalement l'accord en vertu duquel il a été rendu, en l'occurrence la Convention sur les conditions minimales d'accès (CMA)¹⁰ au-delà la Convention et les instruments pris en application de la Convention.

⁴ Par exemple, les observations de la Cour internationale de Justice sur le principe de *compétence de la compétence* dans l'affaire *Nottebohm, exception préliminaire, arrêt [du 18 novembre 1953], C.I.J. Recueil 1953*, p. 119 et 120.

⁵ Michael B. Gerrard and Gregory E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), p. 524-525. Voir aussi Michael A. Becker, « Sustainable Fisheries and the obligation of Flag and Coastal States: The Request by the Sub Regional Fisheries Commission for an ITLOS Advisory Opinion », *American Society of International Law Insights*, Vol. 17, Issue 19 (23 août 2013) ; voir également P. Rao et P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea : A Commentary* (2006), p. 393-394.

⁶ Voir les interventions des différents présidents sur le site web du Tribunal.

⁷ Voir Tafsir Malick Ndiaye, « The Advisory Function of the International Tribunal for the Law of the Sea », 9 (3) *Chinese Journal of International Law* 565-587 (2010) ; Doo-young Kim, « Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea », *Issues in Legal Scholarship* 2010.

⁸ Voir Chapitre II Section 1 de l'exposé écrit version 2 de la CSRP (Les instruments juridiques internationaux de lutte contre la pêche INN applicable dans l'espace de la CSRP).

⁹ Voir Résolution 56/12 du 28 novembre 2001 où l'Assemblée générale des Nations Unies soulignait « l'autorité et le rôle importants du Tribunal concernant l'interprétation et l'application de la Convention ». Comme disait l'ancien Président du Tribunal, le juge José Luis Jesus « l'interprétation de certaines dispositions de la Convention par le biais d'un avis consultatif peut être le moyen le plus approprié de clarifier les questions juridiques se rapportant à la CNUMD ».

¹⁰ Voir article 59 du Statut de la Cour internationale de Justice (CIJ).

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Enfin, les questions posées par la CSRP ont un caractère précis et devraient en conséquence conduire le Tribunal à les déclarer recevables¹¹.

Concernant le droit applicable, la CSRP a invoqué, dans le chapitre II de son exposé écrit, version 2, plusieurs instruments juridiques contraignants qu'elle estime pertinents au soutien de sa demande. Certains de ces instruments juridiques sont directement liés à la Convention CMA, notamment la Convention, l'Accord des Nations Unies sur les stocks de poissons, les instruments juridiques sur la pêche de la FAO, alors que d'autres visent les buts de la Convention CMA. Tous ces instruments sont d'une pertinence indiscutable lorsqu'il s'agit de mettre en œuvre la Convention.

Il existe, par ailleurs, des instruments non contraignants qui ont été volontairement approuvés par les Etats. Ces instruments sont également pertinents dans le cadre de l'avis consultatif soumis au Tribunal. C'est le sens qu'il faut donner à la référence faite par la Chambre des fonds marins aux règles de l'Autorité internationale des fonds marins lorsqu'elle parle de « textes à caractère obligatoire », négociés par les Etats et adoptés suivant une procédure similaire à celle utilisée dans les conférences multilatérales.

Cela confirme la position de la Cour lorsqu'elle déclare, dans son avis consultatif sur la *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo* que les règles portant sur l'interprétation des traités consacrée par la Convention de Vienne « peuvent fournir certaines indications » quant à l'interprétation des résolutions du Conseil de sécurité de l'Organisation des Nations Unies¹².

Par ailleurs, il convient de souligner que les données sur les cadres juridiques nationaux, régionaux et internationaux figurant dans les exposés écrits de la Commission sont communiquées à titre indicatif pour renseigner le Tribunal sur le régime juridique qui soutient l'activité de pêche dans l'espace de la CSRP. La référence à ces instruments juridiques permettra au Tribunal de mieux cerner les difficultés rencontrées par la CSRP et ses Etats membres dans leur interprétation et application.

En conclusion, la CSRP prie très respectueusement le Tribunal international du droit de la mer de se déclarer compétent pour accueillir cette demande d'avis consultatif ; de déclarer que la demande d'avis de la CSRP est recevable ; de dire que les textes invoqués constituent le droit applicable en l'espèce.

Concernant les arguments additionnels en faveur des questions posées, comme précisé dans sa lettre de transmission du 12 mars 2014 de l'exposé écrit, la Commission a informé le Tribunal que le contenu de cet exposé était « sans préjudice d'autres argumentations et informations qui pourront être fournies et traitées pendant la phase orale de la procédure ». Ainsi, la CSRP précise ou apporte dans son exposé oral des éléments additionnels pour renforcer ses arguments aux questions posées.

Tout d'abord, la définition d'un Etat tiers : un Etat tiers est un Etat qui n'est pas membre de la Commission sous-régionale des pêches, comme indiqué dans l'article 2, paragraphe 9, de la Convention CMA.

Ensuite, dans son argumentation, la Commission demande un avis consultatif sur l'application et l'interprétation de la Convention CMA et, au-delà, de la Convention des Nations Unies sur le droit de la mer, mais non sur les autres instruments bilatéraux et multilatéraux signés ou ratifiés par un ou plusieurs de ses Etats membres, qui sont mentionnés dans les exposés écrits de la CSRP pour permettre une meilleure connaissance de la CSRP par le Tribunal.

¹¹ Voir par exemple, Fitzmaurice *The Law and Practice of the International Court of Justice* (Grotius, Cambridge, 1986) Vol. 1, p. 16 à 117.

¹² *Avis consultatif [du 22 juillet 2010], C.I.J. Recueil 2010, p. 403, par. 94* (Interprétation de la résolution 1244 (1999) du Conseil de Sécurité) à l'adresse www.icj-cij.org/docket/files/141/15987.pdf.

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La référence, dans les exposés écrits de la CSRP, au statut juridique des nouvelles utilisations économiques et scientifiques des mers se justifie par l'apparition de faits nouveaux comme l'ampleur de la pêche INN qui appellent de nouvelles réponses juridiques.

Il convient également de préciser que les interrogations de la Commission sous-régionale des pêches quant à l'évolution de la définition de la pêche INN s'expliquent par le fait que le secteur de la pêche est très dynamique et que les techniques de pêche utilisées font de plus en plus appel à des technologies avancées et évolutives comme le dispositif de concentration des poissons (DCP), le transbordement en mer, les filets maillants dérivants, etc.

Il s'y ajoute que certaines grandes marques de distribution se soucient peu de l'origine et de la licéité des produits qu'elles achètent, transforment et commercialisent. Ce constat ne veut en aucun cas dire que la CSRP remet en cause la définition de la pêche INN contenue dans le Plan d'action international de lutte contre la pêche INN, qui a d'ailleurs été textuellement reprise dans l'article 2, paragraphe 4, de la Convention CMA.

Par ailleurs, il convient de préciser que les exemples d'infractions cités dans les exposés écrits de la Commission constituent un échantillon des affaires qui vous sont présentées pour illustrer l'ampleur de la pêche INN dans la sous-région.

A la lumière des articles 58, paragraphe 2, 62, paragraphe 4, et 94 de la Convention, il convient de préciser que les termes « Etat du pavillon » figurant respectivement dans les questions 1, 2 et 3 qui font l'objet de la demande d'avis consultatif de la CSRP, devront être étendus à l'« Etat de la nationalité » des personnes physiques et morales telles que les propriétaires, les affrêteurs et équipages de navires de pêche.

En effet, les obligations de l'Etat de la nationalité des personnes physiques et morales en cas de pêche INN devront également être clarifiées, comme l'a exprimé l'Assemblée générale des Nations Unies dans sa Résolution faisant sien le document final de la Conférence des Nations Unies sur le développement durable, intitulé « L'avenir que nous voulons »¹³. Dans le paragraphe 170 de cette résolution, on peut lire ce qui suit :

Nous nous engageons de nouveau à éliminer la pêche illicite, non déclarée et non réglementée... en faisant en sorte que les Etats côtiers, les Etats du pavillon, les Etats du port, les Etats qui affrètent les navires pratiquant ce type de pêche et les Etats de nationalité de leurs propriétaires réels, ainsi que les Etats qui soutiennent ou pratiquent cette pêche mettent en œuvre, dans le respect du droit international, des mesures efficaces et coordonnées en vue d'identifier les navires qui exercent ce type d'activité et de priver les contrevenants des profits qu'ils en tirent...

Par ailleurs, on peut lire dans l'article 94, paragraphe 2b), de la Convention, que tout Etat « exerce sa juridiction conformément à son droit interne sur tout navire battant son pavillon, ainsi que sur le capitaine, les officiers et l'équipage pour les questions d'ordre administratif, technique et social concernant le navire ».

Enfin, les actes de pêche INN sont des faits internationalement illicites de l'Etat qui engagent la responsabilité internationale de l'Etat du pavillon du navire. En effet, la notion de « faits internationalement illicites de l'Etat », précisée à l'annexe de la Résolution 56/83 de l'Assemblée générale des Nations Unies, qui reprend les termes de la Commission du droit international dans les dispositions qui portent sur la responsabilité des Etats, est accomplie lorsqu'un comportement consistant en une action ou une omission est attribuable à l'Etat en vertu du droit international, c'est-à-dire à un comportement de tout organe de l'Etat, quelles que soient les fonctions qu'occupe cet organe (article 4) et constitue une violation d'une obligation internationale de l'Etat, c'est-à-dire lorsqu'un fait dudit Etat n'est pas conforme à

¹³ Voir Résolution 66/288 de l'AGNU « L'avenir que nous voulons », par. 170.

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ce qui est requis de lui en vertu de cette obligation, quelle que soit l'origine ou la nature de celle-ci (article 12).

Nous allons maintenant développer les arguments de la Commission par question.

Je reprends le libellé de la question n° 1 : quelles sont les obligations de l'Etat du pavillon en cas de pêche illicite, non déclarée, non réglementée exercée à l'intérieur de la zone économique exclusive des Etats tiers ?

Précisions : il s'agit ici des obligations de l'Etat du pavillon en cas de pêche INN opérée dans les eaux sous juridiction des Etats tiers. Le mot « obligations » mérite d'être précisé par rapport à sa traduction en anglais qui peut recouvrir deux sens différents mais complémentaires : obligations peut signifier « responsibility » ou « liability ». Dans la question n°1, elle devra être traduite par le mot « liability ».

Le droit international oblige l'Etat côtier à notifier à l'Etat du pavillon les actes de pêche INN opérés dans les eaux sous juridiction nationale, ainsi que les sanctions afférentes prononcées à son encontre.

Le droit international soumet l'Etat du pavillon à l'obligation de s'assurer que les navires qui battent son pavillon respectent, dans les eaux sous juridiction des Etats tiers, les mesures de conservation et de gestion des ressources halieutiques¹⁴. Par conséquent, l'Etat du pavillon est responsable du contrôle effectif des activités de pêche d'un navire battant son pavillon quel que soit le lieu où il opère. Cette responsabilité découle du droit qu'a l'Etat du pavillon de faire naviguer ses navires partout dans le monde, y compris en haute mer. Elle entraîne, en conséquence, l'obligation de tenir dûment compte des droits et obligations de l'Etat côtier, en respectant ses lois et règlements adoptés conformément à la Convention.

Cette obligation générale qui incombe à l'Etat du pavillon est une obligation de comportement doublée d'une obligation de « due diligence » ou obligation de « diligence requise » qui découle de l'article 194 de la Convention et des principes généraux du droit relatif à la prévention des dommages transfrontaliers. Cette obligation découle également :

- du droit international coutumier ;
- de la Convention de 1958 sur la haute mer ;
- de la Convention notamment dans son article 58, paragraphe 2 et 3, sur les droits et obligations des autres Etats dans la Zone économique exclusive et son article 94 sur les obligations de l'Etat du pavillon.

Elle découle aussi de :

- de l'Accord de 1995 sur les stocks de poissons chevauchants et les stocks de poissons grands migrateurs ; et
- de l'Accord de conformité de la FAO de 1993.

L'obligation de prendre des mesures administratives et réglementaires et de les faire respecter est une obligation de comportement qui relève de l'Etat du pavillon. C'est-à-dire que l'Etat du pavillon doit mettre en place les lois, règlements et autres mesures administratives et procédures qui, au regard de son système juridique, sont appropriées pour assurer le respect effectif de ses obligations par les personnes relevant de sa juridiction conformément à l'article 153, paragraphe 4, de la Convention.

¹⁴ Voir *Lauritzen v Larsen*, 1953, 345 US 571. Voir également les discussions dans Colombos, *International Law of the Sea* (4th ed, Longman, London, 1961) p. 250 et 251. Voir aussi Commission du droit international, Commentaire des articles relatives au droit de la mer, Article 29, par. 3 ; Article 30, par. 1. 1956, *Annuaire de la Commission du droit international*, 1956

(http://legal.un.org/ilc/texts/instruments/francais/projet_d%27articles/8_1_8_2_1956_francais.pdf).

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L'obligation de comportement est donc liée à l'« obligation de diligence requise » de l'Etat du pavillon par rapport aux propriétaires privés et équipages des navires de pêche qui battent son pavillon et quel que soit l'espace maritime où ils opèrent.

Cette obligation de « diligence requise » implique la nécessité non seulement d'adopter les normes et mesures appropriées, mais encore d'exercer un certain degré de vigilance dans leur mise en œuvre et dans le contrôle administratif des opérateurs publics et privés, par exemple en assurant la surveillance des activités entreprises par ces opérateurs et, ce, afin de préserver les droits de l'autre partie¹⁵.

En d'autres termes, l'Etat du pavillon doit s'efforcer par des moyens appropriés d'empêcher que ses navires se livrent à la pêche INN. Un niveau supérieur de « diligence requise » est donc attendu de l'Etat du pavillon, surtout lorsque l'Etat côtier dispose de peu de moyens techniques ou opérationnels nécessaires pour faire appliquer ses lois et règlements – ce qui est le cas dans les Etats membres de la Commission sous-régionale des pêches.

Aussi, l'Etat du pavillon a-t-il une obligation de contrôle effectif sur ses navires et équipages, et de sanction en cas d'infraction, nonobstant celle prononcée par l'Etat côtier.

La collaboration avec l'Etat côtier, dans la mesure du possible, est nécessaire afin de faciliter l'application de la sanction de l'infraction commise, notamment :

- en procédant promptement à une enquête approfondie pour vérifier les allégations de l'Etat côtier ;
- en échangeant avec l'Etat côtier des informations relatives aux activités du navire, y compris des éléments de preuve ;
- en intentant, le cas échéant, une action judiciaire contre le navire ;
- en imposant des sanctions appropriées au navire et à ses exploitants si l'infraction est avérée ;
- et en informant régulièrement l'Etat côtier des mesures prises et de l'avancement de la procédure.

Ce qui nous amène à examiner les lacunes du droit international par rapport à la question n° 1.

En vertu de ce qui précède, il est parfaitement légitime de demander au Tribunal que les responsabilités de l'Etat du pavillon soient clarifiées afin de faciliter leur mise en œuvre effective. En effet, les autorités compétentes dans les Etats membres de la Commission sous-régionale des pêches portent à la connaissance du Tribunal qu'en cas d'arraisonnement d'un navire en infraction pour cause de pêche INN, les autorités de l'Etat du pavillon sont régulièrement informées, mais s'abstiennent de toute réaction, voire de toute réaction positive.

Des difficultés ont été rencontrées par les Etats membres de la CSRP pour faire respecter le droit international, notamment à la suite de l'arraisonnement de navires de pêche de nationalité étrangère. Par exemple, dans le cas de pêche INN dans l'un des Etats membres de la CSRP, l'Etat du pavillon, une fois informé, coopère uniquement lorsque l'infraction fait suite à une activité de pêche opérée dans le cadre d'un accord de pêche entre l'Etat membre et l'Etat du pavillon du navire arraisonné. Dans ce cas seulement, l'Etat du pavillon coopère dans l'application de la sanction en cas de fuite du navire en infraction de pêche INN.

Mais, dans la majorité des cas où le navire a réussi à se soustraire au contrôle des patrouilleurs de surveillance de l'Etat membre de la CSRP, l'Etat du pavillon interpellé n'a pas coopéré. Dans ce cas, l'Etat du pavillon ne devrait-il pas s'engager à poursuivre et à

¹⁵ Voir : *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010, par. 197.

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sanctionner les navires battant son pavillon qui commettent des infractions dans les eaux sous juridiction de l'Etat membre de la CSRP ? La responsabilité solidaire de l'Etat du pavillon avec l'armateur et le capitaine ne pourrait-elle pas être engagée ?

Par ailleurs, une autre difficulté à laquelle les Etats membres de la Commission sont confrontés tient à ce que le droit international ne précise ni les délais ni la forme de la réponse de l'Etat du pavillon, en cas de notification d'une infraction de pêche INN.

Le droit international ne précise pas non plus les droits de l'Etat membre de la Commission en cas de non-coopération de l'Etat du pavillon si un de ses navires de pêche est saisi pour cause de pêche INN dans un port dudit Etat membre.

De même, le droit international reste imprécis sur la nature et les sanctions applicables à l'Etat du pavillon, en cas d'attribution du pavillon de complaisance à un navire en violation des articles 91, paragraphe 1, et 92, paragraphe 1, de la Convention.

En effet, la nationalité du navire repose sur deux principes fondamentaux à savoir le principe du monopole de l'Etat du pavillon et le principe du lien substantiel entre l'Etat et le navire¹⁶.

Le premier principe indique que le navire ne peut naviguer que sous le pavillon d'un seul Etat (article 92, paragraphe 1, de la Convention). S'il navigue sous plusieurs pavillons, les utilisant à sa convenance, il est considéré par le droit international comme un navire sans nationalité et ne pourra revendiquer une de ces nationalités devant un Etat tiers (article 92, paragraphe 2, de la Convention). Et lors d'un voyage ou dans un port d'escale, un navire ne pourra changer de nationalité qu'en cas de transfert effectif de propriété ou de changement d'immatriculation (article 92, paragraphe 2, de la Convention). Une nouvelle nationalité ne sera attribuée qu'après annulation de la nationalité antérieure¹⁷.

Les difficultés des armateurs face à la crise internationale dans le secteur du transport maritime ont amené plusieurs législations nationales à autoriser des navires affrétés coque nue, bien qu'immatriculés dans d'autres pays, à opérer sous pavillon national avec la condition de suspendre la déclaration de propriété et le droit inhérent de hisser les pavillons respectifs. Dans ce cas, il s'agit d'une double immatriculation : la vraie immatriculation de l'Etat du pavillon et l'immatriculation de l'Etat de l'affruteur¹⁸.

Le second principe, celui du lien substantiel, indique la nécessité d'une relation entre l'Etat et le navire (article 91, paragraphe 1). Les critères qui permettent d'assurer le lien substantiel varient selon les divers ordres juridiques, et il revient à chaque Etat de les définir (article 91, paragraphe 1, de la Convention).

Mais, quelle que soit l'option choisie, le critère adopté devra obliger l'Etat du pavillon à :

- Contrôler le navire, les personnes et les biens installés à bord, en matière administrative, technique, sociale (articles 94 et 97 de la Convention) ;
- Exercer sa juridiction pénale en cas d'accident de navigation (article 97 de la Convention) ;
- Imposer aux navires l'obligation d'assister les personnes et navires en situation de danger en mer (article 98 de la Convention) ;
- Interdire et punir le transport d'esclaves (article 99 de la Convention) ;
- Interdire et punir le trafic illicite de stupéfiants et de substances psychotropes (article 108 de la Convention) ;
- Interdire et punir les transmissions radio ou de télévision non autorisées en haute mer (article 109 de la Convention) ;

¹⁶ Alexandra von Böhm-Amolly, « Registo de Navios », in Coord. Januário Costa Gomes, *O Navio, II Jornadas de Lisboa de Direito Marítimo*, Lisboa, Almedina, 2012, p. 173 von Böhm-Amolly.

¹⁷ Von Böhm-Amolly, « Registo de Navios »..., op. cit., p. 173

¹⁸ Von Böhm-Amolly, « Registo de Navios »..., op. cit., p. 173.

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- Réglementer les conditions d'exercice de l'activité de pêche en haute mer par des navires battant son pavillon, veiller à leur respect et sanctionner les navires qui les violent (article 87, paragraphe 1 e), article 116, article 119 et article 120 de la Convention) ;
- Obliger les navires battant son pavillon à respecter les normes internationales visant à prévenir, réduire et contrôler la pollution de l'environnement marin issue des embarcations, à veiller à leur respect et à sanctionner les navires en cas de violation (article 217 de la Convention).

En effet, avec l'exigence du lien substantiel, il faut envisager, avant tout, d'investir l'Etat du pavillon du rôle de mandataire de la communauté internationale, et de l'obligation d'adopter et de conserver face à cette dernière un standard minimum de droits et d'obligations qui lui permettent de contrôler les activités de ses navires dans des espaces maritimes ouverts à tous, sans porter préjudice aux intérêts des tiers et, en général, de la communauté internationale¹⁹.

A la base de cette responsabilité, existe l'idée qu'une meilleure garantie du principe des libertés en haute mer consiste en ce que l'Etat du pavillon contrôle la liberté et l'exercice des activités de ses navires menés dans cette zone maritime²⁰. Dès lors, il faut reconnaître que le but de l'exigence du lien substantiel est le contrôle et la juridiction effectifs²¹.

Il est donc nécessaire que le Tribunal fonde son avis sur les dispositions combinées des articles 56, paragraphe 1 (a), 58, paragraphe 3, 62, 73, paragraphe 1, 91, paragraphe 1 et 92, paragraphe 1, de la Convention pour dire, par rapport à la question n°1 posée par la Commission sous-régionale des pêches, que l'Etat du pavillon du navire doit être tenu entièrement responsable des agissements répréhensibles d'un navire qui bat son pavillon. En effet, la Convention n'indique pas expressément si l'Etat du pavillon encourt une quelconque responsabilité ni, le cas échéant, quelles seraient la nature de celle-ci et les sanctions applicables. Incidemment, le Tribunal pourrait donc préciser le sens qu'il convient de donner aux dispositions de l'article 94 de la Convention susvisée, aux termes desquelles il incombe à l'Etat du pavillon l'obligation positive de prévenir et de punir les activités de pêche INN.

Abordons maintenant la question n° 2 de la CSRP. Le libellé est le suivant : dans quelle mesure l'Etat du pavillon peut-il être tenu pour responsable de la pêche INN pratiquée par les navires battant son pavillon ?

Il s'agit notamment des obligations de l'Etat du pavillon en cas de pêche INN opérée en haute mer par un navire qui bat son pavillon. Plus précisément, il faudrait se référer à la responsabilité de l'Etat du pavillon en cas de violation de son obligation internationale d'exercer la juridiction et le contrôle effectifs sur un navire battant son pavillon.

En plus de sa responsabilité invoquée sous la question 1, le droit international soumet l'Etat du pavillon à l'obligation de s'assurer que les navires battant son pavillon et pêchant en haute mer respectent les mesures de conservation et de gestion des ressources halieutiques, et ne mènent aucune activité qui compromette leur efficacité.

Il faut rappeler que, tout en reconnaissant aux Etats Parties à la Convention le droit de s'engager dans des activités de pêche en haute mer, les dispositions de l'article 116 de la Convention leur imposent de tenir compte des droits, obligations et intérêts des Etats côtiers. De même, les articles 117 et 118 rappellent l'obligation de coopération qui incombe aux Etats relativement à la pêche en haute mer.

Tous ces textes doivent servir de base au Tribunal pour que, dans les situations de pêche INN intervenues en haute mer, l'Etat du pavillon reconnaisse sa responsabilité entière

¹⁹ En un sens près von Böhm-Amolly, « *Registo de Navios* »..., op. cit., p. 175.

²⁰ Von Böhm-Amolly, « *Registo de Navios* »..., op. cit., p. 174.

²¹ Ariella d'Andrea, *The « Genuine Link »*..., op. cit., p. 4.

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engagée s'il est prouvé qu'il a failli à l'obligation de prendre les mesures raisonnables destinées à prévenir la pêche INN opérée par ses navires nationaux.

L'Accord des Nations Unies de 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs et l'Accord de conformité de 1993 confirment la responsabilité de l'Etat du pavillon en cas d'infraction pour cause de pêche INN en haute mer par un navire qui bat son pavillon.

En outre, suivant les dispositions de l'Accord de 2009 sur les mesures du ressort de l'Etat du port, renforcé par les Directives volontaires de 2014 pour la conduite de l'Etat du pavillon²², ce dernier doit :

- a) s'assurer que le navire autorisé à battre son pavillon ne s'adonne pas à la pêche illicite, non déclarée et non réglementée et/ou ne soutient pas cette activité ;
- b) suivre l'activité de pêche de tous les navires battant son pavillon quel que soit son lieu d'activité ;
- c) confirmer, en cas de besoin, les informations contenues dans l'avis d'arrivée du navire ;
- d) coopérer avec les Etats du port et prendre toutes les mesures de sanction nécessaires à l'encontre de son navire appréhendé pour exercice d'activités de pêche INN, même si la législation de l'Etat du port a déjà prévu des sanctions pour ce type d'infraction.

Dans ce cas, un Etat membre de la Commission sous-régionale des pêches pourrait-il, dans le cadre de ses activités de suivi, contrôle et surveillance, notamment la mise en œuvre des dispositions qui sont du ressort de l'Etat du port, arraisonner des navires ayant pratiqué des activités de pêche INN en haute mer et se trouvant dans l'un de ses ports ?

Ce qui m'amène aux lacunes du droit international par rapport à la question n° 2.

L'Accord sur les stocks de poissons chevauchants et les stocks de poissons grands migrateurs soumet l'Etat du pavillon à un certain nombre d'obligations en cas de pêche en haute mer. Suivant l'article 18 de cet Accord, les Etats ne doivent autoriser les navires battant leur pavillon à pratiquer la pêche en haute mer que lorsqu'ils peuvent s'acquitter efficacement des responsabilités qui leur incombent sur ce point.

L'Accord de conformité, en son article 3 paragraphe 3, confirme les dispositions de l'article 18 de l'Accord sur les stocks de poissons :

Aucune Partie ne permet à un navire de pêche autorisé à battre son pavillon d'être utilisé pour la pêche en haute mer à moins d'être convaincue, compte tenu des liens existant entre elle-même et le navire de pêche concerné, qu'elle est en mesure d'exercer effectivement ses responsabilités envers ce navire de pêche en vertu du présent accord.

En outre, le Code de conduite pour une pêche responsable dispose que les Etats du pavillon devraient veiller à ce :

qu'aucun navire habilité à battre leur pavillon n'opère en haute mer ou dans les eaux placées sous la juridiction d'autres Etats, à moins qu'un certificat d'immatriculation ne lui ait été délivré et qu'il n'ait été autorisé à pêcher par les autorités compétentes. Un tel navire devrait avoir à son bord son certificat d'immatriculation et son autorisation de pêcher.
(Code de conduite pour une pêche responsable, paragraphe 8.2 sur les Devoirs de l'Etat du pavillon).

²² Directives volontaires pour la conduite de l'Etat du pavillon, adoptées par Comité des pêches de la FAO à sa trente-et-unième session, Rome 9-13 juin 2014.

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Il est demandé au Tribunal de bien vouloir se prononcer sur les types de sanctions que les Etats membres de la Commission sous-régionale des pêches peuvent prendre en cas de refus de coopération de l'Etat du pavillon, d'inertie à maîtriser les navires battant son pavillon ou de sa réticence à coopérer pour sanctionner une infraction de pêche INN commise en haute mer.

Compte tenu de la faiblesse des moyens de surveillance des Etats membres de la Commission et du caractère récurrent des cas de refus de coopérer de l'Etat du pavillon, le Tribunal saisira l'opportunité de cette demande d'avis pour préciser, le cas échéant, les conditions, la mesure et les modalités des sanctions qu'il convient de prendre dans les cas d'espèce.

La Commission du droit international, dans son projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite, abonde dans le sens de la responsabilité de l'Etat du pavillon du fait des conséquences de ces actes, en l'occurrence en cas de pêche INN par un navire battant son pavillon. En effet, l'Etat du pavillon a une obligation de cessation et de non-répétition de l'acte (article 30), de réparation (articles 31, 34 à 39) et de prise, le cas échéant, de contre-mesures (articles 49 à 54)²³.

Les avis sur les questions 1 et 2 sont d'une importance capitale non seulement pour les organisations régionales de pêche, mais également pour les pays d'immatriculation réputés être des pavillons de complaisance.

Examinons maintenant la question n° 3.

Le Président :

Excusez-moi, Madame, de vous interrompre à présent. Il est presque 16 heures 30 et le Tribunal va se retirer pour une pause de 30 minutes, c'est-à-dire que l'audience reprendra à 17 heures. Nous continuerons à écouter votre intervention alors.

Merci.

(Suspendue à 16 heures 29, l'audience est reprise à 17 heures.)

Le Président :

Nous reprenons l'audience. Je donne tout de suite la parole à Mme Traoré pour la suite de l'exposé de la Commission sous-régionale.

Madame ...

Mme Bèye Traoré :

Merci, Monsieur le Président.

On va examiner maintenant l'argumentation de la Commission sous-régionale des pêches par rapport à la question n° 3 libellée comme suit : lorsqu'une licence de pêche est accordée à un navire dans le cadre d'un accord international avec l'Etat du pavillon ou avec une structure internationale, cet Etat ou cette organisation internationale peut-il être tenu pour responsable des violations de la législation en matière de pêche de l'Etat côtier par ce navire?

Il faut dès lors préciser que les termes de la question 3 sont ceux qui figurent dans les deux exposés écrits (versions anglaise et française) envoyés au Tribunal respectivement les 16 décembre 2013 et 12 mars 2014. Ils font foi, comme la Commission l'a souligné dans sa lettre de transmission, de son exposé écrit version 2, en date du 12 mars 2014. En conséquence, le libellé de la question 3 tel que mentionné dans la version française de la Résolution de la CSRP constitue un défaut que nous demandons très respectueusement au Tribunal de bien vouloir ignorer.

²³ Voir Résolution AGNU – A/RES/56/83 (Responsabilité de l'Etat pour fait internationalement illicite).

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La problématique de la responsabilité et de la définition de l'Etat du pavillon pour le cas d'un navire en infraction battant pavillon d'un Etat membre d'une organisation internationale signataire d'un accord de pêche avec l'Etat côtier se pose. L'examen d'accords de pêche signés avec des Etats membres de la Commission montre une diversité de responsabilités en cas d'arraisonnement de navires pour le fait de pêche INN dans les eaux sous juridiction nationale d'un Etat membre de la CSRP. Trois cas ont pu être observés :

Premier cas, l'accord de pêche fait référence à l'organisation internationale signataire dudit accord comme étant le seul interlocuteur en cas d'acte de pêche INN opéré dans les eaux sous juridiction nationale de l'Etat membre de la CSRP. Il précise que ce dernier Etat doit notifier à l'organisation internationale tout arraisonnement effectué et toute sanction prononcée dans le cadre de la mise en œuvre de l'accord.

Dans ce premier cas, en conformité avec le droit international, n'y a-t-il pas une confusion dans les responsabilités respectives de l'organisation internationale signataire de l'accord et de l'Etat du pavillon ?

Deuxième cas, un accord de pêche qui fait référence à la fois à la responsabilité de l'Etat du pavillon et à celle de l'organisation internationale signataire dudit accord, pour tous les cas d'arraisonnement d'un navire ou toute autre application de sanction dans le cadre de la mise en œuvre dudit accord.

Dans ce deuxième cas, est-il possible d'engager conjointement et solidairement la responsabilité de l'organisation internationale d'une part et de celle de l'Etat du pavillon du navire qui a commis l'infraction d'autre part ?

Troisième cas, l'accord de pêche fait référence à la responsabilité de l'organisation internationale signataire dudit accord pour tout cas d'arraisonnement effectué d'un navire ou pour toute application de sanction dans le cadre de la mise en œuvre dudit accord. En outre, il prévoit la participation éventuelle d'un représentant de l'Etat du pavillon concerné aux échanges avec l'Etat membre de la CSRP.

Dans ce troisième cas, l'Etat du pavillon, réduit à la participation aux échanges entre l'organisation internationale signataire de l'accord de pêche et l'Etat membre de la CSRP dans les eaux desquelles un acte de pêche INN a été opéré, pourrait-il être tenu pour responsable au regard du droit international ?

Ce qui m'amène aux lacunes du droit international par rapport à la question posée n° 3.

Le droit international énonce que seul un Etat peut être considéré comme un Etat du pavillon. Dans ce cas, comme précisé dans l'argumentaire apporté par la CSRP aux questions 1 et 2, l'Etat du pavillon a une obligation de « diligence requise » découlant du droit des traités et du droit coutumier qui l'oblige à prendre de bonne foi les mesures nécessaires pour assurer que le navire qui bat son pavillon respecte les réglementations en matière de conservation et de gestion des ressources halieutiques de l'Etat côtier, mais également pour garantir que ces mesures prises ne soient pas en contradiction avec les intérêts de l'Etat côtier ; ceci conformément à la jurisprudence de la CIJ dans l'affaire du *Détroit de Corfou*²⁴. Mais aussi à l'adage *sic utere tuo ut alienum non laedas* (« use de ton propre bien de manière à ne pas porter atteinte au bien d'autrui »).

Une organisation internationale constituée d'Etats souverains pourrait-elle par conséquent être soumise au même régime juridique que l'Etat du pavillon pour une infraction de pêche INN commise par un navire battant pavillon d'un de ses Etats membres et pêchant sous son couvert ?

L'Etat du pavillon, n'étant pas lié par un accord de pêche à l'Etat côtier, peut-il être tenu responsable en cas de pêche INN du seul fait qu'il soit membre de l'organisation internationale signataire dudit accord ?

²⁴ Voir *Détroit de Corfou, fond, arrêt, C.I.J. Recueil 1949*, p. 22.

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Dans ce cas, qui devra être considéré comme l'Etat du pavillon au sens du droit international ? L'organisation internationale signataire de l'accord de pêche, l'Etat d'immatriculation ou l'Etat de la nationalité du navire en infraction ? Est-il possible d'engager solidairement leurs responsabilités pour une infraction à la réglementation de la pêche commise dans les eaux sous juridiction de l'Etat côtier ? Le droit international mérite d'être actualisé sur la question. La Commission sous-régionale des pêches attend les avis circonstanciés du Tribunal sur ces points.

En effet, suivant l'arrêt rendu par le Tribunal dans l'affaire n° 2 (*Navire « SAIGA »* (No. 2)²⁵) et confirmé dans l'affaire n° 19 (*Navire « Virginia G »*) rendu le 14 avril 2014, une organisation internationale ne peut pas accorder une nationalité à un navire. L'Etat du pavillon a le droit exclusif d'accorder sa nationalité à des navires. En effet, cet arrêt dispose : « L'article 91 laisse à chaque Etat une compétence exclusive en matière d'attribution de sa nationalité à des navires. À cet égard, l'article 91 codifie une règle bien établie en droit international général ... ».

Cette jurisprudence du Tribunal conforte la Commission sous régionale des pêches qui estime que l'Etat du pavillon doit être un Etat, et non une entité regroupant plusieurs Etats qui reste donc incompétente pour :

- attribuer sa nationalité à un navire ;
- et engager seule sa responsabilité issue d'un acte de pêche INN commis par un navire qui bat le pavillon d'un de ses Etats membres, et opère dans le cadre d'un accord de pêche.

Par ailleurs, d'autres vocables comme « partie(s) contractante(s) » utilisés par les organisations régionales de gestion des pêches pour faire allusion à la notion d'Etat du pavillon²⁶ méritent d'être clarifiés par rapport à la Convention notamment dans l'article 91 (*Nationalité des navires*), l'article 94 (*Obligations de l'Etat du pavillon*), l'article 61 (*Conservation des ressources biologiques*) et la Partie V (*Zone économique exclusive*).

Tous ces articles concourent à l'atteinte des objectifs de l'article 193 et autres dispositions de la Convention.

En ce qui concerne maintenant la question 4, elle est libellée comme suit : Quels sont les droits et obligations de l'Etat côtier pour assurer la gestion durable des stocks partagés ou d'intérêt commun, en particulier ceux des thonidés et des petits pélagiques ?

Les espèces pélagiques sont des poissons qui vivent en surface et sont caractérisées par leur comportement migratoire. Leur habitat couvre en général la zone tropicale et subtropicale chevauchant sur la zone maritime de plusieurs Etats. Ces pélagiques sont des espèces couramment ciblées par la pêche INN dans l'espace de la Commission sous-régionale des pêches.

Au niveau de l'Atlantique centre-est, plusieurs espèces de pélagiques migrent entre les zones économiques exclusives de deux ou plusieurs Etats (« transfrontaliers ou stocks d'intérêt commun ») et/ou entre des zones économiques exclusives et les eaux au-delà (« stocks chevauchants »). Il s'agit donc de stocks partagés entre : deux Etats côtiers voisins,

²⁵ Voir affaire Saint-Vincent-et-les Grenadines c. Guinée, arrêt, *TIDM Recueil 1999*, p. 32, par. 51

²⁶ Voir le Recueil de Recommandations de gestion et Résolutions Annexes adoptées par la CICTA (Commission internationale pour la conservation des thonidés et espèces voisines de l'Atlantique) : <http://www.iccat.int/en/recsregs.asp>. Exemples : la Recommandation de l'ICCAT concernant le Belize, le Cambodge, le Honduras et Saint Vincent et les Grenadines faisant suite à la Résolution de 1998 sur les prises non déclarées et non réglementées de Thonidés par les grands palangriers dans la zone de la Convention. Voir également la Recommandation de l'ICCAT concernant l'importation de thons obèse et de ses produits en provenance Saint-Vincent-et-les Grenadines entrée en vigueur le 21 septembre 2002

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deux Etats côtiers non voisins situés de part et d'autre d'un golfe ou d'un océan ou un Etat côtier et l'Etat du pavillon de l'exploitant du stock.

Le terme « stocks partagés » mérite d'être clarifié au regard des dispositions de la Convention et de la demande d'avis consultatif initiée par la Commission sous-régionale des pêches.

Ceci étant précisé, deux types de pêcheries pélagiques sont généralement identifiés dans l'espace de la Commission : les pêcheries de petits pélagiques côtiers et les pêcheries hauturières.

Monsieur le Président du Tribunal, je vous prie d'appeler à la barre M. Papa Kebe, expert en ressources pélagiques, co-agent, qui va aborder la biologie, l'écologie et la situation des espèces pélagiques dans l'espace de la Commission sous-régionale des pêches.

Je vous remercie.

Le Président :

Merci beaucoup, Madame.

A présent, j'invite l'orateur suivant, M. Kebe, à prendre la parole.

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[TIDM/PV.14/A21/1/Rev.1, p. 25–32]

M. Kebe :

Merci, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les membres du Tribunal international du droit de la mer, il me revient l'honneur de vous exposer certains aspects biologiques des pélagiques situés dans l'espace de la Commission sous-régionale des pêches. Au cours de mon exposé, des tableaux et des images vous seront projetés ; ils sont peut-être familiers à certains d'entre vous car ils proviennent, dans la plupart des cas, de documents officiels de la FAO, de l'ICCAT et de la Commission sous-régionale des pêches.

Les pélagiques sont des poissons qui vivent entre la surface et le fond des océans, mais en dehors des côtes et des fonds marins que l'on appelle les zones démersales. Les poissons pélagiques, également appelés « poissons bleus », regroupent plusieurs centaines d'espèces, ayant des caractéristiques communes, dont la coloration sombre sur le dos et argentée sur le ventre, qui est censée les protéger des prédateurs.

La façade orientale de l'Atlantique qui couvre la zone CSRP constitue une des zones les plus riches en ressources marines au monde à cause d'un phénomène océanographique appelé « upwelling » en anglais. Ce phénomène est la conséquence de vents marins très forts qui poussent l'eau de surface, créant ainsi un vide qui favorise la remontée des eaux froides qui sont riches en nutriments, éléments de nourrissage des pélagiques.

Dans mon exposé, je ferai deux chapitres : un qui sera consacré aux petits pélagiques et un second consacré aux grands pélagiques.

Les ressources pélagiques côtières, appelées « petits pélagiques » représentent l'ensemble des poissons de petites tailles et contribuent à concurrence de 77 % des débarquements au niveau de la sous-région. Ces ressources sont constituées principalement de six espèces : premièrement, la sardinelle ronde ; deuxièmement, la sardinelle plate ; troisièmement, l'ethmalose ; quatrièmement les chinchards noirs et les chinchards jaunes et, enfin, les maquereaux.

Le caractère transfrontalier et migratoire de ces espèces fait que les stocks sont partagés entre les pays d'Afrique du Nord-Ouest. L'aire de distribution de ces espèces est très large.

Les sardinelles (rondes et plates) qui sont particulièrement importantes pour les Etats de la sous-région ont des aires de distribution allant du sud du Sénégal au sud du Maroc.

L'ethmalose, une autre espèce largement débarquée dans la sous-région se rencontre dans la zone plus au sud, entre le Sénégal et la Sierra Leone.

Ces petits pélagiques passent la quasi-totalité de leur phase adulte en surface.

Les statistiques de débarquements des petits pélagiques pour l'année 2011 avaient été estimées par le groupe de travail du COPACE/FAO, en 2012, à environ 2,6 millions de tonnes pour les débarquements opérés au niveau du Sénégal, de la Gambie, de la Mauritanie et du Maroc.

En 2011, les prises moyennes d'ethmalose étaient d'environ 115 000 tonnes, de la sardinelle à 535 000 tonnes, la sardinelle plate à 132 000 tonnes, le maquereau à 318 000 tonnes et le chinchard à 367 000 tonnes.

Pour la sardinelle ronde, la période de reproduction la plus importante débute au mois de mai au sud de Dakar. Elle se poursuit en juin sur l'ensemble des côtes sénégalaises et vers le nord jusqu'au Cap Timiris pour se terminer en juillet-août devant les côtes mauritaniennes.

Pour la sardinelle plate, la ponte est continue toute l'année, mais il existe toujours au moins un maximum de reproduction, lequel se situe au début de la saison chaude, aux mois de juillet-août, au Sénégal.

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La période de ponte de l'ethmalose dure toute l'année au Sénégal et en Gambie. En Sierra Leone, la période de ponte se situe entre les mois de mai et de décembre et pour la Guinée-Bissau, entre février et octobre.

La période de reproduction du chinchard est étendue. La ponte massive s'observe entre novembre et décembre et jusqu'à janvier-février dans la région située à 15° de latitude nord.

Voilà rapidement esquissées les zones de reproduction et les statistiques de débarquement pour les petits pélagiques les plus importants au niveau de la Commission sous-régionale des pêches.

Nous allons maintenant voir l'habitat et les migrations de ces petits pélagiques.

En début d'année, la majeure partie du stock de la sardinelle ronde se concentre entre le Sénégal et la Gambie. Il est possible de rencontrer cette espèce au sud de la Gambie, mais cette hypothèse est incertaine et devrait être confirmée par d'autres études scientifiques. A partir d'avril, la sardinelle ronde se dirige vers la zone mauritanienne et, en septembre-octobre, le stock remonte vers le Maroc. Fin octobre, le stock retourne à ses lieux d'origine, c'est-à-dire au sud vers le Sénégal.

La sardinelle plate est moins migratrice et pourrait constituer des populations locales qui demeurent dans la même zone toute l'année. Cette espèce se rencontre sur toute la façade tropicale de l'Atlantique, du Maroc jusqu'en Angola.

Les migrations du chinchard sont liées à des changements saisonniers réguliers des mouvements verticaux des eaux. Au printemps et en été, le chinchard se déplace vers les Açores. En automne et en hiver, lors du renforcement de la circulation verticale des eaux dans la zone du plateau continental, il se déplace vers la côte.

Le groupe de travail du COPACE, qui s'était réuni en 2012, avait conduit une session d'évaluation des stocks sur les petits pélagiques dans la zone nord-ouest de l'Afrique.

Le constat des scientifiques est que les stocks étaient, en général, pleinement exploités ou surexploités. Les efforts de pêche et les prises devraient être réduits dans les pêcheries des petits pélagiques.

Pour la sardinelle plate et ronde, les captures moyennes annuelles étaient d'environ 707 000 tonnes et le stock était surexploité. La recommandation est la mise en place de la réduction des prises actuelles pour éviter un effondrement du stock.

Pour les maquereaux, dont les prises étaient de 250 000 tonnes par an, le stock était aussi surexploité. Le maintien des prises totales à 257 000 tonnes semble être retenu pour maintenir le stock.

Pour le chinchard, les captures étaient de 343 000 tonnes. Le stock était pleinement exploité ou surexploité. Une réduction de l'effort de pêche et un maintien des prises au niveau de celles de 2011 avaient été recommandés par les scientifiques.

Pour l'ethmalose, les prises étaient estimées à 67 000 tonnes annuelles. Le stock était aussi surexploité. Une diminution de l'effort de pêche a été recommandée par les scientifiques.

Monsieur le Président, Madame et Messieurs les membres du Tribunal, les petits pélagiques qui sont exploités dans la zone de la CSRP revêtent une grande importance dans l'économie des pays de la CSRP. La pêche à elle seule est une des principales activités économiques. Elle fournit en effet la plus grande partie de protéines animales pour la consommation alimentaire et nutritionnelle de la population.

En outre, 1,4 million de personnes sont employées directement ou indirectement dans les activités de pêche dans les États membres de la CSRP. Au Sénégal, le sous-secteur artisanal offre un emploi direct à environ 60 000 pêcheurs, dont 20 %, soit 12 000 personnes, participent à la pêche des petits pélagiques.

En 2006, 3 000 pêcheurs, soit environ 50 % des pêcheurs artisanaux de la Gambie, ciblaient essentiellement des petits pélagiques et principalement l'ethmalose.

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La contribution de la pêche aux économies nationales varie d'un Etat à l'autre. En Mauritanie, elle contribue pour environ 5 % du produit intérieur brut et de 20 à 25 % du budget national. Au Sénégal, la contribution au PIB réel et aux recettes d'exportation est estimée respectivement à 1,3 % et 12,3 %. En Gambie, la contribution de la pêche au PIB est de 3 %.

On notera aussi que l'exportation de la farine et de l'huile de poisson constitue une source en devises de plus en plus importante pour la Mauritanie, particulièrement avec la flambée des prix de ces produits sur le marché mondial.

Voilà rapidement résumés certains aspects socio-économiques et biologiques de ces petits pélagiques et nous allons maintenant aborder le second volet de mon exposé que constituent les grands pélagiques.

Les grands pélagiques

Ces grands pélagiques sont des grands migrateurs et sont constitués par les thonidés, les espèces voisines et les autres espèces de poissons pêchées et exploitées dans les pêcheries de thonidés de l'Atlantique.

Les grands pélagiques sont gérés au plan international par une organisation intergouvernementale qui regroupe la majorité des Etats côtiers de l'Atlantique, y compris les Etats membres de la Commission sous-régionale des pêches, à l'exception de la Gambie et de la Guinée-Bissau, mais cette commission inclut aussi tous les Etats pêcheurs africains, asiatiques, américains et européens.

Tous les grands pélagiques qui sont ciblés dans la zone de la CSRP figurent dans l'annexe 1 de la Convention des Nations Unies pour le droit de la mer qui donne la liste des « grands migrateurs ». Les chapitres suivants présentent les trois espèces (albacore, listao et thon obèse), les plus importantes au plan commercial et, par conséquent, au niveau des prises dans l'espace de la CSRP. 80 % des prises effectuées dans cet espace représentent ces trois espèces.

Comme nous l'avons fait pour les petits pélagiques, nous abordons ici aussi la situation des stocks des grands pélagiques.

Nous aurons à utiliser un graphisme qui avait été adopté par les organisations de gestion de la pêche thonière du monde à Kobe en 2007. Il s'appelle le « diagramme de Kobe ». Il sera utilisé pour vous présenter les résultats des évaluations des stocks de thonidés. Ce diagramme consiste en une représentation graphique composée de quatre quadrants, avec trois couleurs pour mieux présenter les données sur l'état des stocks.

Le vert indique que le stock n'est pas en situation de surpêche ou de surexploitation, ce qui est l'objectif visé par toutes les institutions chargées de gérer les pêcheries de thonidés.

Le rouge, par contre, indique que la ressource est en état de surpêche et est surexploitée avec de gros risques d'effondrement du stock.

Le jaune est un signal d'alarme indiquant un état de surpêche ou de surexploitation du stock.

Cela étant dit, la première espèce de thonidés que nous allons voir est l'albacore, appelé en anglais « Yellowfin ».

L'albacore peuple les eaux ouvertes des zones tropicales et subtropicales et il passe plus de 90 % de son temps dans des eaux ayant une température d'environ 22°C. Sa taille maximale signalée est de 239 cm pour un poids de 200 kilogrammes et l'âge maximum de cette espèce est estimé à huit ans.

La zone équatoriale africaine constitue la principale zone de reproduction de l'albacore pendant les mois d'octobre à mars.

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Dans la région nord équatoriale (Sénégal Guinée), la période de reproduction s'étend d'avril à juin. L'albacore fraie aussi pendant la saison chaude autour des îles du Cabo-Verde pendant les mois de juin à octobre, même s'il montre une certaine variabilité interannuelle.

Les trajectoires des individus marqués dans l'Atlantique.

Les lieux de récupération figurent dans la carte qui figure non pas sur ce tableau, mais dans ce tableau-ci exactement.

Certains individus quittent la zone africaine pour se retrouver sur les côtes américaines, tandis que des espèces migrent du golfe de Guinée vers la zone des Canaries. L'ampleur de cette migration requiert plus que jamais une coopération internationale pour le suivi de ces stocks.

Les juvéniles demeurent dans les zones côtières de la région équatoriale, tandis que les pré-adultes et adultes se déplacent vers des latitudes plus hautes ou dans des eaux plus océaniques.

Les individus de 50 cm demeurent dans les zones côtières et présentent des schémas migratoires modérés. Certains juvéniles migrent vers l'ouest et décrivent des mouvements saisonniers tropiques le long des côtes de l'Atlantique oriental et occidental.

Le constat général fait est que la plupart des individus retournent dans leurs zones de ponte lorsqu'ils ont atteint leur maturité sexuelle, en particulier pendant le premier trimestre de chaque année, en réalisant des migrations transocéaniques selon un axe nord-ouest/sud-est le long des régions tropicales. Les adultes réalisent aussi des migrations tropiques vers de hautes latitudes pendant l'été et des migrations génétiques à travers l'océan en atteignant des vitesses de déplacement en moyenne d'environ 1,74 miles/jour.

Les prises annuelles effectuées durant la dernière évaluation de stock étaient de 101 000 t, soit largement en dessous de la production maximale équilibrée qui était estimée entre 114 000 et 155 000 t.

Les avis scientifiques découlant des dernières évaluations de stock étaient basés sur deux types de modèles dont les résultats sont assez pessimistes. Il a été noté une grande incertitude dans les évaluations de stock de cette espèce. Avec une probabilité de 26 %, l'état des stocks semble être conforme aux objectifs de gestion. Ainsi donc, le stock semble ne pas être en état de surpêche.

L'effort de pêche aussi n'a pas encore atteint le seuil limite. Les taux de captures totales admissibles adoptés sur recommandation du Comité scientifique de la CICTA semblent être respectés.

La seconde espèce que nous allons voir est le listao, lequel évolue en général en haute mer. Cette espèce se concentre en général dans des zones de convergence situées aux limites des masses d'eau tempérée et froide. Le listao peuple d'habitude des eaux ayant une température superficielle comprise entre 20 et 30°C. Sa longueur peut atteindre 100 cm pour un poids de 18 kg et sa durée de vie maximale est estimée à 5 ans.

Le listao se reproduit de façon opportuniste durant toute l'année, dans de vastes zones de l'Atlantique. Dans l'Atlantique oriental, le listao fraie de part et d'autre de l'Équateur, qui inclut le golfe de Guinée jusqu'à la longitude de 20°-30° ouest. La ponte a lieu pendant toute l'année et atteint son apogée entre novembre et mars.

Les trajectoires du listao dans l'Atlantique et leurs lieux de récupération sont indiquées dans la figure que vous avez devant vous. Certaines de ces espèces migrent depuis le golfe de Guinée vers la zone des Canaries, un peu plus haut, en traversant la zone maritime des Etats membres de la CSRP.

Les déplacements de cette espèce dépendent des conditions ambiantes et de leur affinité à se regrouper autour d'objets flottants qui concentrent des bancs mixtes (juvéniles et adultes) de cette espèce et d'autres thonidés. La vitesse moyenne de déplacement observée chez le listao est d'environ 2,80 miles/jour.

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Il a été aussi signalé l'existence de déplacements à partir du golfe de Guinée vers le sud-est en été et vers le nord-ouest en octobre, ce qui suggère une vaste dispersion de cette espèce, en bancs mixtes, depuis le golfe de Guinée.

Nous allons, pour le listao, maintenant voir l'état des stocks. Il est peu probable que ce stock soit surexploité même en faisant preuve de beaucoup de prudence.

Historiquement, ce stock semble avoir des indicateurs sur la mortalité et la biomasse qui présagent d'une durabilité de cette pêcherie. La prise moyenne des cinq dernières années qui est d'environ 161 000 t mais l'intervalle de l'estimation de la production maximale équilibrée (PME) tourne entre 143 000 à 170 000 t.

Enfin, la dernière espèce de thonidés que nous allons exposer est le thon obèse qui, lui, a une température d'environ 29° C. Par contre, il peut faire des incursions en profondeur jusqu'à 500 m, où la température est d'environ 5° C.

La taille maximale observée pour ce thon obèse peut atteindre 2,50 m, son poids maximum estimé est de 210 kg et sa durée de vie maximale est de 15 ans.

La ponte du thon obèse se produit principalement durant la nuit. On estime que cette espèce fraie à partir de 18 heures jusqu'au-delà de minuit, selon une fréquence assez régulière et quasi journalière. Il se peut que cette tendance à frayer durant la nuit vise à réduire au maximum les dangers associés à la prédation et aux rayons ultraviolets.

La ponte a lieu durant toute l'année dans une vaste zone autour de l'Équateur, depuis les côtes du Brésil jusqu'au golfe de Guinée. Elle présente des pics de janvier à juin au sud. Par contre, dans la partie nord de l'Atlantique, la période de frai se réduit aux mois de juillet à septembre et dans la partie sud (Congo Angola), elle se limite aux mois de novembre et décembre.

Les trajectoires du thon obèse et les lieux de récupération, que vous voyez sur la figure à l'écran, expliquent la grande mobilité de cette espèce. Comme la presque totalité des thonidés, cette espèce traverse de grands espaces au niveau de l'Atlantique.

Le thon obèse est une espèce qui présente une haute tendance migratoire. Les données de marquage montrent que sa vitesse de déplacement est supérieure à celle de l'albacore et comparable à celle du listao. Il présente par ailleurs une série de déplacements saisonniers en fonction des groupes d'âge et de la nature de ses migrations, selon qu'elles sont de nature trophique ou génétique.

Ils demeurent dans la zone de ponte depuis leur naissance jusqu'à l'arrivée du printemps où ils entreprennent des déplacements vers les tropiques. Ces déplacements longent les côtes africaines depuis le Cap López jusqu'au Sénégal et la Mauritanie. Certains individus poursuivent leur route vers les Açores, les Canaries et Madère, à une vitesse de 10 milles/jour.

Les pré-adultes se déplacent aussi bien vers le nord (Sénégal) que vers le sud (Angola). Pendant les mois d'octobre à novembre, le thon obèse qui s'est déplacé vers les archipels retourne vers le sud, à son lieu de ponte.

Des études de marquage ont montré l'existence de migrations transatlantiques depuis le golfe de Guinée vers les côtes du Brésil et de déplacements depuis le golfe de Guinée le long des côtes africaines vers les îles de Madère et des Açores.

Comme pour le cas de l'albacore et du listao, on a enregistré des migrations transatlantiques depuis les côtes américaines vers le golfe de Guinée. Dans l'Atlantique oriental, on a observé aussi des déplacements depuis le golfe de Guinée vers des pêcheries situées au nord (Açores) et au sud (Angola), ainsi que les trajets retours correspondants.

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Etat des stocks du thon obèse.

Selon les estimations, il semble que ce stock n'est pas en état de surpêche et que les prises de la dernière année, qui étaient d'environ 70 536 t, demeurent en dessous de la production maximale équilibrée estimée entre 78 000 et 101 600 t.

Les indicateurs suggèrent que le stock n'est pas en état de surpêche et les prises restent en dessous de la PME.

Hormis les quelques incertitudes soulignées plus haut, la pêcherie semble soutenable si les parties continuent de respecter les captures totales admissibles, qui sont de 85 000 t, en vigueur, qui avaient été suggérées par le Comité scientifique de la CICTA.

La principale conclusion des évaluations de stocks de ces trois espèces qui se trouvent dans la zone tropicale de la CSRP indique l'existence de graves lacunes dans les données relatives aux activités des flottilles INN, ce qui a contraint les scientifiques à formuler de nombreux postulats sur les prises par taille. Ces avis scientifiques véhiculent beaucoup d'incertitudes difficilement gérables par les gestionnaires chargés d'élaborer des plans d'aménagement de ces pêcheries.

Monsieur le Président, nous venons de terminer l'examen scientifique de ces pêcheries. Nous vous remercions et nous vous demandons d'appeler à la barre Mme Diénaba Bèye Traoré, pour compléter l'argumentaire juridique sur la question 4. Merci.

Le Président :

Merci beaucoup, Monsieur Kebe.

Je donne maintenant la parole à Mme Bèye Traoré qui va conclure.

DEMANDE D'AVIS CONSULTATIF - COMMISSION SOUS-RÉGIONALE DES PÊCHES

EXPOSÉ DE MME. BÈYE TRAORÉ
 COMMISSION SOUS-RÉGIONALE DES PÊCHES
 [TIDM/PV.14/A21/1/Rev.1, p. 32–35]

Mme Bèye Traoré :

Merci.

Monsieur le Président, Madame et Messieurs les membres du Tribunal international du droit de la mer, la CSRP va terminer ses argumentations en abordant les lacunes du droit international par rapport à la question 4.

Considérant le caractère partagé de certains stocks, les dispositions des articles 61, paragraphe 2, 63, paragraphe 1, et 64 de la Convention soulignent la nécessité d'une concertation directe ou par l'intermédiaire des organisations régionales ou sous-régionales de pêche appropriées pour coordonner et assurer leur conservation et développement.

Mais autant l'article 63, paragraphe 1, explique le contenu du mot « conservation » des stocks partagés, autant l'interprétation du mot « développement » figurant dans cet paragraphe a besoin d'être clarifiée.

Suivant l'interprétation de S. Nandan et autres¹, ce mot « développement » de l'article 63, paragraphe 1, devrait s'appliquer en tenant compte des exigences de l'article 61 qui vise « la conservation et la gestion des ressources biologiques pour éviter que le maintien de ces ressources ... ne soit compromis par une surexploitation, en envisageant une stratégie à long terme pour la pérennité du stock partagé comme une ressource viable ».

En outre, l'article 61, paragraphe 3, de la Convention soumet les Etats côtiers à l'obligation de prendre en compte les normes internationales généralement acceptées par la communauté internationale quand ils définissent les mesures de conservation et de gestion de leurs ressources halieutiques partagées. Il est indispensable que le Tribunal donne son avis sur les instruments juridiques dans lesquels la Commission sous-régionale des pêches peut trouver ces mesures-là.

Ces mesures devront inclure celles mentionnées dans les articles 5 et 6 de l'Accord sur les stocks de poissons. En effet, les principes généraux figurant dans l'article 5, et les dispositions de l'article 6 de cet Accord sur le principe de précaution, sur la détermination des points de référence pour chaque stock, ainsi que les mesures à prendre si ceux-ci sont dépassés, ainsi que l'approche écosystémique des pêches, qui figurent également dans des instruments de type volontaire comme le Code de conduite pour une pêche responsable, devraient maintenant être considérés comme des normes internationales minimales acceptées, et donc applicables à tous les stocks y compris les stocks de poissons pélagiques.

En tant qu'Etat de la zone dans laquelle se déroule l'activité de pêche, le droit international reconnaît à l'Etat côtier le droit de sécuriser les ressources halieutiques situées dans ses eaux sous juridiction nationale, en définissant leurs conditions d'accès aussi bien pour les navires nationaux qu'étrangers. Ce droit s'accompagne de responsabilités notamment en matière de gestion des stocks partagés.

Par ailleurs, aux termes de l'article 63 de la Convention, les Etats sont invités à coopérer directement ou par l'intermédiaire des organisations sous-régionales ou régionales appropriées « lorsqu'un même stock de poissons ou des stocks d'espèces associées se trouvent dans les zones économiques exclusives de plusieurs Etats côtiers » (paragraphe 1). De même, lorsqu'un « même stock de poissons ou des stocks d'espèces associées se trouvent à la fois dans la zone économique exclusive et dans un secteur adjacent à la zone » (paragraphe 2).

¹ S. N. Nandan, S. Rosenne and N.R. Grandy, *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Volume II, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 647, par. 63.12 (b).

EXPOSÉ DE MME BÈYE TRAORÉ – 2 septembre 2014, après-midi

L'article 63 de la Convention demande aux Etats côtiers concernés par la gestion des stocks partagés «... de s'entendre sur les mesures nécessaires à la conservation de ces stocks... ». Rien d'autre n'est indiqué par exemple sur la définition d'un stock partagé ainsi que sur les objectifs de gestion et d'allocation des captures entre ces Etats concernés sur lesquels ces Etats ont besoin de s'accorder pour une gestion durable de ces ressources.

Bien que l'article 63, paragraphe 1, et la jurisprudence² demandent aux Etats de s'accorder de bonne foi sur les mesures de conservation et de gestion à prendre pour la durabilité des stocks partagés, il n'y a aucune obligation pour ces Etats d'aboutir à un accord. S'il n'y a pas d'accord, chaque Etat côtier gèrera le stock partagé quand il traversera ses eaux sous juridiction nationale. Il en résulte un stock mal géré et une inégalité dans l'allocation des bénéfices issus de son exploitation si un Etat côtier prend des mesures strictes de conservation afin d'augmenter le rendement maximum à long terme en réduisant substantiellement ses captures à court terme alors que les autres Etats concernés exploitent lourdement le stock pour en tirer un gain rapide à court terme.

Beaucoup d'Etats côtiers qui partagent les mêmes stocks signent des accords de pêche sans se concerter au préalable sur les mesures de conservation et de gestion durable de ces ressources.

En outre, le statut juridique des stocks de poissons pélagiques qui ne sont pas gérés par une organisation régionale de gestion des pêches mérite aussi d'être posé et des pistes de solution trouvées.

Le Tribunal pourrait, dans le cadre de son avis, apporter des éclairages sur les droits et obligations de l'Etat côtier en matière de gestion durable des stocks partagés ou d'intérêt commun. En effet, ces droits et obligations nécessitent d'être précisés par le droit international.

Monsieur le Président, Madame, Messieurs les membres du Tribunal, tels sont les arguments de la Commission sous-régionale des pêches.

J'espère que ces interventions, la teneur de notre exposé oral, ainsi que les exposés écrits soumis antérieurement, contribueront à clarifier les questions juridiques sur lesquelles vos avis éclairés sont sollicités.

Comme le Président en exercice de la Conférence des ministres de la Commission sous-régionale des pêches l'a indiqué dans son intervention, la CSRP se félicite par avance de tout éclaircissement que pourrait apporter le Tribunal aux dispositions clés de la Convention et des autres instruments juridiques internationaux concernant les droits et obligations de l'Etat du pavillon en cas de pêche INN opérée dans la ZEE de l'Etat du pavillon ou dans un Etat tiers et en haute mer. De même, des précisions sur les droits et obligations de l'Etat côtier pour une gestion durable des stocks partagés ou d'intérêt commun.

Une interprétation claire et une mise en œuvre correcte des dispositions de la Convention, des droits et obligations de l'Etat du pavillon, de l'Etat du port et de l'Etat côtier en cas de pêche INN sont dans l'intérêt de tous les Etats Parties à la Convention des Nations Unies sur le droit de la mer.

Monsieur le Président, Madame, Messieurs les membres du Tribunal, ceci est la fin de notre intervention. Nous vous remercions de votre bien aimable attention.

Le Président :

Merci beaucoup, Madame Traoré.

² Voir affaire du Plateau continental de la mer du Nord, arrêt, C.I.J. Recueil 1969, p. 47 ; affaire de la Compétence en matière de pêcheries, arrêt, C.I.J. Recueil 1973, p. 32.

DEMANDE D'AVIS CONSULTATIF - COMMISSION SOUS-RÉGIONALE DES PÊCHES

Cela nous amène au terme de l'audience d'aujourd'hui. Le Tribunal reprendra ses audiences demain matin à 10 heures et entendra les représentants de l'Allemagne, de l'Argentine, de l'Australie, du Chili et de l'Espagne qui présenteront leurs exposés oraux.

L'audience du Tribunal est maintenant levée.

(L'audience est levée à 17 heures 53.)

3 September 2014, a.m.

PUBLIC SITTING HELD ON 3 SEPTEMBER 2014, 10.00 A.M.

Tribunal

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, KELLY, ATTARD, KULYK; *Registrar* GAUTIER.

List of delegations: [See sitting of 2 September 2014, 3.00 p.m.]

AUDIENCE PUBLIQUE TENUE LE 3 SEPTEMBRE 2014, 10 HEURES

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, Mme KELLY, MM. ATTARD, KULYK, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 2 septembre 2014, 15 heures]

The President:

Good morning. Today we will continue the hearing in Case No. 21 concerning the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

This morning we will hear oral statements from Germany, Argentina, Australia, Chile and Spain.

I now give the floor to Ambassador Ney, the representative of Germany.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

STATEMENT OF MR NEY

GERMANY

[ITLOS/PV.14/C21/2/Rev.1, p. 1–6]

Mr Ney:

Mr President, distinguished Members of the Tribunal, it is an honour for me to appear before this Tribunal today representing the Federal Republic of Germany.

With your permission, I will present to you the comments of the Federal Republic of Germany with regard to the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

Let me begin by underlining the importance of this case for international law, as this is the first request for an advisory opinion outside the Tribunal's Seabed Disputes Chamber.

In Case 17, the Tribunal's Seabed Disputes Chamber rendered an Advisory Opinion that has greatly contributed to strengthening the law of the sea by clarifying, in particular, the obligations and responsibilities of sponsoring States with respect to activities in the area in accordance with the United Nations Convention on the Law of the Sea; henceforth I shall call it "the Convention".

In general, Germany believes that requests for advisory opinions could be used more regularly in State practice. Many provisions of the Convention leave room for interpretation. At the same time, the rule of law at sea has been gaining ever increasing importance and is continuously being challenged in many parts of the world. As we have witnessed in Case 17, the law of the sea can be strengthened not just by contentious procedures entailing binding decisions but also by advisory opinions. The States Parties to the Convention would all benefit from the wisdom and guidance provided by the Tribunal – the specialized judicial organ in the field of the law of the sea.

Mr President, as the request submitted by the Sub-Regional Fisheries Commission is the first occasion on which the full Tribunal has been asked to render an advisory opinion, the Tribunal may wish to carefully examine the legal basis and the scope of its advisory jurisdiction under article 138 of its Rules.

Article 138, paragraph 1, of the Rules reads: "The 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."

A number of States Parties have expressed doubts as to whether article 138 of the Rules has a sufficient legal basis in the Convention or whether the Tribunal, by framing its Rules, may have overstepped its competence and conferred upon itself a new type of jurisdiction inconsistent with its powers under the Convention, including its Statute. Germany does not share any of these doubts. According to article 16 of the Statute of the Tribunal (Annex VI of the Convention), the Tribunal clearly has the authority to decide upon its own Rules, albeit bound by the Convention and the Statute that were agreed upon by States Parties.

In this context, article 21 of the Statute confers a broad jurisdiction upon the Tribunal that is not limited to the settlement of disputes.

Article 21 of the Statute reads: "The 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."

The wording of article 21 of the Statute makes it clear that the Tribunal's jurisdiction is broader than the jurisdiction of the other courts or tribunals referred to in articles 287 and 288 of the Convention. In particular, it is not limited to the dispute settlement provisions in Part XV of the Convention but expressly includes all other applications in accordance with the Convention and, in addition, all matters specifically provided for by any other agreement which confers jurisdiction on the Tribunal.

STATEMENT OF MR NEY – 3 September 2014, a.m.

Therefore, in Germany’s view, article 21 of the Statute by itself serves as a sufficient legal basis for the competence of the full Tribunal to accept requests for advisory opinions if these are specifically provided for by a relevant international agreement.

There is no reason to assume that the wording “all matters” would not include requests for advisory opinion. In particular, the argument that the wording “all matters” must be read as meaning “all disputes” and that the jurisdiction of the Tribunal is limited by article 288, paragraph 2, of the Convention cannot be followed.

The general rule of treaty interpretation, as established by article 31 of the Vienna Convention on the Law of Treaties – also reflecting customary law – is to interpret treaties objectively, that is “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 their object and purpose.”

Other circumstances, including the negotiating history, may, according to article 32 of the Vienna Convention on the Law of Treaties, serve only as a supplementary means of interpretation “in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 remains ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.” None of these cases apply here.

The ordinary meaning of “all matters” is a wide one. Its wording is not limited to disputes or other contentious proceedings. It is quite clear that the purpose and intention of article 21 of the Statute is to shape the International Tribunal for the Law of the Sea as a living institution and to expressly provide room for states to enter into further bilateral or multilateral agreements conferring jurisdiction on the Tribunal.

This understanding of article 21 of the Statute is confirmed when we look at the French and Spanish texts. Both the French and the Spanish wording of article 21 of the Statute are phrased in an equally open manner as “all matters”.

The French text reads: “*Le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal.*”

The phrase “*Toutes les fois que cela est expressément prévu*” literally means that the Tribunal shall have jurisdiction “every time that this is expressly foreseen”.

In the Spanish text, the jurisdiction of the Tribunal expressly extends to “all questions expressly foreseen” in another agreement (“*todas las cuestiones expresamente previstas*”). It is quite clear that this would include an abstract legal question and does not have to be a dispute (which in Spanish would be “*controversia*”).

To mention just one more, the Russian text too speaks about “all questions” (“*все вопросы*”).

As these texts confirm that the objective meaning of article 21 of the Statute is neither ambiguous nor obscure.

While some States Parties have invoked article 288 of the Convention as a limit of the Tribunal’s jurisdiction under article 21 of the Statute, a closer look at these provisions reveals that there is no such connection between article 288 of the Convention and article 21 of the Statute.

Article 288 is located in Part XV, Section 2, of the Convention, which deals with the settlement of disputes by compulsory procedures entailing binding decisions and with the corresponding jurisdiction of the various courts and tribunals involved in this context. It is not, however, an exhaustive provision when it comes to the role and competence of the Tribunal under the Convention. Specifically, it does not intend to limit any of the provisions of the Statute. On the contrary, article 288 is complemented by the Statute, including article 21, when it comes to the specific role and jurisdiction of the Tribunal.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

Mr President, summing up so far, it is Germany's view that article 138 of the Rules of the Tribunal has a sound legal basis in an objective interpretation of articles 21 and 16 of the Tribunal's Statute. Article 138 of the Rules does not create a new type of jurisdiction but only specifies the prerequisites that the Tribunal has established for exercising its jurisdiction.

I shall now proceed to the subsumption of these prerequisites to the case before us. Three conditions have to be met for the Tribunal to accept a request for an advisory opinion under article 138 of its Rules: first, the request must concern a legal question; second, it shall be transmitted by an authorized body; and, third, an international agreement related to the purposes of the Convention must specifically provide for the submission of such a request to the Tribunal.

Mr President, regarding the first condition, the nature of the questions submitted, the four questions put forward by the Sub-Regional Fisheries Commission are all legal questions, originating in the law of the sea framework. They touch upon the scope of rights, obligations and liabilities of flag States and coastal States in a fisheries context.

As for the second condition, transmission by an authorized body, the request was transmitted by the Permanent Secretary of the SRFC, who has been duly authorized by the SRFC's Conference of Ministers in accordance with article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (MCA Convention).

The request also complies with the third condition, namely that an international agreement related to the purposes of the Convention specifically provides for the submission of such a request to the Tribunal.

The MCA Convention is a fisheries-related international agreement and basic legal instrument of the Sub-Regional Fisheries Commission.

It is related to the purposes of the UN Convention on the Law of the Sea, namely to its articles 55-73, addressing the rights and responsibilities of coastal and other States in the exclusive economic zone, to article 94, addressing the duties of flag States, and to the relevant provisions of the Convention addressing the conservation and management of the living resources in the exclusive economic zone and high seas, such as articles 61-67 and 116-119.

In its article 33, the MCA Convention explicitly provides for the submission of legal matters to the Tribunal for advisory opinions.

Mr President, in their written submissions to the Tribunal, some States Parties have suggested that the jurisdiction of the Tribunal in any advisory proceedings under article 21 of the Statute and article 138 of the Rules would be limited to clarifying legal questions concerning the interpretation or application of the underlying agreement, which confers the advisory jurisdiction, in this case the MCA Convention.

Germany does not agree. There is no restriction on requesting parties in either article 21 of the Statute or articles 130-138 of the Rules to pose only legal questions that directly concern the interpretation or application of the underlying international agreement allowing for the request to the Tribunal.

In particular, such a restriction cannot be derived from article 288, paragraph 2, of the Convention, as this provision only deals with disputes concerning the interpretation or application of international agreements other than the UNCLOS in compulsory procedures entailing binding decisions, not with advisory opinions. Moreover, international agreements do not stand alone. They have to be applied and interpreted within the context of international law surrounding them, as article 31, paragraph 3(b), of the Vienna Convention on the Law of Treaties stipulates.

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Articles 131 and 138 of the Rules of the Tribunal only require the underlying international agreement to be related to the purposes of the Convention and the request for an advisory opinion to be on a legal question arising within the scope of the activities of the submitting State or body.

Both of these conditions are satisfied in the present request. The MCA Convention is related to the purposes of UNCLOS and the four questions submitted to the Tribunal for an advisory opinion are legal questions arising within the scope of the SRFC's activities. The SRFC is looking to install a comprehensive system to combat IUU fishing and protect the marine living resources of its member States. It wishes to obtain a thorough assessment of certain rights, obligations and liabilities of coastal and flag States in order to help it to properly perform its functions as a fisheries cooperation organization in accordance with international law.

Mr President, the fact that the Tribunal, in order to answer the request submitted by the SRFC, may have to apply or interpret international instruments other than the MCA Convention or customary international law does not in itself affect the principle of State consent to any kind of peaceful dispute settlement, as some States Parties have argued.

States cannot be compelled to submit their disputes to any kind of peaceful settlement without their consent. This important principle is also reflected in article 20, paragraph 2, of the Statute of the Tribunal, which explicitly requires that the agreement conferring jurisdiction on the Tribunal must be accepted "by all the parties to that case".

However, it is important to note that this provision applies only to contentious proceedings. Advisory opinions, by their very nature, are delivered only to the requesting party; they do not involve any other parties, nor are they binding on any party. Rather, their purpose is to provide legal advice to the requesting party so as to assist it in the performance of its functions.

Relevant case law seems to support this finding. It is true that in the 1923 *Status of Eastern Carelia* case the Permanent Court of International Justice declined to issue an advisory opinion on questions involving a pending dispute without the consent of all parties to the dispute. However, the Court did not rule that, as a matter of law, it could not interpret international conventions without the prior consent of all parties to these conventions.

This distinction is important because the four abstract questions submitted by the SRFC do not seem to be connected to any pending dispute between States. So far, there seems to be only an abstract possibility that any advisory opinion on these questions might – or might not – gain relevance in possible future disputes between members and non-members of the SRFC.

Moreover, the *Eastern Carelia* case or doctrine has undergone considerable changes in more recent case law. In its 1950 *Peace Treaties* and 1975 *Western Sahara* advisory opinions, the International Court of Justice has established "that the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court, but the propriety of the exercise" of its advisory jurisdiction.

As a result, Germany finds that the questions submitted by the SRFC fall within the jurisdiction of the Tribunal.

Mr President, distinguished Members of the Tribunal, those are my essential points. They certainly do not cover all aspects of this case, nor are they exhaustive. In particular, I shall refrain from extending my statement to the substantive matter of the questions submitted to the Tribunal. I hope that my observations may assist the Tribunal in determining the scope of its jurisdiction in the present case.

To conclude, I would like to reiterate that Germany firmly believes that the law of the sea is strengthened not just by judicial decisions in contentious procedures but also by advisory opinions.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

Advisory proceedings have the great advantage that they do not end with one party prevailing and the other one losing. They also allow third parties to voice their opinions regarding the interpretation of the Convention and other instruments. Germany therefore believes that they could be used more regularly in State practice.

Germany trusts that the Tribunal will handle its advisory jurisdiction with utmost responsibility.

Thank you very much.

The President:

I thank Mr Ney for his statement.

I now give the floor to the representative of Argentina, Mr Martinsen.

STATEMENT OF MR MARTINSEN – 3 September 2014, a.m.

STATEMENT OF MR MARTINSEN
ARGENTINA
[ITLOS/PV.14/C21/2/Rev.1, p. 6–12]

Mr Martinsen:

Mr President, Mr Vice-President, honourable Members of the Tribunal, it is indeed a great honour for me to appear before this distinguished Tribunal representing the Argentine Republic. There is no need for me to underscore the great importance that my country attaches to the work of this Tribunal, which is considered to be one of the pillars of contemporary international law, and that is the reason for Argentina to act in support of the Tribunal in every relevant international forum dealing with the activities of the Tribunal.

Mr President, by letter dated 27 March 2013, this International Tribunal for the Law of the Sea received a request from the Permanent Secretary of the Sub-Regional Fisheries Commission to render an advisory opinion on four questions concerning the regulation of fisheries, citing article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under National Jurisdiction of the Member States of the Sub-Regional Fisheries Commission 2012 as the legal basis for its request. As the Tribunal is aware, Argentina has already participated in the written stage of this procedure.

Mr President, before sharing our views on the procedural aspects of this case, we would like to make some remarks of a general nature. Argentina is a developing country as well as a coastal State with large maritime areas to take care of. As any other State sharing the same features, Argentina is concerned by the challenges arising from the need to conserve the natural resources existing in those maritime areas and prevent their depredation with the limited resources it has available to that end. Therefore Argentina has learned a lot in this field and has shared its findings and experience with other developing nations facing the same or similar challenges. Illegal fishing in our national maritime areas by foreign vessels must come to an end as soon as possible. Argentina not only understands the situation leading the Member States of the SRFC to request this advisory opinion, it also shares their concerns, their needs and their challenges.

Argentina is of the view that the answers to these challenges need to be addressed by strengthening international cooperation, in particular among developing countries sharing similar problems, limitations and concerns. Argentina strongly believes that those problems may be solved by the ways and means provided for in Part XIV of UNCLOS regarding the development and transfer of marine technology. Effective implementation of the relevant clauses of the Convention would enable developing States to acquire the technology they need for proper monitoring, control and surveillance of fishing activities in the areas within their national jurisdiction. Argentina stresses its willingness to engage in consultations with all other developing States, especially with the members of the Sub-Regional Fisheries Commission, regarding the issues raised in the request made to the Tribunal. South-South cooperation has proven to be an excellent tool to deal with problems faced equally by most developing countries in this field.

In any event, Argentina considers that the sovereign and exclusive rights that the Convention recognizes to coastal States regarding every aspect of fishing activities are a fundamental pillar of the law of the sea. In no way could these rights be jeopardized by any attempt by flag States to exercise any sort of jurisdiction regarding fisheries in maritime areas of coastal States.

Regarding the jurisdiction of this Tribunal to deal with the request for an advisory opinion as the one submitted by the SRFC, Argentina reiterates, in general, the considerations put

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

forward in its written statement of November 28, 2013, which I would summarize as follows, together with some further remarks on the issues involved.

The Statute of the Tribunal does not provide for an advisory jurisdiction of a general scope for ITLOS as a full court. No clause in the Convention or in the Statute of the Tribunal provides expressly for such a jurisdiction. Advisory opinions are only mentioned in the Convention as procedures that may take place in accordance with the relevant provisions of Part XI of UNCLOS under the competence of the Seabed Disputes Chamber. Besides, article 21 relates to Part XV of the Convention dealing specifically with “Settlement of Disputes”.

The rule specifically allowing for the possibility of an advisory opinion is article 138 of the Rules of the Tribunal. According to this clause, an international agreement related to the purposes of UNCLOS may specifically provide for the submission to the Tribunal of a request for an advisory opinion. If article 138 of the Rules were to be considered as “a legitimate interpretation of article 21 of the Statute”,¹ then the request must necessarily relate to “matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

Even according to a broad interpretation of article 21 of the Statute, there is an essential condition that does not seem to have been fulfilled in the request since none of the questions posed to the Tribunal or the explanatory documents submitted by the SRFC identifies which are those “matters specifically provided for” in the SRFC Convention that are requested to be interpreted by the Tribunal in its advisory opinion. No indications are given in the request as to which are the relevant clauses of that Convention to be applied or interpreted in this case.

Mr President, Argentina also reiterates the considerations it put forward in its written submission that might lead the Tribunal to consider that its advisory jurisdiction should be declined in this particular case.

The first of those considerations relates to the purpose of the request. As expressed in the first paragraph under title V, “Justification...”, in the Technical Note submitted by the SRFC, the request expresses:

There now exist many new economic and scientific uses of the seas whose legal status is open to argument. New developments call for new legal responses which the Tribunal can give through its advisory opinions. The advisory function of the Tribunal can make a great contribution to sound governance of the seas and oceans.²

As recognized by the International Court of Justice in the case *Legality of the Threat or Use of Nuclear Weapons*, “It is clear that the Court cannot legislate [...] Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules”.³

Therefore, since the Tribunal may not legislate, neither may it create the “new responses” asked for in the Request. We also fail to see what the concept of governance in this context might be, not being a concept considered or contemplated in the Convention.

Moreover, in addition to the request for “new responses”, the instruments upon which those responses are asked to be found are not creating mandatory rules in spite of the assumption made in the Technical Paper that these instruments “bring major innovations to

¹ P. Chandrasekhara Rao and Philippe Gautier, *The Rules of the International Tribunal for the Law of the Sea*, Martinus Nijhoff Publishers, p. 394.

² “Technical Note” dated March 2013 submitted by the Permanent Secretariat of the Sub-Regional Fisheries Commission, p. 6, under the title “Justification for the Request to the International Tribunal for the Law of the Sea (ITLOS) for an Advisory Opinion”.

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 18.

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classic international law”.⁴ Those instruments referred to in the Technical Paper are the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁵ (IUU IPOA) developed by the FAO “as a voluntary instrument, within the framework of the Code of Conduct for Responsible Fisheries”. The other instrument is the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing that has not yet received even half the consents required for its entry into force.

Mr President, we are grateful to the SRFC for the information provided in the second revision of the document they submitted in March this year and for the further clarifications brought by their officers yesterday in this room. Nevertheless, we still fail to see how the Convention could be interpreted as a tool to combat IUU fishing, which is a category created 20 years after the Convention was adopted.

Moreover, we should remember that, according to paragraph 3.4 of the International Plan of Action to Prevent IUU Fishing, not all the categories of activities belonging to the IUU definition are necessarily contrary to international law, something that we should keep in mind in order to adopt the proper tools to combat IUU fishing.

Neither the IPOA on IUU fishing nor the FAO Port States Measures Agreement belong to the “agreement” that attributes consultative jurisdiction to this Court. Hence, the condition established under article 21 of the Statute of the Tribunal does not seem to have been met since no “matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” are invoked in the request as the object of the advisory opinion.

Another consideration that could lead the Tribunal to consider that its advisory jurisdiction might be declined in this particular case is the way in which the questions posed to it have been framed. Some of those questions lack essential information of a legal nature. Others do not indicate factual elements that are equally important in order to elaborate an appropriate legal answer. We will refer later on to this issue.

Mr President, Members of the Tribunal, Argentina is grateful for the contribution made by the international organization submitting this Request as well as to its Member States. We are having this extremely useful and interesting debate thanks to their initiative. We also strongly appreciate the degree of commitment evidenced by so many States Parties to the Convention participating in this procedure, in particular the ideas put forward by States expressing views opposite to ours that have enriched this discussion and reminded us that struggling for consensus is an attitude that made the Convention possible, and since then has inspired the work in all the organs it has established. We think that these procedures should be infused by the same constructive attitude.

The views wisely expressed by Germany and Japan, as well as by other States, in support of the exercise of an advisory jurisdiction by the full Tribunal led us to consider in which ways a common ground among the different positions expressed in this case could be somehow harmonized in order to help the Tribunal reach a wise decision.

With such a consensus approach in mind, Argentina would not object to the application of article 138 of the Rules, provided that the essential requirements stemming from article 21 of the Statute are met, nor would it oppose the exercise of the advisory jurisdiction of this Tribunal if appropriate measures are taken by the Tribunal and the requesting organization to solve the issues regarding the admissibility of the case.

In order to fulfil the requirements of article 21 of the Statute, the Argentine Republic notes that if in this case “an international agreement” confers upon the Tribunal a certain

⁴ Ibid. Note 2.

⁵ Developed by the Food and Agriculture Organization of the United Nations (FAO) within the framework of the Code of Conduct for Responsible Fisheries” and adopted at the Twenty-fourth Session of its Committee on Fisheries (COFI) on 2 March 2001.

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advisory function regarding “matters specifically provided for” in that agreement, the jurisdiction stemming from these circumstances is necessarily restricted *rationae materiae* to the matters regulated by that particular agreement and *rationae personae* to the requesting international organization and possibly to the States parties to such “international agreement”.

Since the SRFC Convention is “*res inter alios acta*” concerning Argentina and many other States Parties to the Convention, any possible effect of a procedure set forth by such instrument, as well as participation in such procedure, should be confined to the international organization requesting it and as it may be provided for by the rules in force in such organization and its member States.

Consequently, Argentina is of the view that the Tribunal should, as a preliminary stage of this procedure, make a decision on whether it has or has not advisory jurisdiction to deal with Case 21. Should it arrive at a positive answer, then the advisory procedure should continue but, in Argentina’s view, restricted to the requesting organization and possibly its Member States.

Mr President, certain other issues should be addressed, from our perspective, in order to facilitate the exercise of the advisory jurisdiction in the present case. Those issues may be dealt with by either the requesting party or by the Tribunal itself, given the broad powers given to it by articles 16 and 27 of the Statute to decide on procedural matters and on the conduct of the cases.

A matter that requires particular attention is the one related to the need to identify which are the “matters specifically provided for” in the SRFC Convention that need to be interpreted by the Tribunal. Since no indications are given in the request and in the rest of the documents submitted to the Tribunal on this point as to which are the relevant clauses of that Convention to be applied or interpreted in this case, we think that the requesting organization should provide further clarity on this issue.

The other matter that would require to be addressed is the need for more accuracy, either in legal and factual grounds, of the questions posed by the requesting organization. Regarding this topic, Argentina reiterates the comments made in its written submission on each of the questions contained in the request. That may be also done either by the organization or by the Tribunal itself.

Mr President, since until now in this case the main disagreement among the participants has been the existence of a general advisory jurisdiction of the Tribunal that has not been expressly provided for in the Convention or the Statute, the decision of the Tribunal to invite all UNCLOS States Parties to participate in this procedure has been a very wise one.

Apart from that general consideration, as it may be inferred from what was stated in writing and now orally, Argentina does not consider it has to participate in a procedure stemming from a treaty which Argentina is not a party to. Nevertheless, we would like to take this opportunity to contribute with some of its views to the discussion of certain issues of substance that might be of interest in this case.

First, the questions posed by the requesting organization as well as by some of the written statements submitted to the Tribunal do not seem to give due consideration to the fact that not all States are parties to the same treaties. Then they might wrongly assume that the rights and duties of flag States may be analyzed without previously identifying the particular instruments applicable to each specific State. In this vein, it would be a mistake, for instance, to assume that the provisions of a certain treaty such as the United Nations Fish Stocks Agreement could be applicable to States not having expressed their consent to be bound by it.

Second, the sovereign rights of the coastal States are of an exclusive nature, including those recognized regarding fisheries. Therefore, the determination of the possible unlawfulness of fishing activities in national maritime areas is an exclusive competence of the coastal State in the exercise of such sovereign rights. Since the laws and regulations

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applicable to fishing activities in maritime areas within national jurisdiction need to be those established by the coastal State, no State other than the coastal State is entitled to determine whether or not a vessel complied with those laws and regulations. Article 73 of the Convention dealing with enforcement of laws and regulations of the coastal State leaves no room for doubt on this issue.

Third, efforts by flag States to prevent the vessels flying their flag from fishing illegally in maritime areas of other States must not interfere in any way in the exercise of the exclusive jurisdiction by the coastal State.

Fourth, the rights and duties of the flag States are, in general, considered under article 94 of the Convention. It was not by coincidence that such provision was included under Part VIII of the Convention since those rights and duties are particularly relevant in the high seas. In no way may those rights and duties be construed in a detrimental manner regarding the sovereign rights of coastal States.

That is the reason why the Voluntary Guidelines for Flag State Performance, adopted by the 31st Session of the Committee of Fisheries of the Food and Agriculture Organization, specify in paragraph 3 that:

These Guidelines apply to fishing and fishing related activities in maritime areas beyond national jurisdiction... **Where a vessel operates in maritime areas under the jurisdiction of a State other than the flag State the application of these Guidelines is subject to the sovereign rights of the coastal State.**⁶

In conclusion, Mr President and distinguished Members of the Tribunal, Argentina is of the view that the possibility of rendering an advisory opinion, as requested by the SRFC, should be assessed in the light of the following considerations.

First, the Tribunal, in our view, should consider as a preliminary matter whether it has advisory jurisdiction in the present case, and if it arrives at a positive conclusion on that matter, then it might decide on the conditions under which such jurisdiction should be exercised. Again, in our view, those conditions would restrict the continuation of the procedure to the requesting Parties.

In the case that the Tribunal should decide to exercise advisory jurisdiction, the questions posed to the Tribunal should include all legal information and factual references of an essential nature in order to allow for a proper legal response. Those references should include, at least, the identification of the clauses of the instrument conferring advisory jurisdiction that are to be interpreted by the Tribunal. Also as a condition for an accurate legal answer, information should be provided on which other treaties are applicable to the flag States whose rights and duties are to be interpreted by the Tribunal. Factual information regarding the maritime areas which the questions refer to is also essential to allow the Tribunal to perform its judicial function.

Mr President, distinguished Members of the Tribunal, Argentina is grateful for having had the possibility of addressing the Tribunal in this case. I thank you all very much for your attention.

The President:

Thank you, Mr Martinsen, for your statement.

I now give the floor to the delegation of Australia, which has requested a speaking time of 45 minutes.

Mr Campbell, you have the floor.

⁶ Document COFI/2014/4.2/Rev.1, “Voluntary Guidelines for Flag State Performance”, adopted by the 31st Session of the Committee of Fisheries of the Food and Agriculture Organization. Emphasis added.

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STATEMENT OF MR CAMPBELL

AUSTRALIA

[ITLOS/PV.14/C21/2/Rev.1, p. 12–19]

Mr Campbell:

Mr President, Members of the Tribunal, it has been some time since I have appeared before the Tribunal, the last time being the “*Volga*” case, and before that in the *Southern Bluefin Tuna Cases*. For me, it is a distinct honour to appear before you again. I should say that Australia is an original party to the 1982 Convention and is committed to its proper implementation, including through the important role played by this Tribunal.

As a coastal State Party, we appreciate also the serious consequences of illegal, unreported and unregulated fishing activities and the challenges faced by coastal States, including Member States of the Sub-Regional Fisheries Commission, as outlined by Mr Papa Kebe yesterday. That said, the importance of the subject matter of these proceedings is not, of itself, a legal justification underpinning the ability of this Tribunal to give an advisory opinion on this matter.

Mr President, I will be addressing the Tribunal on matters of jurisdiction and submitting that the Tribunal, as fully constituted, lacks the jurisdiction to render an advisory opinion in this case or indeed any other case. Australia will not be addressing the merits of the request.

First, I will deal with a number of what I would call less than convincing justifications that have been put forward to support such an advisory jurisdiction, more often than not as a secondary form of support for other arguments purportedly based on the 1982 Convention. Then, I will analyze and respond to the arguments based upon the text of the 1982 Convention and, in particular, article 288 of the Convention and articles 16 and 21 of the Tribunal’s Statute.

My colleague Ms Ierino will then argue that even if the Tribunal does find that it has an advisory jurisdiction, it should exercise its discretion not to render an opinion in this case for a number of cogent reasons.

Mr President, Members of the Tribunal, it will not have escaped your notice that Australia is not alone in its view that the Tribunal does not have jurisdiction to hear this case, and in that regard we respectfully adopt much of what is contained in the written statements of Ireland, the People’s Republic of China, Thailand and the United Kingdom.

Mr President, let me begin with two general points concerning the jurisdiction of international courts and tribunals. First, it is trite to say that such jurisdiction is not to be presumed. It is incumbent upon those requesting the advisory opinion to establish beyond doubt that the Tribunal does have jurisdiction to render such an opinion. Also, it is incumbent on the Tribunal to be satisfied beyond doubt that it has such jurisdiction.¹ No burden of disproof lies with those countries, including Australia, which question the existence of such jurisdiction.

Second, it is a *sine qua non* of adjudication by international courts and tribunals that it is based upon the consent of States.² This applies as much to advisory opinion competence as it does to contentious cases. Jurisdiction to adjudicate is always the subject of express

¹ R. Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), p. 1057. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, I.C.J. Reports 1996* (“*Threat or Use of Nuclear Weapons*”), p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004* (“*Construction of a Wall*”), p. 144, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010* (“*Unilateral Declaration of Independence in Respect of Kosovo*”), p. 412, para. 17.

² H. Thirlway, “Law and Procedure, Part Nine”, 1969 *BYIL* 69, pp. 1.4.

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conferral.³ It is not to be implied. That principle flows from the sovereignty of States. There is no express conferral of an advisory jurisdiction on the Tribunal as a whole by the States Parties to the 1982 Convention and, parenthetically, there was no conferral upon the Tribunal of a power to accord itself an advisory jurisdiction. To do so would have been unprecedented.⁴

That said, the Third United Nations Convention on the Law of the Sea did turn its collective mind to the matter and conferred in express terms an advisory opinion capacity only on the Seabed Disputes Chamber of this Tribunal in the circumstances set out in articles 159, paragraph 10, and 191 of the 1982 Convention. That fact alone, together with the absence of an express conferral of an advisory jurisdiction on the Tribunal as a whole, should be the end of the matter. As you, Judge Wolfrum, noted in 2013: “The drafters of the UN Convention on the Law of the Sea were rather reluctant to entrust the Tribunal...with competences to give advisory opinions equivalent to the ones of the ICJ.”⁵

Australia agrees with that conclusion, though we would replace the words “were rather reluctant to entrust” with the words “did not entrust”. The correct position, we would submit, is neatly summarized in the Virginia Commentary: “The Tribunal itself has no advisory jurisdiction, and the advisory jurisdiction of the Chamber is limited to legal questions that may be referred to it only by the Assembly or Council, within the scope of their activities.”⁶

I will now, Mr President, with your indulgence, move to what I have termed “subsidiary justifications”. The diversity of the arguments put forward to support such an advisory capacity on the Tribunal as a whole we believe betray the fact that, in the absence of an express conferral, no such capacity exists. Let me turn to some of those arguments, mainly for the purposes of dismissing them.

I will start with one which has, I think, an air of desperation about it. That is “neither the Convention nor the Statute explicitly indicate that such jurisdiction shall be excluded”.⁷ To be fair, this is usually put forward as a secondary argument, which I mentioned earlier.

At least two responses come to mind. This point might have had some relevance if other treaties founding the jurisdiction of international courts and tribunals contained such an explicit exclusion of advisory jurisdiction; however no such precedent exists and nothing can be drawn from the absence of such a clause. Second, as noted earlier, the advisory jurisdiction of international courts and tribunals should always be the subject of an express conferral. The absence of a clause excluding such jurisdiction is, in our submission, of no relevance.

The second alleged underpinning which is reflected in the written statement of Germany⁸ appears to be based upon a melting pot of factors. It combines the notion that the 1982 Convention and the Statute of the Tribunal are living instruments, with rules of treaty

³ H. Thirlway, “Advisory Opinions”, *Max Planck Encyclopedia of Public International Law* (OUP), para. 4. See also S. Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume II: Jurisdiction*, (Martinus Nijhoff, Leiden, 2006), pp. 94–95. C. Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff, 2002), p. 503. Written Statement of Australia, para. 7; First Written Statement of the United Kingdom, para. 9, Second Written Statement of the United Kingdom, para. 6; Written Statement of Portugal, paras. 13–14.

⁴ Written Statement of Australia, paras. 8–9 and Annex A; Written Statement of the United Kingdom, paras. 29–33; Written Statement of the United States, paras. 14–15; Written Statement of the People’s Republic of China, paras. 9–14; Written Statement of Spain, para. 6.

⁵ R. Wolfrum, “Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?” in R. Wolfrum and I. Gätzschmann (eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), p. 55.

⁶ M. Nordquist *et al* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI, (Martinus Nijhoff, Dordrecht, 1991) (“*Commentary*”), p. 644. See also *Commentary*, Volume V, p. 416.

⁷ Written Statement by the Federal Republic of Germany, para. 8; see also Written Statement of New Zealand, para. 8.

⁸ Written Statement by the Federal Republic of Germany, para. 8.

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interpretation and an alleged general movement amongst States in favour of the Tribunal's jurisdiction to issue advisory opinions. A combination of these factors is relied upon to support the conclusion that jurisdiction would seem to find its legal basis in an objective interpretation of article 21 of the Statute. That is, that article 21 of the Statute of the Tribunal "by itself already provides an implicit legal basis" for the Tribunal having advisory competence. (I must say that this morning Germany has expressed the view that it somehow has an express basis.) Apparently, by reason of all these factors, the negotiating history of the Convention so clearly favouring, as it does, the view that the full Tribunal does not have an advisory jurisdiction, is described as "superseded".⁹

This alleged underpinning of advisory jurisdiction, we would submit, is more in the nature of assertion. Also, as noted earlier, an express grant of jurisdiction is required – as with the Seabed Disputes Chamber – and it is not something that is "implicit" or "implied".

The third subsidiary form of justification for an advisory capacity is that it forms part of "a consensual solution" as established by article 138 of the Rules. This has been described in the following terms: "If the jurisdiction of international courts and tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction."¹⁰

For the sake of brevity, by way of response, we adopt that given in the first written statement of the United Kingdom at paragraphs 25 to 27. Leaving aside the speculative tone in which this idea is raised, its application in this case would require the consensus of all Parties to the 1982 Convention and not just the Members of the SRFC if an advisory opinion is to be given on the interpretation and application of aspects of the 1982 Convention.

The fourth subsidiary argument is one raised by the SRFC yesterday. The SRFC noted that the issue of competence to give advisory opinions has been raised on a number of occasions within relevant UN fora with no objections.¹¹ However, any such lack of objection is of no legal consequence whatsoever. It does not amount to consent, and any application of the legal principle of acquiescence would, we submit, be bizarre. This is the first occasion on which article 138 of the Rules has in fact been relied upon, and this Tribunal is the correct forum in which to challenge such reliance.

The fifth, and final, subsidiary argument also arises out of the SRFC's submissions yesterday. I mention this just to clarify what was being said. The statement was made: "Article 288, paragraph 4, gives the Tribunal the possibility to itself decide on its jurisdiction in the case of a request for advisory opinion."¹²

Obviously, these words do not reflect fully article 288, paragraph 4, which requires a dispute over jurisdiction as a pre-condition of its application. To be fair, it was later conceded by the SRFC that a dispute is required and that it must be settled in accordance with the 1982 Convention.¹³

And it is to other aspects of the 1982 Convention that I will now move. I noted earlier that the provisions most frequently cited as possible sources of the Tribunal's advisory jurisdiction are article 288 of the Convention and article 21 of the Statute of the Tribunal.

⁹ *Ibid.*

¹⁰ R. Wolfrum, "Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes" in R. Wolfrum and I. Gätzmann (eds.) *International Dispute Settlement: Room for Innovations?* (Springer-Verlag, Heidelberg, 2013), 55.

¹¹ ITLOS/PV.14/C21/1, pp. 9–10 (Bèye Traoré).

¹² ITLOS/PV.14/C21/1, p. 9 (Bèye Traoré).

¹³ *Ibid.*

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Moving to article 288, in Australia’s submission, article 288 does not provide a basis for the conferral of advisory jurisdiction on the Tribunal as a whole.¹⁴ Leaving aside the particular provisions concerning the Seabed Disputes Chamber (para. 3), article 288 is concerned solely with the conferral of jurisdiction on the courts and tribunals referred to in article 287 of the 1982 Convention jurisdiction over “disputes”. This is confirmed by its placement in Part XV, which is entitled “Settlement of Disputes” and in Section 2 of Part XV, which is subtitled “Compulsory Procedures Entailing Binding Decisions”.¹⁵

Also, if article 288, paragraph 2, of the 1982 Convention did provide a legal basis for the Tribunal to give advisory opinions, it would follow that the other dispute settlement bodies referred to in article 287, paragraph 1 – that is the ICJ and Annex VII and VIII tribunals – could also have advisory jurisdiction. Such a result was not intended and is unsustainable.

Moving to article 21 of the Statute, article 21 of the Statute of the Tribunal, forming Annex VI to the 1982 Convention, also deals with the jurisdiction of the Tribunal. Article 21 refers to three categories over which the Tribunal has jurisdictional competence. The first category is “disputes” and, as I noted earlier, that term does not encompass an advisory jurisdiction.

The second category referred to in article 21 is that of “all applications submitted to the Tribunal in accordance with the Convention”.¹⁶ This category was the subject of some analysis yesterday by the SRFC, focusing on differences in meaning between the words “*différends*” and “*demandes*” in the French language text. The first word was said to apply to “contentious” situations and the second to “non-contentious” situations. Solely on the basis of this difference in meaning, the conclusion is reached that “the advisory jurisdiction of the Tribunal is thus expressed” and that this “shows clearly the Tribunal’s jurisdiction to give an advisory opinion.”¹⁷

To ascribe an advisory competence to the Tribunal based solely on a nuance of wording in the French text of one article of the Tribunal’s Statute is, with all due respect, far-fetched. That it is far-fetched is demonstrated by at least two factors. The first is that a more modest advisory jurisdiction is expressly conferred on the Seabed Disputes Chamber by the 1982 Convention. That being so, it could have been expected that at least the same express basis would have been used to confer a broader advisory jurisdiction for the Tribunal as a whole. Secondly, the word “*demande*” (and “application” in the English text) is followed by the words “submitted to it in accordance with the Convention”. This indicates that any conferral of advisory jurisdiction cannot be based solely on a nuance of language in article 21 but would need to be sourced elsewhere in the Convention, which it is not. In fact, the words “*demande*” and “application”, as so qualified, were intended to encompass requests for provisional measures and applications for the prompt release of a vessel made under the 1982 Convention.¹⁸ The *Virginia Commentary* supports that view.

The third category referred to in article 21 is that of “matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”; that is, any agreement other than the 1982 Convention. Could the word “matters” encompass an advisory jurisdiction? The answer to that question, in our view, is “no”. This aspect of article 21 is based upon article 36, paragraph 1, of the Statute of the International Court of Justice,¹⁹ where the word

¹⁴ Written Statement of Australia, paras. 16–20; First Written Statement of the United Kingdom, para. 19; Written Statement of Portugal, para. 8; Written Statement of Spain, paras. 9–10; Written Statement of Ireland, para. 2.2; Written Statement of the People’s Republic of China, paras. 29–30.

¹⁵ Written Statement of Portugal, para. 8.

¹⁶ P. Chandrasekhara Rao and P. Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, Leiden, 2006), p. 394.

¹⁷ ITLOS/PV.14/C21/1, p. 7 (Bèye Traoré).

¹⁸ M. Nordquist *et al* (eds.), *Commentary*, Volume V, pp. 360 and 378.

¹⁹ M. Nordquist, Volume V, p. 378.

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“matters” is clearly referring to disputes and not “advisory opinions”.²⁰ Also, in accordance with the accepted principles of interpretation referred to by Germany this morning, article 21 must be read in its context.²¹ Indeed, this is the difficulty that Australia has with the position put forward by Ambassador Ney on behalf of Germany this morning. Germany read article 21 in complete isolation from the main text of the Convention. There is undoubtedly a hierarchy under which the Statute gives effect to the jurisdictional provisions of the Convention. It cannot have a broader application than the relevant conferral of jurisdiction in article 288, paragraph 2, of the main body of the 1982 Convention which, as I mentioned earlier, is confined to *disputes*.²² This clear link between article 288 of the 1982 Convention and article 21 of the Statute is supported by the *travaux préparatoires*.²³

Nevertheless, assume for the moment that the Tribunal decides that article 21 by implication confers, or provides a basis for a rule conferring an advisory jurisdiction on the Tribunal by an “other agreement”. In that case, such an advisory jurisdiction necessarily would be limited to matters concerning the interpretation or application of that other agreement as between parties to the agreement. It would not extend to the interpretation and application of the 1982 Convention.²⁴ That conclusion in part flows from the express terms of article 288, paragraph 2, of the main text of the Convention and also from the more general law concerning the *inter se* rights and responsibilities of States parties to treaties. It would be very odd if the parties to a regional or even bilateral agreement could ask for an advisory opinion from the Tribunal concerning the interpretation or application of the provisions of the 1982 Convention when meetings of the States Parties to the 1982 Convention cannot request such an opinion.

Therefore, it is the submission of Australia that article 21 of the Statute does not accord or provide a basis for according advisory competence in the Tribunal. Even if it did (and it does not), that advisory jurisdiction would be limited to the interpretation and application of the “any other agreement” referred to in article 21 as between the parties to that agreement. On either basis, the request of the SRFC would lie outside the competence of the Tribunal.

Finally, I move to article 16 of the Statute, the rule-making power. That power does not provide an independent source of power to make a rule, such as article 138, conferring an advisory jurisdiction on the Tribunal.²⁵

Article 16 of the Statute is in identical terms to the rule-making power in article 30 of the Statute of the ICJ. In relation to article 30, the respected commentator Thirlway notes:

It is recognised that the rule-making power may be exercised to fill *lacunae* in the Statute; but the concept of a *lacuna*, of what is missing from the Statute must be defined by reference to what is present in the Statute. The rule-making power cannot, on this basis, be exercised at large. It would not be possible, e.g., for the Court, by

²⁰ Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds), *The Statute of the International Court of Justice – A Commentary* 2nd ed. (OUP, 2012), p. 641 (Tomuschat).

²¹ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31.

²² Written Statement of Australia, para. 26; Written Statement of Ireland para. 2.6; Written Statement of Portugal, para. 9; Second Written Statement of Thailand, para. 8.

²³ M. Nordquist *et al*, *Commentary*, Volume V, p. 378.

²⁴ Written Statement of Australia para. 27; Written Statement of Ireland, para. 2.11; Written Statement of the Argentine Republic, paras. 17–18; First Written Statement of the United Kingdom, para.46; Written Statement of the Netherlands, paras. 2 and 3; Written Statement of the United States, para. 24.

²⁵ Written Statement of Australia, paras. 11, 34–39; First Written Statement of the United Kingdom, paras. 16–18 and 31–33; Second Written Statement of Thailand, para. 5.

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enacting a rule, to confer upon itself a jurisdiction which it did not otherwise possess, under the Statute or on some other basis. This may be an extreme example ...²⁶

Similarly, it would not be possible for the Tribunal, by making a rule, to confer upon itself a jurisdiction to give an advisory opinion that it did not otherwise possess under the 1982 Convention, or the Statute of the Tribunal. To do so would, in the words of Sir Hersch Lauterpacht, amount to “an excess of zeal”.²⁷

Article 138 of the Rules, purportedly made pursuant to article 16 of the Statute, is framed squarely in terms of a conferral of power upon the Tribunal to give an advisory opinion. It stands in stark contrast to the other provisions of the Rules which do not purport to confer jurisdiction on the Tribunal. Rather, those other provisions of the Rules rely upon the jurisdiction that has been conferred expressly by the 1982 Convention, and they are framed for carrying out that jurisdiction.

The purported conferral of a power to give an advisory opinion on the Tribunal by article 138 of the Rules, both in its terminology and in its effect, is the conferral of a new and substantive function; it is not a rule for carrying out an already existing “function” or a “rule of procedure” within the meaning of article 16. As such, article 138 is beyond the rule-making power of the Tribunal.

Mr President, Members of the Tribunal, it is for those reasons that Australia submits that this court is without jurisdiction to entertain this request for an advisory opinion.

Mr President, Members of the Tribunal, I thank you for your attention once again and ask that you call upon Ms Ierino to continue the oral submissions of Australia.

The President:

Thank you, Mr Campbell, for your statement.

I now invite Ms Ierino to continue the presentation of Australia.

²⁶ Zimmerman, Tomuschat, Oellers-Frahm, Tams (eds), *The Statute of the International Court of Justice – A Commentary* 2nd ed. (OUP, 2012), p. 518. See also Kolb, *The International Court of Justice* (Hart Publishing, Oxford and Portland, Oregon, 2013), 2013, p. 101, footnote 64, and *Land, Island and Maritime Frontier Dispute* case, Diss. Op. Shahabudeen, *I.C.J. Reports 1990*, p. 48.

²⁷ H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1982), p. 91.

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STATEMENT OF MS IERINO

AUSTRALIA

[ITLOS/PV.14/C21/2/Rev.1, p. 19–24]

Ms Ierino:

Mr President, Members of the Tribunal, it is an honour to appear before you in these proceedings, and to do so on behalf of Australia.

As you have heard from Mr Campbell, it is Australia's primary submission that the Tribunal is without jurisdiction to give the requested opinion. If the Tribunal lacks jurisdiction, the question of exercising your discretionary power does not arise.¹

However, should you determine that the Tribunal does possess an advisory jurisdiction, we respectfully submit that the Tribunal should decline to exercise any such jurisdiction in the present case. This submission is without prejudice to Australia's primary submission, delivered by Mr Campbell.

Mr President, before turning to the address the cogent reasons that underpin this submission, I will first make a few preliminary remarks concerning the Tribunal's discretion in the case before you.

It was uncontested in the written statements submitted in this case that article 138 of the Rules of the Tribunal establishes a power of a discretionary character: "the Tribunal **may** give an advisory opinion...". Indeed, it is clear that the Rules of the Tribunal governing the exercise of advisory jurisdiction are modelled on relevant provisions of the Statute and the Rules of the International Court;² that is to say, like article 65 of the ICJ Statute, article 138 confers on the Tribunal "the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request."³

As the International Court stated in *Western Sahara*, "[a]s a judicial body, the Court is bound to remain faithful to the requirements of its judicial character, even in giving advisory opinions".⁴ That statement applies equally to this Tribunal in the exercise of any advisory jurisdiction.

In light of the potentially wide-ranging nature of the jurisdiction conferred under article 138, this Tribunal must have some discretion as to whether it should respond to a request for an advisory opinion if it is to be in a position to protect the integrity of its judicial role.⁵ Accordingly, it should be satisfied that that integrity remains intact.⁶

Australia respectfully submits that there are compelling reasons⁷ that should lead the Tribunal, in the exercise of its discretion, to decline to respond to the present request, as to do otherwise would be inconsistent with its judicial function. Indeed, even amongst those States

¹ *Threat or Use of Nuclear Weapons*, p. 232, para. 10; *Construction of a Wall*, p. 144, para. 13; *Unilateral Declaration of Independence in Respect of Kosovo*, p. 412, para. 17; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, p. 73, para. 14.

² Zimmermann, Tomuschat, Oellers-Frahm, Tams (eds), *Statute of the International Court: A Commentary* 2nd ed. (OUP, 2012), p. 1657.

³ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950 ("Interpretation of Peace Treaties"), p. 72.

⁴ *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975 ("Western Sahara"), p. 21, para. 23.

⁵ *Status of Eastern Carelia, Advisory Opinion*, 1923, P.C.I.J. Series B, No. 5, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1973, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1982, p. 334, para. 22; *Construction of a Wall*, pp. 156-157, paras. 44-45; *Unilateral Declaration of Independence in Respect of Kosovo*, p.416, para. 29.

⁶ See, e.g., *Unilateral Declaration of Independence in Respect of Kosovo*, p. 416, para. 31.

⁷ *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, I.C.J. Reports 1956, p. 86; *Construction of a Wall*, p. 156, para. 44; *Unilateral Declaration of Independence in Respect of Kosovo*, p. 416, para. 30.

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that are of the view that the Tribunal does possess an advisory jurisdiction, there is hesitation as to whether it would be appropriate for the Tribunal to respond to the questions referred for its opinion in the present case.⁸

With your indulgence, Mr President, I will now move to deal with each of these compelling reasons for declining jurisdiction in turn.

The first such reason is that any opinion rendered by the Tribunal in response to the questions referred by the SRFC would not have the character merely of advice given to the SRFC for its own internal purposes. Any such opinion would touch on a range of bilateral and multilateral agreements and affect the position of third States, including Australia, which have not sought the exercise of advisory jurisdiction by the Tribunal.

That this is so is confirmed by Chapter II of the SRFC's written statement, in which it set out a long list of international agreements and non-binding instruments as the "applicable law" for the present case. Yet, yesterday we heard from the SRFC that it seeks an advisory opinion from this Tribunal on the interpretation and application of the MCA Convention and the 1982 Convention alone, and *not* regarding any other bilateral or multilateral instruments.⁹

With all due respect, the wide-ranging questions posed by the SRFC extend well beyond the interpretation and application of the MCA Convention and the 1982 Convention. Indeed, in its oral submissions yesterday, the SRFC expressly invoked relevant provisions of the Fish Stocks Agreement, the Compliance Agreement and the Port State Measures Agreement.¹⁰ The Commission noted, for example, that it was vital for the Tribunal to give its opinion on the effect of certain articles in the Fish Stocks Agreement,¹¹ and welcomed "any and all clarification that the Tribunal may provide of the key provisions of the Convention *and the other international legal instruments* pertaining to the rights and duties of flag States in cases of IUU fishing as well as clarification of the rights and duties of coastal States in an effort to achieve sustainable management of shared stocks."¹²

The President:

I am sorry to interrupt you, Ms Ierino, but would you speak more slowly so that our interpreters can follow?

Ms Ierino:

Yes, Mr President.

The President:

Thank you.

Ms Ierino:

In short, despite its protestations to the contrary, the Commission is asking the Tribunal to clarify the rights and duties of States under a range of conventions and to fill what it sees as existing gaps in the law.

On its face, article 33 of the MCA Convention seeks to define the scope of the questions upon which an advisory opinion may be requested in a very broad manner. However, it does not follow that the SRFC may properly ask questions of the Tribunal which extend well beyond the scope of that Convention and which concern its rights and obligations in relation

⁸ Written Statement of New Zealand, para. 20; First Written Statement of the European Union, paras. 5-17; Written Statement of Japan, para. 18.

⁹ ITLOS/PV.14/C21/1, p. 11 (Bèye Traoré).

¹⁰ ITLOS/PV.14/C21/1, p. 16 (Bèye Traoré).

¹¹ ITLOS/PV.14/C21/1, p. 25 (Bèye Traoré).

¹² ITLOS/PV.14/C21/1, p. 26 (Bèye Traoré).

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to States parties to other conventions that have not consented to the Tribunal's exercise of jurisdiction.

If this were permissible, as Ireland has noted,

any two or more States parties to [the 1982 Convention] could conclude an agreement between them solely for the purpose of obtaining from the Tribunal an advisory opinion on the interpretation or application of specific provisions of the 1982 Convention where such an advisory opinion could not be requested pursuant to any provision of [the 1982 Convention] itself.¹³

In this respect, the current request has been submitted to the Tribunal by seven States Parties to the 1982 Convention – the SRFC Member States. However, any opinion rendered in response to these far-reaching questions would equally affect all 166 States Parties to that Convention, as explicitly recognized yesterday by the SRFC,¹⁴ and others.¹⁵

Further, as you have heard from a number of States,¹⁶ the Fish Stocks Agreement, the Compliance Agreement and the Port State Measures Agreement contain their own dispute resolution mechanisms, which do not confer advisory jurisdiction on the Tribunal.¹⁷ The States Parties to those Agreements have not consented to the granting of an advisory jurisdiction to the Tribunal relating to their interpretation and application.¹⁸

Although, as Germany noted earlier this morning, the International Court of Justice has set aside the principle of consent as a jurisdictional issue in advisory opinions,¹⁹ it has left the principle untouched as a question of judicial propriety. As the Court stated in its Advisory Opinion on *Western Sahara*, “the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion”.²⁰

In this respect, Australia agrees with the European Union that

advisory opinions cannot be used to undermine or circumvent the applicable dispute settlement provisions of the bilateral or multilateral instruments in place ... nor be used to replace or extend the law-making powers that the parties to such agreements confer.²¹

For these reasons, Australia shares the view expressed by other States that any request for an advisory opinion submitted under the MCA Convention may only properly relate to matters internal to the SRFC, and the interpretation or application of the rights or obligations of the SRFC Member States *inter se* under that Convention.²² The Tribunal may touch upon

¹³ Written Statement of Ireland, para. 2.11

¹⁴ ITLOS/PV.14/C21/1, pp. 10 and 26 (Bèye Traoré).

¹⁵ Written Statement of Australia, para. 43.

¹⁶ Written Statement of Australia, paras. 43–47; Written Statement of Thailand, para. 20; First Written Statement of the United Kingdom, para. 47; Written Statement of the United States, para. 36.

¹⁷ Written Statement of the United States, paras. 35–37. See also First Written Statement of the United Kingdom, para. 27.

¹⁸ Written Statement of the United States, paras. 35–37. See also First Written Statement of the United Kingdom, para. 27.

¹⁹ *Interpretation of Peace Treaties*, p. 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951 (“*Reservations to the Genocide Convention*”), p. 19; *Construction of a Wall*, p. 157, para. 47; *Western Sahara*, p. 24, paras. 31–32.

²⁰ *Western Sahara*, p. 25, para. 32, discussing *Interpretation of Peace Treaties*, p.71. See also *Western Sahara*, p. 20, para. 21; *Construction of a Wall*, p. 157, para. 47.

²¹ First Written Statement of the European Union, para. 12.

²² Written Statement of Australia, para. 50; First Written Statement of the United Kingdom, paras. 46–47; Second Written Statement of the United Kingdom, para. 8; First Written Statement of the Netherlands,

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other rules of international law, including the 1982 Convention, incidentally and only insofar as it is necessary to interpret or apply the provisions of the MCA Convention.²³

In discussing the principle of consent in relation to the International Court's advisory jurisdiction, Sir Hersch Lauterpacht described that Court's "attitude of restraint in subjecting, however indirectly, sovereign States to its jurisdiction."²⁴ Australia respectfully invites this Tribunal to adopt a similar attitude of restraint in approaching the present request.

Let me turn to the second compelling reason for declining to respond to the present request, which is that the SRFC is improperly seeking a legislative solution from the Tribunal to the questions it asks.

In its recent statement the SRFC identified numerous perceived "shortcomings" of international law that informed the formulation of the questions submitted to the Tribunal.²⁵ In particular, it pinpointed a number of matters that are "not specified by international law"²⁶ or in respect of which "international law is silent".²⁷ These shortcomings were further amplified yesterday during the oral submissions of the SRFC, and described as "gaps" in international law, which it has asked the Tribunal to fill.²⁸

Australia is sympathetic to the SRFC's desire to ensure that the challenges faced by coastal States in respect of IUU fishing are addressed. However, we respectfully submit that it is not this Tribunal's role effectively to legislate to fill any gaps or silences in the international law pertaining to IUU fishing and management of shared stocks. Indeed, Australia agrees with Argentina that it would be incompatible with this Tribunal's judicial character to do so.²⁹ The judicial function is to state the existing law, not to legislate.³⁰ Any "legislative" solutions must be pursued by States as part of the future codification and progressive development of international law, be it through the development of new treaties or institutions or improvements to those that already exist.

A third compelling reason for declining jurisdiction arises from the impossibility of providing a clear legal answer to the questions posed by the SRFC, which, on their terms, apply indiscriminately to all flag States and all coastal States. Australia agrees with the European Union and others³¹ that the answer to each of the four questions referred to the Tribunal will inevitably differ for each State, including as between the member States of the SRFC, depending on that State's individual bilateral and multilateral treaty obligations.

A number of States, including Australia, also have identified other, more particular concerns, in respect of the formulation of the questions referred to the Tribunal by the SRFC.³² We adopt these submissions, and need say nothing further on this point.

Mr President, let me conclude Australia's submissions. For the reasons stated, both orally and in our written statement, Australia submits that the Tribunal should hold that the SRFC's request does not fall within its jurisdiction or, in the alternative, that the Tribunal should exercise its discretion and decline the request for an advisory opinion.

paras. 2.7 and 2.8; Written Statement of the Argentine Republic, para. 18; First Written Statement of Thailand, p. 5; Written Statement of Ireland, para. 2.11.

²³ Written Statement of the Netherlands, para. 2.9.

²⁴ H. Lauterpacht, *The Development of International Law by the International Court* (CUP, 1982), p. 358.

²⁵ Written Statement of the SRFC, pp. 18–21, 23–25, 51–53.

²⁶ Written Statement of the SRFC, p. 18.

²⁷ Written Statement of the SRFC, p. 23.

²⁸ ITLOS/PV.14/C21/1, pp. 13–19, 24–26 (Bèye Traoré).

²⁹ Written Statement of the Argentine Republic, para. 22.

³⁰ *Threat or Use of Nuclear Weapons*, p. 237, para. 18.

³¹ First Written Statement of the United Kingdom, paras. 44–45; First Written Statement of the European Union, paras. 6–8.

³² Written Statement of Australia, paras. 55–61; Written Statement of the People's Republic of China, para. 90; First Written Statement of the United Kingdom, paras. 51–52.

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Mr President, Members of the Tribunal, thank you for your attention. That concludes the oral statement of Australia in these proceedings.

The President:

Thank you, Ms Ierino, for your statement. The Tribunal will now withdraw for a break until noon. The meeting is now suspended.

(Break)

The President:

I now give the floor to the representative of Chile, Mr Schott.

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STATEMENT OF MR SCHOTT

CHILE

[ITLOS/PV.14/C21/2/Rev.1, p. 24–30]

Mr Schott:

Mr President, I am greatly honoured to appear before this Tribunal on behalf of the Chilean Government to convey our position on this important issue that constitutes Case No. 21, referred to the consideration of this high instance. We are trying to reply to the questions raised in the scope of this advisory opinion, as requested by the Sub-Regional Fisheries Commission of Africa.

Chile appears in this hearing as a member State of the UNCLOS and particularly reaffirming a fundamental purpose, *inter alia* its fight against illegal, unreported, unregulated (IUU) fishing. Our country attaches great importance to this matter from three different viewpoints deriving from its triple status as a coastal State, as a port State, and as a flag State. It also reflects the efforts we are currently making towards implementation of a new national policy intended to reinforce Chile's actions to prevent, deter and eliminate illegal fishing.

Specifically as regards the request for an advisory opinion, our country understands that the jurisdiction of this Tribunal is conferred by the Convention and by the respective rules of its Statutes. As this is an advisory instance, we must highlight two essential items relating to the jurisdiction of the Tribunal to hear and adjudge on the matter referred to its consideration.

Chile is of the opinion that the jurisdiction of this Tribunal to try this request stems from article 138 of the regulations, provided that certain requirements are met, namely, that it be a question made in legal terms, by a qualified entity, under an international agreement that provides for this consultation with the Tribunal and on a matter contained in the Convention. These requirements are met in the instant case. The jurisdiction is in line with the provision of article 21 of the Statute of the Tribunal, according to which “[t]he jurisdiction of the Tribunal comprises all disputes and all applications that are referred to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

As this is an advisory opinion requested by a specific international agency of regional reach and which Chile is not a party to, the reply given by Chile is not intended to establish rules for that agency without having jurisdiction to do so or take part in a contentious matter without having authorization to do so. That is, it only intends to provide elements of analysis for the Tribunal to reply to a regional agency duly authorized by the regulations, bearing in mind that this opinion is not an international judgment and does not have a binding effect.

On the other hand, as the jurisdiction of the Tribunal on this matter stems from a specific sub-regional convention, the parties to that treaty are indeed entitled to the interpretation and implementation of agreements, and under no circumstance should it be considered that either the duty of the Tribunal on the matter or the positions expressed by countries towards the consultation imply a possible involvement in issues dealing with disputes or issues in question between third parties or proper to the regional organization that submits the consultation.

Mr President, the United Nations Convention on the Law of the Sea contains fundamental rules on conservation and use of marine living resources in the exclusive economic zone, in addition to establishing specific rules on the conservation and management of living resources on the high seas, which give rise to important legal consequences for any State in respect of its nationals fishing on the high seas. Such obligations have been implemented and developed in important instruments relating to the status of the flag State. Part XII of the Convention, which refers to the protection and preservation of the marine environment, consistently harmonizes these goals with the sovereign right of States to exploit their natural

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resources and establish policies to protect and preserve such marine environment.¹ Section 9 of Part XII, abovementioned, establishes the responsibility of States according to international law, in compliance with their international obligations relating to the preservation and protection of the marine environment.²

As it will not escape the attention of this Court, although the concept of illegal, unreported and unregulated (IUU) fishing is not contained in those terms in the UNCLOS, the same can be inferred from it. Indeed, it so transpires from the abovementioned article 61 on conservation of living resources, in addition to the provision of article 73 of that Convention which indicates that a coastal State, in the exercise of its sovereign rights for the exploitation, conservation and management of resources should take such measures, including boarding, inspection, arrest, and judicial proceedings against foreign flag merchant vessels as are necessary to ensure compliance with coastal nation rules and regulations adopted in conformity with the Convention.

Further, the 1995 New York Convention³ on Straddling Fish Stocks and Highly Migratory Fish Stocks, which Chile will soon adhere to, contains some guiding principles on fisheries that may help understand the concept of illegal, unreported and unregulated (IUU) fishing. Indeed, the preamble refers to unregulated fishing and to the problems it generates.

The concept of illegal, unreported and unregulated (IUU) fishing as such has been recalled since 1999 in the annual resolutions of the UN General Assembly on Sustainable Fisheries,⁴ mainly because it is one of the most serious problems affecting fish stocks, including straddling and highly migratory, which are overfished or subject to intensive and poorly regulated fishing efforts.

The Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing approved by the United Nations Food and Agriculture Organization, 2001,⁵ first defined IUU fishing from a legal point of view and established the need for national legislation to effectively address all aspects of IUU fishing. It also contains a catalogue of measures to be taken by coastal, port and flag States.

Mr President, by virtue of the foregoing, our country believes that the concept of illegal, unreported and unregulated (IUU) fishing is a sufficiently rooted concept. It can be held that the concept of illegal, unreported and unregulated (IUU) fishing in terms established in the abovementioned Action Plan is part of customary international law. The above is confirmed by the definition of article 1(e) of the said Agreement on Measures of the Port State, which conceptualizes it by referring it to the activities described in paragraph 3 of FAO International Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2001.

Now I will refer to the questions. On question 1, the UN Convention regulates the maritime spaces, including the exclusive economic zone over which coastal States have sovereign rights for exploration and exploitation, natural resources conservation and management, as well as jurisdiction for the protection and preservation of the marine environment.

In this regard, both the UN Convention on the Law of the Sea and the 1995 New York Agreement establish that foreign flagged ships are bound not to conduct fishing activities in a foreign EEZ unless they are granted consent thereto and, in such a case, always observing the internal regulations of the coastal State.

¹ Article 193 of the UNCLOS.

² Article 233 of the UNCLOS.

³ 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁴ A/RES/54/32, 19 January 2000.

⁵ FAO Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. <http://www.fao.org/docrep/003/y1224s/y1224s00.HTM>.

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This obligation entails the flag State making sure its flag vessels – the vessels which have been granted its nationality – do not perform fishing activities within the economic exclusive zone of third party States unless they have the relevant consent.

Article 62 of the Convention provides that where the coastal State does not have the capacity to harvest the entire allowable catch determined by it, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch. It also prescribes that nationals of the States that have been given said rights shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.

On the other hand, flag States must ensure that every vessel flying its flag conducting operations in the exclusive economic zone of third parties exercises its activities in a manner not to undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, sub-regional, regional or global levels. States should also ensure that vessels flying their flags fulfill their obligations on the collection and provision of data relating to their fishing activities.

In the line of the above, mention should be made of the 1995 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which sets out legally binding principles and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, of a non-binding nature.

The Agreement on Compliance specifically envisions the flag State responsibility in this respect.

Accordingly, there are duties upon flag States to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal State's powers to enforce sanctions and measures which cannot be undermined by the flag State.

Question 2 concerns to what extent the flag State shall be held liable for IUU fishing activities conducted by vessels sailing under its flag.

In respect of duties of the flag State under international law, article 94 of the UN Convention sets forth the duties of the flag State, which rules are applicable in the exclusive economic zone to the extent that they do not derogate from, or impinge upon the sovereign rights of the coastal State. By definition, a flag State is entitled to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Likewise, in exercising their rights and performing their duties in the exclusive economic zone, States – including the flag State – shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UN Convention and other rules of international law. It means that no enforcing jurisdiction may be exercised in foreign exclusive economic zones.

The foregoing involves a duty of due diligence upon the flag State in that it must ensure that its vessels comply with its own laws and regulations as well as with those of the coastal State. For that purpose, it has jurisdiction and control over the vessels under its flag, through the adoption of appropriate measures.

Laws and regulations that must be respected include those relating to fishing and, quite particularly, those under article 61, paragraph 1, of the UN Convention related to allowable catch of the living resources of the exclusive economic zone determined by the coastal State.

Article 18 of the New York Agreement also reflects that the duties of the flag State comprise the adoption of such measures as may be necessary to ensure that vessels on the high seas flying its flag comply with sub-regional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the

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effectiveness of such measures. According to this, a flag State may bear responsibility and liability as a consequence of its own conduct.

Furthermore, the obligation for a State to “ensure” that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States is clearly set out in the New York 1995 Agreement.

This Tribunal, in its Advisory Opinion in respect of the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, in 2011,⁶ stated that the sponsoring State’s obligation “to ensure” is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation “of conduct” and not “of result”, and is an obligation of “due diligence”.

Question 3: as previously indicated, according to the law of the sea, especially reflected in the UN Convention, supplemented by the 1995 New York Agreement, and in agreements establishing regional fisheries organizations, such as the South Pacific Regional Fisheries Management Organization, in conjunction with the Plan of Action, the flag State is subject to certain obligations, particularly to exercise effective control and jurisdiction on subjects authorized to fly its flag. This is a consequence of basic principles of international law.

As regards fishing regulations, article 62 of the UN Convention provides that where a coastal State has determined the total allowable catch (TAC) of its exclusive economic zone and that its capacity to harvest living resources there is not sufficient, it shall, through agreements or other arrangements, give the States access to the surplus of the allowable catch. This figure means that a fishing license issued by the coastal State amounts to a permit to conduct fishing activities in the exclusive economic zone.

In this regard, whether this permit is issued in conformity with an international agreement or on the basis of a bilateral agreement, the effect should be the same as to the responsibility and liability of a flag State that is party to said agreements.

As a general conclusion, a breach of the rules of the fisheries legislation of the coastal State by nationals of other States, whether or not there is an international agreement between these States, will not constitute a violation of international law by the flag State or the international agency. On the other hand, a flag State or an international agency may be held responsible for misconduct of flagged vessels fishing in the exclusive economic zone of a coastal State, whenever the flag State and the international agency have failed to comply with their own duties under international law. The liability of the flag State will only arise in the event that the flag vessel of that State conducts IUU fishing operations due to the failure by the first State to observe its own obligations towards that vessel. The same conclusion applies in respect of an international agency.

Question 4: “What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?”

As previously stated, a coastal State has exclusive sovereign rights for the purpose of exploration, exploitation, conservation and management of natural resources in its EEZ. It has competence also to promote the objective of optimal use of living resources. The State, within its powers, will determine the maximum allowable catch thereof, and adopt the conservation and management stock measures that permit their conservation in order to avoid over-exploitation. Such measures must take into account the most accurate scientific data

⁶ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion*, para. 110.

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available to it for the sake of sustainability, and be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

In respect of specific rights and duties, under articles 63 and 64, the UN Convention regulates the situation of straddling species present in the EEZ of two or more coastal States or in the high seas and of highly migratory species. In the first case, coastal States, directly or through proper regional or sub-regional organizations, shall agree on the necessary measures to coordinate and ensure the conservation and development of such stocks. If the said species transits through the EEZ of a State and the adjacent high seas, States involved in the fisheries shall endeavour, directly or through proper regional or sub-regional organizations, to directly agree upon the necessary steps for the conservation of those species in the adjacent area.

Additionally, the New York Agreement asserts the criterion of compatibility of measures (article 7) as an important tool for conservation and management of marine living resources, by projecting the efforts in that regard in the different marine areas. The 1995 Agreement states: “Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible...” and it adds “coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.”

To that end, among other aspects, account should be taken of previously agreed measures and applied for waters under national jurisdiction and ensure that the establishment of measures for the high seas does not undermine the effectiveness thereof. In the event that those measures previously adopted for the high seas are different from those adopted for the EEZ of a coastal State, like care should be taken not to undermine the effectiveness of the former.

It is also worth mentioning that cooperation for conservation and management (article 8) is a fundamental principle that permits an answer to the question made, as it aims at ensuring an effective conservation and management of these stocks.

Therefore, an effective international law on the matter demands that ORP mechanisms be in force so that conservation and management rules and practices around the rights and obligations of flag States and fishing vessels authorized to fly them are generated.

In conclusion, to summarize, it is the view of Chile that a distinction between the various actors is necessary to ascertain the rights and obligations according to the powers of flag States, port States and coastal States.

At the same time, the illegal, unreported, unregulated fishing concept is sufficiently rooted in the law, and there is an *opinio juris* which has been modelled through a series of international agreements, resolutions and domestic laws.

It is the duty upon flag States to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal State’s powers to enforce sanctions and measures which cannot be undermined by the flag State.

Flag States’ duties are not to be equated with the obligations of a flagged vessel. A State obligation is not only different from that which is borne by a vessel, but it is also subject to international principles in which a flag State cannot guarantee – unless with its consent – that any vessel flying its flag does not conduct IUU fishing.

With these conclusions, I complete the presentation of the Republic of Chile. I thank you for your attention.

The President:

Thank you, Mr Schott, for your statement.

We will now hear the representative for Spain, Mr Martín y Pérez de Nanclares.

You have the floor.

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STATEMENT OF MR MARTÍN Y PÉREZ DE NANCLARES

SPAIN

[ITLOS/PV.14/C21/2/Rev.1, p. 30–37]

Mr Martín y Pérez de Nanclares:

Mr President, distinguished Members of the Tribunal, it is a great honour for me to appear before you on behalf of the Kingdom of Spain. Spain recognizes and deeply appreciates your invaluable work in interpreting and developing the law of the sea, as we well know from our recent experience in the “*Louisa*” case.

Today, the questions before us deal with very important issues for international law, and Spain is acutely aware of the important problems created by illegal, unregulated and unreported fishing off West Africa. However, due to the division of powers between the European Union and its member States, our oral statement will not address the merits of the questions submitted to this honourable Tribunal by the Sub-Regional Fisheries Commission. I am also fully aware that it is late and that we are all tired; and since I am the last speaker I will try to speak for no longer than 20 or 25 minutes.

Therefore, I re-assert the content of our written statement, and I will address three main questions in my oral statement.

First of all, I will address the contentious issue of the sources of the Tribunal’s advisory jurisdiction. In that regard, I will consider the doctrine of inherent functions of international courts and tribunals, and other possible sources of advisory jurisdiction.

Second, and more specifically, I will set forth the interpretation proposed by the Kingdom of Spain for article 138 of the Rules of the Tribunal.

Third, I will finish my remarks by addressing the propriety of the exercise of the Tribunal’s advisory jurisdiction. In that sense, Spain considers that the principle of consent of the States should be safeguarded when exercising those functions.

Mr President, I will now begin by analyzing the sources of the advisory jurisdiction of the International Tribunal for the Law of the Sea.

In our opinion, the exercise of advisory jurisdiction is not one of the inherent functions of international judicial bodies. This can be inferred from international case law and international practice, supported by the most respected doctrine.

In fact, we have to bear in mind the distinction in practice between the doctrine of implied powers of international organizations and the theory of inherent functions of international judicial bodies. The former was affirmed by the International Court of Justice (ICJ) in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*. Very seldom have international courts or tribunals referred to the theory of inherent powers of international organizations when determining their own powers and functions. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) mentioned this in its decision in the *Blaskic Subpoena* case of 18 July 1997. However, this holding was reversed by the Appeals Chamber in its decision of 29 October 1997, in which the ICTY preferred to speak of inherent functions of judicial organs, rather than the more general implied powers of international organizations.

Actually the doctrine of inherent functions of judicial bodies has a more specific meaning. It was also formulated by the ICTY in the *Tadic* case. There, the inherent functions were described as follows: “It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents... although this is often done.”

The *Blaskic Subpoena Appeal Decision*, the *Tadic* case and the earlier ICJ *Nuclear Tests* case all set forth the doctrine of inherent functions of judicial bodies. They confirm that international courts and tribunals have inherent functions; however, these are limited to

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ensuring that the exercise of the jurisdiction given expressly to a tribunal or court by its statute is not frustrated, and that its basic judicial functions are safeguarded.

Exceptionally, the notion of inherent functions of judicial organs has been based on a general principle of both domestic and international procedural law. Nevertheless, in the majority of these cases international courts and tribunals have adopted a functional approach.

Indeed, such an approach was used by the ICJ in the *Nuclear Tests* case. According to that approach, some judicial functions have an inherent nature because they are aimed either at ensuring the proper administration of justice or guaranteeing the effectiveness of the courts' jurisdiction.¹

In a manner consistent with that approach, authors such as Oeller-Frahm and Thirlway² have stated that the advisory jurisdiction does not belong to those inherent functions which ensure the proper administration of justice. Thus, it has to be conferred expressly to a court or tribunal. As Amerasinghe has stated:

In the international legal system a judicial tribunal does not have inherent advisory jurisdiction unless its constitutive instruments expressly give it that jurisdiction. Equally the advisory jurisdiction, if expressly attributed to a tribunal, will be confined to the express grant of jurisdiction and only to the extent and within the limits expressly established in such grant.³

Likewise, international practice confirms this idea. An analysis of international tribunals and courts shows that the advisory jurisdiction is subject to an express conferral by the constituent instruments. This is the case of both the established international courts and the more specialized courts and tribunals in the area of human rights or regional integration. The constituent instruments of those international courts and tribunals contain provisions regarding the organs entitled to request an advisory opinion, the rules of procedure and the limits *ratione materiae*.

However, Mr President, there is no such conferral of jurisdiction in UNCLOS or in the Statute of this Tribunal. Detailed provisions regulating the procedure are also absent from those instruments.

Furthermore, the necessity of an express conferral of the advisory jurisdiction of a general nature stands out in comparison with articles 159, paragraph 10, and 191 of UNCLOS, which expressly set forth the advisory jurisdiction of the Seabed Disputes Chamber. Article 40, paragraph 2, of the Statute establishes the authority of the Chamber regarding the procedure.

Therefore, Mr President, how could the absence of those specific dispositions in UNCLOS be interpreted? I would like to underline the fact that in the preparatory works for the Convention no evidence can be found of proposals regarding a true advisory jurisdiction of a general nature.

From our point of view, only recourse to the interpretation of some further dispositions is left.

Mr President, article 288, paragraph 2, of UNCLOS and article 21 of the Statute have been mentioned as constituting a conferral of jurisdiction. Both norms should be read together and interpreted systematically.

¹ Gaeta, Paola, "Inherent Powers of international courts and tribunals", in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, 2003, cites Blaskic subpoena case and Rio Grande Irrigation and Land Company (UK-US arbitral tribunal, 1923).

² Oellers-Frahm, K., "Lawmaking through Advisory Opinions?", *German Law Journal*, 2011, pp. 1033-1056 (p.1); Hugh Thirlway, "Advisory Opinions", in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, online edition (section B.1, para. 4).

³ Chattharanjan Felix Amerasinghe, *Jurisdiction of specific international tribunals*, Martinus Nijhoff Publishers, 2009, p. 199

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It should be stressed that article 288 is located in section 2 of Part XV, dedicated to the binding resolution of disputes, and its wording refers clearly to disputes between parties to a contentious process. It also relates to applications, for example, for provisional measures and the prompt release of vessels.

Let us now turn to article 21 of the Statute. The use of the expression “all matters” has given rise to different interpretations. It reflects the approach of article 36, paragraph 1, of the Statute of the ICJ; and the most respected doctrine does not find evidence that the use of the term “all matters” in this article should encompass anything but disputes.⁴

In any case, a broader interpretation of the word “matters” would be more reasonable in article 36, paragraph 1, of the ICJ’s Statute than in article 21 of the Statute of ITLOS, because the ICJ’s advisory jurisdiction is expressly recognized in article 96, paragraph 2, of the UN Charter. However, UNCLOS does not recognize an advisory jurisdiction of a general nature to the Tribunal.

Finally, if article 21 of the Statute could somehow be construed as accepting the Tribunal’s advisory jurisdiction through the use of the word “matters”, this jurisdiction would be restrictive *per se*. It would be confined, *ratione materiae* and *ratione personae*, to the scope of “any other agreement”, as stated in article 21, which specifically provides for the jurisdiction of the Tribunal.

Therefore, it would not appear as an advisory jurisdiction of a general nature but as a more limited and specific advisory jurisdiction, in the sense given in article 138 of the Rules of the Tribunal. Following Judge Wolfrum’s “consensual” approach, it would emerge as an additionally established jurisdiction based upon the consensus of the parties.⁵

Mr President, I shall now deal with the second issue of this oral statement, namely the specific problems posed by article 138 of the Rules of the Tribunal, its interpretation, and the limits which should be read into it.

In that respect, article 138 of the Rules of the Tribunal is seen as the basis for the request for an advisory opinion submitted by the SRFC to the Tribunal.

May I point out that article 288, paragraph 2, of UNCLOS states that by virtue of an international agreement related to the purposes of the Convention, a group of States or other subjects of international law may grant the Tribunal jurisdiction over disputes between the parties concerning the interpretation and application of that international agreement.

An analogous reading of article 138 of the Rules would allow the parties to an international agreement related to the purposes of the Convention to grant an advisory jurisdiction to the Tribunal. That jurisdiction would then extend over legal questions related to the interpretation of that international agreement and its application to the parties.

Likewise, the Kingdom of Spain considers that the request for an advisory opinion made by the SRFC offers the Tribunal a valuable opportunity to interpret article 138 of the Rules in the light of international law.

In this regard, I would like to stress that article 138 was introduced by the Tribunal in the first version of its Rules in 1997 and has no precedent in the Rules of the Permanent Court of International Justice or the Rules of the ICJ. In our view, this article is in clear need of interpretation. In article 138 we miss not only more precise terms but also the determination of certain prerequisites subject to judicial control, such as those set out in article 96, paragraph 2, of the UN Charter related to the ICJ’s advisory jurisdiction. These prerequisites also appear in article 191 of UNCLOS, concerning the advisory jurisdiction of the Seabed Disputes Chamber. Incidentally, the written statements of some other countries – for example

⁴ Tomuschat (Article 36), *The Statute of the ICJ: A commentary*, Oxford University Press, 2006; Shabtai Rosenne, *The Law and Practice of the International Court*, Martinus Nijhoff Publishers, 2006, p. 641.

⁵ Wolfrum, R., “Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?”, *International Dispute Settlement: Room for innovations?*, Wolfrum, R.; Gätzschmann (eds.), p. 54.

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Japan⁶ and China⁷ – have also taken note of the need for careful interpretation of article 138 of the Rules.

In this respect, it is worth recalling that in the wording of article 138 there are no clear limits on the scope of the “legal questions” submitted to the Tribunal. For the Kingdom of Spain, it is clear that those “legal questions” should have been confined to those concerning the interpretation or application of the international agreement conferring advisory jurisdiction on the Tribunal.

Consequently, the questions posed to the Tribunal in the framework of a request for an advisory opinion should not reach beyond the extent *ratione materiae* and *ratione personae* of the international agreement conferring advisory jurisdiction. In our opinion, this requirement is not fulfilled by the request by the SRFC for an advisory opinion.

In addition, this requirement is reinforced by a second one, namely that the legal questions submitted to the Tribunal should arise within the scope of the competences of the organ requesting the advisory opinion. This requirement was subject to judicial control by the Seabed Disputes Chamber, which found that the questions contained in the request for an advisory opinion in Case 17 arose within the scope of the activities of the Council of the International Seabed Authority. On the other hand, the ICJ examined that requirement in its landmark 1996 advisory opinion on the *Legality of Use of Nuclear Weapons in an Armed Conflict*. There, the ICJ, making a restrictive interpretation of the words “arising within the scope of its activities”, found that there was no sufficient connection between the activities of the World Health Organization and the legal question contained in the request for an advisory opinion. As the written statement of Japan declares, “the entities which are allowed to request an advisory opinion of an international court or tribunal have been strictly limited.”⁸

In this case, essentially the Tribunal is not being asked to make a judicial pronouncement over legal questions arising on the basis of the MCA Convention but to address very general questions pertaining to other instruments of international law.

In our view, an international agreement among a group of States cannot entitle them to submit to the Tribunal legal questions within the scope of agreements other than the one granting advisory jurisdiction. This would entail a way to circumvent or divert the will of the parties to those other instruments.

Moreover, the judicial pronouncement requested from the Tribunal would, in the end, exceed the obligations and rights of the parties to that international agreement.

In that context, it must be taken into account that none of those instruments foresees an advisory jurisdiction of the Tribunal. The parties’ consent is required in order to submit any dispute over the interpretation or application of those instruments to judicial settlement. Furthermore, the Tribunal is being asked to interpret international agreements which do not apply to some parties to the SRFC.⁹

Mr President, let me focus now on the final arguments of the Kingdom of Spain, regarding our concerns about the propriety of the exercise of the Tribunal’s judicial functions.

⁶ Japan WS, para. 11: “The fact that the legal bases for requesting an advisory opinion of the ICJ and the Seabed Disputes Chamber of the Tribunal are only given by the Charter and the Convention respectively suggests that the scope of ‘an international agreement’ as provided in Article 138, paragraph 1, of the Rules of the Tribunal should also require a careful interpretation.”

⁷ China WS, para. 63: “Thus, adopted by the Tribunal, Article 138 of the *Rules of the Tribunal* might arguably amount to a case of the exercise of inherent jurisdiction by the Tribunal. Caution is certainly called for in this respect.”

⁸ Japan WS, para. 10

⁹ Only Guinea and Senegal are parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The ILO 2006 Convention does not apply to any of them.

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Even in the limited scope of the special advisory jurisdiction conferred by an international agreement, due attention must be given to the propriety of the exercise of judicial functions by the Tribunal.

Therefore, when carrying out its advisory functions, the ICJ must satisfy itself as to the propriety of the exercise of its judicial functions. In our view, there is no reason for this honourable Tribunal not to give the same careful considerations to this matter. In that respect, the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent is of great importance.

Mr President, we ask ourselves whether the giving of an advisory opinion in this case would be incompatible with the Tribunal's judicial nature.

Controversies between States cannot be subject to judicial settlement without the consent of the States involved.

In the case of advisory proceedings, obviously the situation is certainly different. First of all, an advisory opinion is not binding, although it carries great authority. In addition, an advisory opinion is given not to States but to the organ entitled to request it.

It follows that no State can prevent the giving of an advisory opinion requested according to international law. However, as mentioned earlier, the consent of States still plays a role if the issuing of an advisory opinion has the effect of submitting a dispute to judicial settlement. This has been affirmed by the ICJ in the *Western Sahara* and *Peace Treaties* opinions and by the PCIJ in the *Eastern Carelia* opinion. Moreover, in the recent advisory opinions about *Construction of a Wall in Occupied Territory* or the *Declaration of Independence of Kosovo*, the ICJ also examined this possible effect.

Taking these considerations into account, let us go back to the request for an advisory opinion by the SRFC. The questions submitted to the Tribunal are not framed in such controversial terms as might be, for example, questions regarding the status of islands and rocks or the requirements for a bay to qualify as historic. Nevertheless, these general questions submitted to the Tribunal by the SRFC may give rise to controversies between States, or between States and international organizations.

The Kingdom of Spain holds that any legal question which could entail a dispute between States would compromise the Tribunal's judicial functions and extend beyond the limits of the special advisory jurisdiction contained in article 138 of the Rules. In this case, the legal questions posed to the Tribunal reach beyond that special jurisdiction and, in our view, the Tribunal should decline the exercise of its jurisdiction.

Moreover, for the Kingdom of Spain it is evident that the questions posed to the Tribunal, by virtue of its general character, are of interest to all States.

Hence, the lack of broad consensus legitimizing the request for an advisory opinion should compel the Tribunal to decline the exercise of its jurisdiction. This lack of consensus is evidenced by a large number of written statements within the framework of this process.

For example, the United States, Argentina, the United Kingdom and the Netherlands¹⁰ have expressed doubts about the legitimacy to request an advisory opinion from the Tribunal.

Mr President, allow me to finish this oral statement by respectfully recording our conclusions.

First, in UNCLOS there are no provisions granting the Tribunal an advisory jurisdiction of a general nature.

¹⁰ United States WS, para. 38, regarding *Additional Discretionary Considerations*: "Finally, responding substantively to the questions posed might encourage States to enter into new international agreements, the sole purpose of which is to confer advisory jurisdiction to the tribunal over a matter under another agreement that does not confer such jurisdiction."

More generally, regarding the sources and scope of the Tribunal's advisory jurisdiction, Argentina WS, paras. 13-17, UK First WS, para. 25 to 27, Netherlands First WS, par. 2.3.

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Second, neither can article 21 of the Statute of the Tribunal be construed as a basis for that advisory jurisdiction. Even if some advisory functions could be read into that article, the advisory jurisdiction of the Tribunal should be of a specific and restricted nature.

Third, in our opinion, article 138, paragraph 1, of the Rules of the Tribunal should be interpreted by the Tribunal as limited *ratione materiae* and *ratione personae* to the scope of the international agreement conferring advisory jurisdiction. In this particular case, article 138 of the Rules cannot be the legal basis for the request for an advisory opinion.

In conclusion, there are compelling reasons for the Tribunal to decline the exercise of these judicial functions. On the one hand, they are linked to the guarantee of the principle of consent by States for their disputes to be submitted to judicial settlement. On the other hand, they emanate from a lack of broad consensus legitimizing the request for an advisory opinion.

Mr President, distinguished Members of the Tribunal, I trust that this statement has helped to clarify the issues at stake. Let me once more reiterate the gratitude of the Kingdom of Spain to this Tribunal and the great honour that it has been for me to address Your Excellencies.

I thank you for your attention.

The President:

Thank you, Mr Merino de Mena, for your statement.

That concludes the oral statements for today.

The hearing will resume tomorrow morning at 10 a.m. to hear the statements of Micronesia, New Zealand, the United Kingdom, Thailand and the European Union.

I wish you a pleasant afternoon.

(The sitting closes at 12.57 p.m.)

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PUBLIC SITTING HELD ON 4 SEPTEMBER 2014, 10.00 A.M.**Tribunal**

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, KELLY, ATTARD, KULYK; Registrar GAUTIER.

List of delegations: [See sitting of 2 September 2014, 3.00 p.m.]

AUDIENCE PUBLIQUE TENUE LE 4 SEPTEMBRE 2014, 10 HEURES**Tribunal**

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, Mme KELLY, MM. ATTARD, KULYK, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 2 septembre 2014, 15 heures]

The President:

Good morning. Today we will continue the hearing in Case No. 21 concerning the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission. At this public sitting we will hear oral statements from Micronesia, New Zealand, United Kingdom, Thailand and the European Union.

I now invite the representative of the Federated States of Micronesia, Mr Mulalap, to take the floor.

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STATEMENT OF MR MULALAP
FEDERATED STATES OF MICRONESIA
[TLOS/PV.14/C21/3/Rev.1, p. 1–8]

Mr Mulalap:

Mr President, distinguished Members of the Tribunal, good morning. It is a deep pleasure and a tremendous honour for me to represent the Federated States of Micronesia and deliver an oral statement on its behalf in Case No. 21.

At the outset, I wish to inform the Tribunal that this oral statement will supplement the written statement that was submitted by the Federated States of Micronesia to the Tribunal on 29 November 2013. This oral statement will spend considerable time discussing the issue of whether the Tribunal has the jurisdiction to issue the advisory opinion requested by the Sub-Regional Fisheries Commission and, if so, whether the Tribunal should exercise its discretion to issue the opinion. This oral statement will conclude with relatively brief updates to the responses that the Federated States of Micronesia made in its written statement to the four questions from the Sub-Regional Fisheries Commission.

Additionally, I wish to inform the Tribunal that for the rest of this oral statement, in the interests of brevity, I will refer to the Federated States of Micronesia as simply “Micronesia”, knowing full well that the name “Micronesia” is more properly reserved for an entire geographical region of Oceania containing many island States in addition to my own State.

Mr President, this Tribunal has an opportunity to deliver an advisory opinion as a full body on several matters of critical importance for all States, particularly a small-island developing State like my own. Micronesia is eager to participate in this historic occasion. Micronesia understands, however, that there is some uncertainty over whether the Tribunal has the jurisdiction to issue the requested advisory opinion and, if so, whether the Tribunal should exercise that jurisdiction. Although Micronesia discussed the issue of the Tribunal’s jurisdiction in chapter 2 of its written statement, the matter deserves a deeper analysis.

As a fundamental matter, it should be noted that an advisory opinion is, by its nature, not intended to settle contentious disputes and should not be taken by any party, whether a State, international organization, or some other entity, as imposing legally binding obligations. Rather, an advisory opinion presents legal advice on matters referred to the issuing body by another entity, so as to assist that entity in its affairs. A State cannot object to the Tribunal exercising jurisdiction in issuing an advisory opinion simply because the State is not a party to the entity that requests the advisory opinion. No dispute is directly resolved by an advisory opinion, and no State is bound by an advisory opinion unless the State is part of the entity that requests the advisory opinion and subsequently implements the opinion as obligations for its constituents. Indeed, a State can formally and publicly disagree with the legal conclusions identified and presented by an advisory opinion without necessarily breaching international law.

As another fundamental matter, it should be noted that an entity which requests an advisory opinion is entitled to set the limits, if any, for the content of its request. Similarly, the body issuing the opinion is entitled to set the limits, if any, for the content of the opinion. There is no hard and generally applicable rule under international law as to what those limits should be for the requesting and issuing entities; it is up to those entities to dictate their own limits.

As a final fundamental matter, it should be noted that even if a body finds that it has jurisdiction to issue a requested advisory opinion, the body can exercise its discretion to not issue the opinion, assuming that the body has such discretion. However, there is, once again, no hard and generally applicable rule under international law establishing grounds on which the body must base its discretion. On the one hand, as the International Court of Justice noted

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in paragraph 33 of its judgment in the *Western Sahara* case, the body could choose to be cautious with honouring requests if honouring those requests “would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent”.

On the other hand, as the International Court of Justice noted in paragraph 50 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the body could choose to issue a requested advisory opinion, despite the danger of engaging in a judicial settlement of a dispute, if the subject of the advisory opinion is “on a question which is of particularly acute concern, and one which is located in a much broader frame of reference than a bilateral dispute”.

This becomes an issue of admissibility rather than jurisdiction, but in either situation the bedrock analysis is the same: the requested body is bound only by its constituent instruments when it comes to deciding whether it has jurisdiction to issue a requested advisory opinion and, if so, whether it shall exercise the discretion to issue the opinion.

The constituent instruments of the Tribunal are the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Statute of the Tribunal (which is an annex to UNCLOS), and the Rules of the Tribunal. UNCLOS is the primary instrument from which the Statute of the Tribunal derives its authority. The Rules of the Tribunal, in turn, derive their legitimacy from the Statute of the Tribunal (and, by extension, UNCLOS). There must be harmony between the three instruments, but this harmony does not necessarily require that each instrument fully reflects all the provisions in the other instruments. This would be unduly cumbersome. It cannot be expected that UNCLOS, for example, should contain overly technical guidance on how a State can engage in proceedings before the Tribunal. Rather, as is the general practice in contemplative legal bodies, the primary constituent instrument establishes a framework within which the subsidiary instruments flesh out the content of the primary instrument. As long as the subsidiary instruments do not directly contradict the provisions of the primary instrument, then there is harmony between the instruments.

Proceeding down this hierarchy of instruments, we can note that the main text of UNCLOS does not expressly address the issue of whether the full Tribunal can issue an advisory opinion. However, UNCLOS contains a number of annexes, all of which were negotiated by the parties that adopted UNCLOS, and all of which, according to article 318 of UNCLOS, are considered integral parts of UNCLOS. Thus, there is a presumption that the annexes are in harmony with UNCLOS.

Annex VI of UNCLOS contains the Statute of the International Tribunal for the Law of the Sea. Articles 16 and 21 of Annex VI are of particular relevance to our discussion today. Article 16 grants the Tribunal the authority to “frame rules for carrying out its functions.” Article 21 recognizes the Tribunal’s jurisdiction to perform some of those functions. Specifically, article 21 recognizes the Tribunal’s jurisdiction as comprising “all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

Micronesia asserts that the phrase “all matters” in article 21 is inclusive of the phrase “all disputes and all applications” in the same article. Further, the distinction drawn by article 21 between “disputes” and “applications” clearly indicates that the Tribunal has jurisdiction over non-contentious matters, as contained in “applications” rather than “disputes.” There would be no other reason to separate the terms “disputes” and “applications” in article 21. Therefore, article 21 recognizes the Tribunal’s jurisdiction to not just adjudicate disputes conferred upon the Tribunal by some agreement other than UNCLOS but also non-contentious “applications,” which Micronesia asserts include requests for advisory opinions.

Having established that the Tribunal has jurisdiction under its Statute to carry out functions relating to advisory proceedings, we now turn to the procedural requirements for

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such proceedings. As I noted earlier, article 16 of the Statute of the Tribunal grants the Tribunal the authority to adopt rules for carrying out its functions, one of which is conducting advisory proceedings. In that vein, the Tribunal adopted article 138 of its Rules. Article 138, paragraph 1, states 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.”

As previously explained in paragraph 7 of Micronesia’s written statement, the request from the Sub-Regional Fisheries Commission to the Tribunal for the advisory opinion in Case No. 21 meets the procedural elements contained in article 138.

Thus, there is a flow, a harmony of sorts, between UNCLOS, its Annex VI, and the Rules of the Tribunal, a flow that, at the very least, does not foreclose the possibility of the Tribunal issuing the advisory opinion requested by the Sub-Regional Fisheries Commission. Article 138 of the Rules of the Tribunal performs a legitimate role contemplated by articles 16 and 21 of Annex VI, which were negotiated and adopted by the drafters of UNCLOS, as well as accepted as binding by States Parties to UNCLOS. In other words, the drafters of UNCLOS and the States Parties to UNCLOS have endorsed a set of texts that, when read together, allow for the full Tribunal to issue advisory opinions.

Nevertheless, in their written statements in Case No. 21 some States argued that the Tribunal cannot confer onto itself advisory jurisdiction that is not conferred upon it by the Tribunal’s constituent instrument. However, as I noted earlier, article 21 of Annex VI, an “integral part” of UNCLOS, arguably confers such jurisdiction on the Tribunal; the Tribunal is not conjuring up jurisdiction from nowhere but is instead acting in full compliance with its own Statute, as imposed on the Tribunal by the drafters of UNCLOS.

Some States also argued in their written statements and in these oral proceedings that even if article 21 could be read to confer such jurisdiction, it is at best an implicit conferral, whereas only an explicit conferral is sufficient. However, there is no basis in international law for such a line of argument. On the contrary, as the International Court of Justice recognized in page 182 of its advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, a body may possess certain implied powers that “are conferred upon [the body] by necessary implication as being essential to the performance of its duties.” Micronesia contends that the issuance of an advisory opinion is essential to the Tribunal’s performance of its duties. Pursuant to article 288, paragraph 2, of UNCLOS, the Tribunal has a broad competence for dispute-settlement beyond Part XV of UNCLOS, so that the Tribunal essentially opens itself up as a permanent international court ready for submissions from any entities, including those not parties to UNCLOS. The Tribunal’s duties, therefore, are potentially expansive, limited mainly by the political will of other entities to submit disputes and applications relating to UNCLOS to the Tribunal. By pondering and issuing advisory opinions that survey the international law of the sea, the Tribunal will enhance global understanding of the international law of the sea and give guidance to States and other entities on how they should handle international law of the sea matters. Such an enhancement of understanding will, in turn, allow the Tribunal to perform its expansive dispute-settlement duties much more effectively in the future. In that sense, advisory proceedings are “essential” to the Tribunal’s “performance of its duties.”

Some States, in their written statements, attempted to delve into the negotiating history of UNCLOS in order to determine the intent of the drafters of UNCLOS, particularly with regard to article 21 of Annex VI. However, there is no cause to delve into the *travaux préparatoires* of UNCLOS or Annex VI, because the ordinary meaning of the relevant language in the relevant provisions of those instruments is sufficient, as I previously argued. Even if the Tribunal were to interpret those provisions in light of their “object and purpose” (as dictated by article 31 of the 1969 Vienna Convention on the Law of Treaties),

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Micronesia's interpretation of those provisions still stands. Article 1 of the Statute of the Tribunal proclaims that the Tribunal must function in accordance with UNCLOS. The preamble to UNCLOS notes that a primary purpose of UNCLOS is the establishment of

a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment.

These principles, these objectives and purposes, suffice UNCLOS and arguably justify the existence of the Tribunal as a guardian of the aforementioned "legal order for the seas and oceans." This guardianship role, as I previously noted, is an expansive one, allowing the Tribunal to deal with disputes and applications beyond Part XV of UNCLOS and involving even non-States Parties to UNCLOS. The reference to "all matters" in article 21 of Annex VI, therefore, should be viewed in as expansive a manner as possible, as befitting the guardianship role of the Tribunal under UNCLOS.

Some States argued in their written statements and in these oral proceedings that even if the Tribunal has jurisdiction to issue the requested advisory opinion, the Tribunal should exercise its discretion to not issue the opinion altogether. States are particularly concerned that the advisory opinion will prejudice existing or potential legal disputes between States, especially UNCLOS-related disputes. Micronesia wishes to re-emphasize, however, that an advisory opinion issued by the Tribunal will be non-binding and cannot be used by disputants as precedent in the settlement of their disputes. Furthermore, every advisory opinion contains an identification and presentation of law, and every legal principle in international law has its detractors who dispute their legitimacy, so every advisory opinion will, in some manner, touch on either existing or potential legal disputes. That should not be enough to bar the issuance of an advisory opinion. If it were enough, then no advisory opinion could ever be issued. Something more is needed – perhaps an analysis of an existing dispute that arrives at what is, for all intents and purposes, a "judgment" on the merits of the dispute.

Micronesia is aware of the concerns of its fellow States, however, and so Micronesia proposes that the Tribunal issue an advisory opinion characterized by a sufficient level of abstraction and generality, without delving into the specifics of existing or potential legal disputes, but also without depriving the opinion of practical use for the Commission and the international community. When identifying and discussing particular legal principles, the Tribunal can note dissenting and conflicting views among States regarding those principles, without necessarily siding with certain views. The rather general nature of the questions submitted by the Sub-Regional Fisheries Commission should make this task easier to accomplish.

Micronesia does not, however, support the argument of some States that any advisory opinion issued by the Tribunal should necessarily be limited in its scope to the Members of the Sub-Regional Fisheries Commission and the activities they perform under the relevant instruments of the Commission, particularly the MCA Convention. The Tribunal is not required by any of its constituent instruments to limit itself in such a manner. Article 21 of Annex VI and article 138 of the Rules of the Tribunal allow the Tribunal to deal with requests for advisory opinions submitted pursuant to agreements other than UNCLOS, but neither article requires the Tribunal to limit those advisory opinions either to the scope of activities in those agreements, or to the parties to those agreements. The scope of the Tribunal's advisory opinions in those situations is limited only by the terms of the requests for the advisory opinions, assuming that those terms comply with article 138 of the Rules of the Tribunal. If the drafters of UNCLOS had wanted to limit the Tribunal's advisory

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jurisdiction to the scope of activities performed under those agreements by the parties to those agreements, then the drafters could have employed language similar to article 96 of the United Nations Charter, which allows United Nations organs other than the Security Council and the General Assembly to “request advisory opinions of the [International] Court [of Justice] on legal questions arising within the scope of their activities.” No such language is employed in UNCLOS, including in any of its annexes.

Micronesia concedes that the general purpose of an advisory opinion is to furnish legal advice to a requesting entity in order to assist the entity in the performance of its legal actions. However, even if the Tribunal were to limit the advisory opinion to the MCA Convention, other relevant instruments of the Sub-Regional Fisheries Commission, and the members of the Commission, the Tribunal can still discuss general principles of the international law of the sea when addressing the four questions submitted by the Commission. After identifying and discussing those general principles, the Tribunal can then discuss the activities of the members of the Commission under the relevant instruments in light of those principles. The important point is that the Tribunal engages in that general, systematic survey of the relevant principles of the international law of the sea and presents its findings through an advisory opinion that will provide legal advice to the Commission in order to assist the Commission in its performance of its functions, as well as guide the international community.

Finally, if States Parties disagree with the Tribunal possessing and exercising jurisdiction to issue the advisory opinion requested in Case No. 21, then the proper course of action is for States Parties to amend UNCLOS to explicitly limit or renounce the Tribunal’s advisory jurisdiction. For the time being, the Tribunal can only proceed in accordance with the adopted and ratified provisions of UNCLOS and its subsidiary instruments, provisions which arguably grant the Tribunal advisory jurisdiction in Case No. 21.

Turning to Micronesia’s responses to the four questions submitted to the Tribunal by the Sub-Regional Fisheries Commission, Micronesia wishes to make the following additions to, and clarifications of, the detailed responses Micronesia made in its written statement.

On question 1, Micronesia notes that the most extensive international treatments of the legal scope and ramifications of illegal, unreported, and unregulated fishing (IUU fishing), as well as flag State responsibility for IUU fishing, are currently contained in a number of soft law instruments, as noted in paragraphs 23, 32, and 33 of Micronesia’s written statement. Despite being soft law, these instruments reflect existing hard international law – particularly the customary international law principle imposing responsibility on a State to refrain from actions within its jurisdiction or control that damage the environment of another State. The Tribunal should not hesitate to examine such soft law instruments when surveying the obligations of flag States to address the IUU fishing of their flagged vessels in the exclusive economic zones of third party States.

On question 2, Micronesia wishes to reiterate its general position from paragraphs 46 to 52 of its written statement. In the absence of explicit direct obligations or liabilities imposed on a flag State by an instrument, measure, or some other international arrangement, the flag State has a due-diligence obligation under international law to ensure that its flagged vessels do not engage in IUU fishing on the high seas and in the national waters of third party States; the failure of the flag State to discharge its due-diligence obligation is an internationally wrongful act that incurs State responsibility – which, in this context, is synonymous with the notion of liability, and which can be addressed only through reparation in the form of restitution, compensation, or satisfaction from the flag State to the injured State or the injured regional fisheries management organization (RFMO).

Micronesia further notes that under the international law on State responsibility for internationally wrongful acts, an injured State can take lawful countermeasures against a

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State responsible for such wrongful acts, in order to induce the delinquent State to cease its wrongful acts and provide reparation to the injured State. Micronesia alludes to countermeasures in paragraph 44 of its written statement, which discusses how some RFMOs and injured coastal States have black-listed flag States that fail to comply with relevant regulations to prevent, deter, and eliminate IUU fishing conducted by their flagged vessels.

Micronesia additionally notes that under the international law on State responsibility for internationally wrongful acts, as codified in article 42 of the International Law Commission's articles on the same topic, any State can invoke the responsibility of another State to discharge a breached obligation and provide reparation if "the obligation breached is owed to ... the international community as a whole," even if the State invoking the responsibility is not the directly injured State. Although there is no definitive listing in international law of obligations owed by each State to the international community as a whole, it is Micronesia's contention that the proper management of the health and resources of the world's Ocean is one of those obligations. The preamble to UNCLOS notes that the "problems of ocean space are closely interrelated and need to be considered as a whole," and asserts that the peaceful and equitable use, conservation, study, protection, and preservation of the marine environment must "take ... into account the interests and needs of mankind as a whole" and "promote the economic and social advancement of all peoples of the world." States Parties to UNCLOS, as well as non-States Parties that are nevertheless bound by the customary nature of the provisions of UNCLOS, therefore owe a legal obligation to the international community as a whole to safeguard the world's fragile Ocean for the benefit of all mankind. Although UNCLOS establishes a regime of maritime zones, that regime does not undermine the notion that the world's Ocean is a singular expanse – an "Oceanscape" – where activities in one area affect other areas and the livelihoods of all of the world's people. In managing their own maritime zones, States and RFMOs must be cognizant of the zones of others, as well as the overall Ocean. This is particularly necessary with IUU fishing, a scourge of the Ocean that, by definition, knows no boundaries.

On question 3, Micronesia wishes to note that the reference to "international agency" in the English text of the question should be read by the Tribunal to be synonymous with "international organization," as is the case in the French text of the question. Micronesia's responses to question 3 in its written statement operate with that understanding.

Additionally, Micronesia notes that the attribution of an internationally wrongful act to an international agency should not be confused with the attribution of an internationally wrongful act to a Member State of that agency. If the Member State engages in wrongful acts over which the international agency has no oversight, then the liability for the wrongful acts belongs to the State rather than the agency. However, if the international agency has the obligation to deter, eliminate, or prevent those wrongful acts committed by the Member State, then the failure to discharge that obligation would be an internationally wrongful act attributable to the international agency, thereby requiring the agency to discharge its obligation and make reparation.

Finally, on question 4, Micronesia asserts that although the 1995 United Nations Fish Stocks Agreement does not enjoy the near-universal ratification of UNCLOS, the Agreement nevertheless contains a number of key principles regarding the sustainable management of the Ocean's resources that are now customary international law. Those principles include the obligation to cooperate to conserve marine living resources and the precautionary approach. Both principles have been repeatedly endorsed by the United Nations General Assembly in its annual resolution on sustainable fisheries, a clear indication of State practice.

Mr President, to conclude, please allow me to direct you to the flag of the Federated States of Micronesia. The flag is a deceptively simple one: four white stars situated on an expanse of blue. The four stars represent not just the four main island groups of Micronesia,

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but also the tradition of instrument-free Ocean wayfinding that allowed my people's ancestors to sail millennia ago from Asia, establish far-flung roots in the Pacific, and build empires beyond the shores of their island homes using nothing but wind, current, and stars. The blue, of course, is the Ocean, vast, and historically a source of succour for my people. The Ocean, despite its various maritime zones, is a singular entity, an "Oceanscape", and there is a need for a permanent international judicial body like the Tribunal to provide legal guidance on the rights, obligations, and liabilities of all States with regard to the proper utilization and management of the Ocean and its fragile resources. To safeguard the health of the Ocean and its resources is a profound historical and cultural obligation for the people of Micronesia, one that is nearly akin to the obligation to care for one's elders. A healthy and productive ocean is synonymous with a healthy and productive Micronesia. Micronesia submits that this is the same for all other States in our blue world.

With deepest gratitude and respect, and apologies for speaking for a long time, I thank you, Mr President, and the honorable Members of the Tribunal for allowing me to speak here today on behalf of Micronesia. In my native tongue, *siro', ma karim'magar gad*.

The President:

Thank you, Mr Mulalap, for your statement.

I now call on the representative of New Zealand. Ms Ridings, you have the floor.

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STATEMENT OF MS RIDINGS

NEW ZEALAND

[ITLOS/PV.14/C21/3/Rev.1, p. 8–16]

Ms Ridings:

Mr President, Members of the Tribunal, it is an honour to appear before you in these proceedings and to do so on behalf of New Zealand.

Mr President, as other speakers have emphasized, these are highly significant proceedings for the Tribunal. The questions contained in the request made by the Sub-Regional Fisheries Commission raise issues of both procedure and substance. Those issues go to the extent of the Tribunal's jurisdiction to issue advisory opinions. They go also to the heart of flag State responsibility, a bedrock concept in the law of the sea.

Moreover, the request before the Tribunal concerns the real and urgent problem of illegal, unregulated and unreported fishing, a problem which undermines efforts to achieve sustainable fisheries, and which poses a particular threat to small island and developing States. The IUU problem is particularly acute not only in West Africa, but also in the Pacific region to which New Zealand belongs. After West Africa, the western and central Pacific Ocean is the region with the highest rate of IUU fishing in the world.¹ It is estimated that annual losses due to IUU fishing in the western Pacific region could be as high as 1.5 billion US dollars.² This is a significant loss to the small island States of the region, whose economic wealth lies in the natural resources of their exclusive economic zones.

The particular nature of IUU fishing dictates the response to it. IUU fishing is like the Hydra of ancient myth: no sooner is one head cut off, but two others grow in its place. Vessels are continually renamed and reflagged to stay ahead of authorities. Operators are shielded by company structures. IUU activity can be cleverly masked by ostensibly legitimate operations. An IUU vessel may be flagged to one State, beneficially owned by a company registered in a second State, and operated by nationals of a third State. The only solution is one where all relevant States take responsibility and play their part.

Mr President, in these submissions I will not repeat the detail of New Zealand's written statements, nor attempt to give comprehensive answers to the questions raised. I will instead focus on four key points. First, I will make a few observations on jurisdiction and admissibility; second, I will address the obligations of the flag State, as raised by question 1 of the Request; third, I will address the accompanying liability arising from those obligations, as raised by questions 2 and 3; and I will conclude with the rights and duties of the coastal State in relation to shared stocks, as raised by question 4.

Mr President, the questions of jurisdiction and admissibility have been comprehensively addressed in the written and oral statements before the Tribunal. I shall not attempt to traverse that well-trodden ground further, but will offer three short observations.

First, the Tribunal has the competence to determine the extent of its own jurisdiction. In doing so, it must act in accordance with the Statute, the Rules and the provisions of the Convention.

Second, rule 138 of the Rules of the Tribunal expressly contemplates that the Tribunal may render an advisory opinion in response to a request such as that submitted by the SRFC; but it does not require it to do so. The wording of the rule is clear that the Tribunal retains the ability to decline a request if it considers that is necessary to protect its judicial role.

¹ World Ocean Review "Illegal Fishing: Where Does IUU Fishing Take Place?" <http://worldoceanreview.com/en/wor-2/fisheries/illegal-fishing/> (accessed on 28 August 2014).

² Forum Fisheries Agency, *Request for Proposals – Quantification of IUU fishing*, <http://www.ffa.int/node/845> (accessed 2 September 2014).

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Third, in New Zealand’s opinion, the questions addressed in the SRFC Request are legal questions. However, they do raise issues of general international law that go beyond the ambit of the MCA Convention under which the request has been made. Accordingly, should the Tribunal find that it has jurisdiction, it may be necessary to interpret the questions further, and perhaps to narrow their scope, in the interests of greater precision. In that regard, I note that New Zealand has interpreted all of the questions in the Request as relating to fishing within the exclusive economic zone. This seemed an appropriate interpretation given the particular context within which the Request has been made.

Mr President, I will now move to address the issues relating to the obligations of the flag State, which are raised by question 1 of the Request.

As a starting point, New Zealand recalls the primacy of coastal State authority within its exclusive economic zone. The duty to comply with coastal State laws forms a fundamental part of the legal and political bargain underpinning the concept of the EEZ. That duty is recorded in the Convention in both articles 58, paragraph 3, and 62, paragraph 4; it attaches to all States. As the language of article 62, paragraph 4, itself reflects, all States have an obligation to ensure that their nationals comply with the laws and regulations of the coastal State when fishing in its EEZ.³

It is therefore of little surprise that the written statements submitted to the Tribunal agree that a flag State is under a legal duty to exercise effective control over its vessels when fishing in the EEZ of another State.⁴ As this Tribunal has recognized in the *M/V “SAIGA”*⁵ and *M/V “Virginia G”*⁶ cases, that duty flows from the long-standing freedom of a State to allow vessels to fly its flag. Put plainly, such freedom comes with responsibility.

The flag State’s duty of effective control was expressed in article 5 of the 1958 High Seas Convention, reaffirmed in article 94 of the 1982 Convention, and expressly applied to fishing vessels by both the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. It has repeatedly been recalled by the members of the United Nations, most recently by the General Assembly in its resolution 68/71, adopted by consensus on 9 December 2013.⁷

The existence of that duty is therefore not in any serious contention; nor, I submit, is its content. The content of the duty of effective control has been described in some detail in several legal instruments adopted under the auspices of the Food and Agriculture Organization of the United Nations. These include the 1995 Code of Conduct for Responsible Fisheries, the 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing, and the Voluntary Guidelines for Flag State Performance adopted in 2014.

These may be non-binding instruments, as statements before the Tribunal have pointed out.⁸ However, they represent internationally agreed standards adopted in order to describe the content of the general duty recognized by international law. To that extent, they have their own normative value. They are a classic example of the type of “soft-law” instruments that, to borrow the words of respected commentators Patricia Birnie and Alan Boyle, “serve as

³ See New Zealand WS at [32]-[35].

⁴ See New Zealand WS2 at [3].

⁵ *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) (Case No. 2)*, Judgment of 1 July 1999 at [83].

⁶ *The M/V “Virginia G” Case (Panama/Guinea-Bissau) (Case No. 19)*, Judgment of 14 April 2014 at [113].

⁷ General Assembly Resolution A/RES/68/71 *Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments* at PP21, OP6, 51 and 53.

⁸ See Thailand WS2 at [22].

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agreed standards for the implementation of more general treaty provisions or rules of customary international law”.⁹

It is clear from these instruments that the duty of effective control is not merely a passive duty. It requires the flag State to take active steps to ensure that its vessels comply with coastal State laws when fishing in the EEZ of another State. As such, the duty requires “due diligence” on the part of the flag State. Using the words of the Seabed Disputes Chamber, it requires the flag State to “deploy adequate means, to exercise best possible efforts, to do the utmost”¹⁰ to ensure that its vessels comply.

It is therefore not enough for a flag State simply to adopt laws to control its vessels. As the International Court of Justice has noted in the *Pulp Mills case*, due diligence requires “also a certain level of vigilance in [the enforcement of such laws] and the exercise of administrative control”.¹¹

The duty of effective control therefore carries with it the expectation that the flag State will vigilantly take all reasonable and appropriate measures to control the actions of its fishing vessels.

The international community has clearly identified what measures are “reasonable and appropriate” in this context through a number of international legal instruments as I have outlined.¹² As a minimum, a flag State must: maintain records of its fishing vessels; require its vessels to be authorized to fish in coastal State waters; require its vessels to be properly marked and easily identifiable; monitor the activities of its vessels and the catches taken; and investigate, prosecute and sanction violations of applicable coastal State laws, in cooperation with the coastal State concerned.

Greater vigilance in the application of these measures can be expected when a vessel fishes in the EEZ of a developing State, as such States frequently lack the technical capacity for the monitoring, surveillance and enforcement necessary to combat IUU activity.¹³

Mr President, I now turn to my third point – the liabilities that flow from the duty I have just described.

There is a broad concurrence amongst the written statements before the Tribunal that a failure by a flag State to exercise effective control over its vessels entails international legal responsibility under the ordinary rules of international law.¹⁴

That is not to say that a flag State is directly responsible for the IUU fishing undertaken by its vessels. However, it is responsible for its own failure to take the steps necessary to discharge its own duty to exercise effective control over its vessels in order to prevent IUU fishing from taking place. Responsibility thus flows from the conduct of the flag State itself.

The legal consequences of responsibility have been definitively analyzed by the International Law Commission in its *Draft Articles on Responsibility of States*.¹⁵ The Draft Articles set out the content of international legal responsibility and the circumstances in which such responsibility may be invoked. They codify the central principle that the responsible State is under an obligation to make full reparation for the injury caused by its internationally wrongful act.¹⁶ Such reparation may take the form of restitution,

⁹ Birnie, Boyle & Redgwell *International Law and the Environment* (3rd ed, Oxford University Press, 2009) at 35.

¹⁰ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, (Case No. 17), Advisory Opinion of 1 February 2011 at [110].

¹¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14 at [197].

¹² See New Zealand WS at [31] and WS2 at [5].

¹³ See Somalia WS at II(5); New Zealand WS2 at [7].

¹⁴ See New Zealand WS2 at [9].

¹⁵ *Report of the International Law Commission (A/56/10)*, 2001 chp.IV.E.1.

¹⁶ Draft Article 31(1).

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compensation and satisfaction, either singly or in combination.¹⁷ The blacklisting of offending vessels may also be an appropriate sanction in some circumstances.¹⁸ However, beyond that, I do not think that it is necessary, or indeed appropriate, to attempt to state in the abstract what remedy will be most applicable in any given case.

Whether a flag State has failed to discharge its duty of effective control will be a question of fact. As noted by the Seabed Disputes Chamber, such failure may arise from an act or an omission to act.¹⁹

A consistent pattern of IUU fishing by the vessels of a particular flag State may raise a presumption that the flag State is failing to discharge its duty of effective control. To quote the respected legal maxim – *res ipsa loquitur* – such facts will speak for themselves.

However, New Zealand does not consider that this means that it is necessary to establish a consistent pattern of IUU activity, or a systemic failure, in order to establish that a flag State has failed to exercise effective control. A flag State may also breach its duty in a specific case where the facts demonstrate that the flag State has not taken the steps it should have done in order to control the actions of a vessel flying its flag.²⁰

Mr President, the SRFC Request also raises the question: What if a vessel is operating under an access agreement concluded not with the flag State but with an international organization of which the flag State is a member? Does the international organization also incur responsibility? That, as New Zealand understands it, is the question posed in question 3 of the Request.

As a starting proposition, a breach by an international organization of its international obligations will entail responsibility at international law. That point was recognized by the International Court of Justice in the *Special Rapporteur* case.²¹ It was further reflected by the International Law Commission in its *Draft Articles on Responsibility of International Organizations*.²²

New Zealand therefore agrees with the view expressed by several submitters that the international organization will be legally responsible if it fails to comply with the obligations that it has assumed under an access agreement.²³

As noted by the European Union, it is reasonable to expect that such an access agreement will include an obligation on the part of the international organization to take appropriate steps to ensure that vessels comply with the terms of access.²⁴ This would include compliance with the laws of the coastal State. Such an obligation gives rise to its own due diligence obligation on the part of the international organization. The international organization will therefore be responsible if it fails to take the steps necessary to ensure compliance with the terms of the agreement. New Zealand therefore accordingly agrees with the points that have been made to this effect by Somalia,²⁵ the Federated States of Micronesia²⁶ and Chile.²⁷ The

¹⁷ Draft Article 34(1).

¹⁸ See New Zealand WS2 at [10]-[12].

¹⁹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, (Case No. 17), Advisory Opinion of 1 February 2011 at [177].

²⁰ *Contra* EU WS at [80] and EU WS2 at [26].

²¹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, pp. 88–89.66.

²² *Report of the International Law Commission*, A/66/10, 2011, chap. V, paras. 77–88 at Draft Articles 3 to 5.

²³ See e.g. Somali WS at [26], FSM WS at [58], and Chile WS at p22.

²⁴ EU WS at [90] and at n38; EU WS2 at n3.

²⁵ Somalia WS at [27].

²⁶ FSM WS at [58] – [60].

²⁷ Chile WS at p22.

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absence of any specific clause in the access agreement attributing liability for breach is of no consequence.²⁸

A repeated pattern of non-compliance by vessels of member States would raise a presumption that the international organization has not discharged its obligation – that there has been a systemic failure, as it were.²⁹ However, as with the flag State duty of effective control, it cannot be necessary to establish such a pattern. The international organization will be in breach of its duty whenever the evidence shows that it has not taken necessary steps to ensure that vessels flagged to its member States comply with the agreed terms of access.

Mr President, I have addressed the principle that the international organization will have direct responsibility for its own breaches of the access agreement, but this may not exhaust its responsibility. In addition, there may be situations in which the international organization's responsibility will also be entailed by the conduct of its member States.³⁰

This point has been addressed by the International Law Commission's Special Rapporteur – now Judge Gaja of the International Court. He noted that compliance with an agreement concluded with an international organization may depend on the conduct of that organization's individual member States.³¹ In that case, should a member State of the organization fail to conduct itself in the expected manner, the agreement is breached and the organization itself is responsible.³²

New Zealand therefore does not agree with the proposition that responsibility for breaches of such an access agreement will fall only on the flag State.³³ Put simply, having concluded an agreement with the coastal State setting out the terms under which its member States may fish in the EEZ, the international organization must also be considered to have agreed to assume responsibility if those terms are not complied with. Both the offending State and the international organization bear responsibility for the breach.

Otherwise the access agreement is little more than a chimera – an unenforceable guarantee offering nothing of substance to the coastal State. It will be left, as we say, to fall between two stools. On the one hand, the coastal State would have no recourse against the flag State because the access agreement has been concluded with the international organization; and, on the other, it would have no recourse against its treaty partner, the international organization, because the vessels fall under the jurisdiction of the flag State.

Mr President, that simply cannot be right. A State cannot plead its internal law in order to avoid responsibility for its international obligations.³⁴ Nor should the limited competence of an international organization be allowed to shift its responsibility to its member States. To borrow the words of one commentator, Sienho Yee, to do otherwise “really exalts the form of independent personality [of the international organisation] over the systemic values of the international community as well as the realities of international life”.³⁵

Mr President, I now turn to my final point – the rights and duties of the coastal State, as addressed in question 4.

²⁸ *Contra* EU WS at [89].

²⁹ *Cf.* EU WS2 at [26].

³⁰ *See* New Zealand WS at [54]-63].

³¹ *See Second Report of the Special Rapporteur on the Responsibility of International Organisations*, Giorgio Gaja, A/CN.4/541, 2004 at [10] to [12].

³² *Ibid* at [11].

³³ *Contra* EU WS at [92] and EU WS2 at [24]-[27].

³⁴ *See* e.g. Draft Article 32 of the ILC's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*.

³⁵ Sienho Yee “‘Member Responsibility’ and the ILC Articles on the Responsibility of International Organisations: Some Observations” in Raggazzi (ed) *Responsibility of International Organisations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) at 332.

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As article 56 of the Convention records, the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources of the EEZ. In exercising those rights, articles 61 and 62 provide that the coastal State has a particular responsibility to determine the total allowable catch of living resources and the basis for access by other States to any surplus catch.

A significant body of law has developed articulating specific principles for the proper conservation and management of fisheries under this framework, including principles such as the precautionary approach and the ecosystem approach to fisheries management. This body of law serves to implement the general principles of environmental protection set out in articles 192 and 197 of the Convention.³⁶

The coastal State also has additional specific obligations with respect to the conservation and management of shared stocks. Such stocks include both straddling stocks, addressed in article 63 of the Convention, and highly migratory species, addressed in article 64.

Common to all of these provisions is the obligation of cooperation. A cooperative approach ensures that measures taken by one State do not undermine those taken by another. It reflects the general obligation of cooperation that you, Judge Wolfrum, described in the *MOX Plant* case as “the overriding principle of international environmental law”.³⁷ The content of this obligation of cooperation is elaborated in more detail in relation to straddling and highly migratory stocks through the provisions of the 1995 UN Fish Stocks Agreement.

In order to discharge their duty of cooperation coastal States and other States with a real interest in the fishery are obliged to work together either directly or, more commonly, through an appropriate regional fisheries management organization. It is through the vehicle of an RFMO that interested States can establish shared objectives for the management of shared stocks and adopt the necessary substantive obligations and mechanisms to achieve those objectives.

The duty of cooperation is not merely a procedural duty. As has been recognized by the International Court of Justice in the recent *Whaling in the Antarctic* case, it also has a substantive content.³⁸ In the words of Judge Sebutinde in that case, cooperation must be “meaningful”.³⁹ In New Zealand’s submission, that requires that account be taken of the legitimate interests of others, with a view to reaching a mutually agreeable solution. As emphasized by the Seabed Disputes Chamber, this is especially important where the interests are in a shared resource.⁴⁰

At the same time, if cooperative efforts fail to reach agreement, a coastal State is not absolved from its responsibilities to conserve and manage the resources of its EEZ. The duty of cooperation is without prejudice to the sovereign rights of the coastal State.⁴¹ To quote leading commentators Churchill and Lowe:

the States concerned are required to negotiate arrangements for the management of shared stocks in good faith and in a meaningful way, [but] there is no obligation on such States to reach agreement. If no agreement is reached, each State will manage that part of the shared stock occurring in its EEZ in accordance with the general rights and duties relating to fisheries management by a coastal State in its EEZ.⁴²

³⁶ See New Zealand WS2 at n8.

³⁷ *MOX Plant Case (Ireland v. UK) (Case No. 10)*, Provisional Measures Order of 3 December 2001, Separate Opinion of Judge Wolfrum at p4.

³⁸ *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening)*, Judgment of 31 March 2014 at [246].

³⁹ Separate Opinion of Judge Sebutinde at [15]. See also the authorities in New Zealand WS at [70].

⁴⁰ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, (Case No. 17), Advisory Opinion of 1 February 2011 at [147], [148] and [150].

⁴¹ See New Zealand WS at [71]-[73].

⁴² Churchill & Lowe *The Law of the Sea* (3rd ed, Manchester University Press, 1999) at p294.

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Mr President, I have one further and final observation in relation to Question 4. As this Tribunal confirmed in the recent *M/V “Virginia G” Case*, the “sovereign rights” of the coastal State and its EEZ necessarily include rights to take appropriate enforcement action.⁴³ That point is specifically recorded in article 73, paragraph 1, of the Convention.

Enforcement action may include appropriate monitoring, control and surveillance measures to deter and identify illegal activity. It will also include boarding and inspection as well as the prosecution and imposition of sanctions where illegal activity has occurred.

It is axiomatic that the coastal State has primary jurisdiction in relation to the enforcement of its own laws regarding its EEZ. However, this does not absolve the flag State of its own duty of effective control. As I noted earlier, that duty requires the flag State to take its own enforcement action against its vessels where violations have been brought to its attention. Indeed, some sanctions can only be taken by the flag State, such as deregistering the vessel or denying it authorization to fish.⁴⁴

New Zealand therefore does not agree with the proposition that once a coastal State has imposed a sanction of adequate severity the flag State is absolved of its own responsibility to sanction its vessel.⁴⁵ As I noted at the outset, the concerted efforts of *both* flag and coastal States are required if we are to bring an end to IUU activity.

Mr President, Members of the Tribunal, that brings me to the conclusion of my submissions.

The Tribunal has a significant task ahead of it. New Zealand welcomes any greater clarity that the Tribunal may bring to the questions that have been placed before it. I hope that the observations put forward by New Zealand in its written statements, and again today, will be of assistance to you as you undertake this task.

Mr President, Members of the Tribunal, I am grateful for your attention.

The President:

Thank you for your statement, Ms Ridings.

I now give the floor to the representative of the United Kingdom, Ms Nicola Smith.

⁴³ *The M/V “Virginia G” Case (Panama/Guinea-Bissau) (Case No. 19)*, Judgment of 14 April 2014, at [255].

⁴⁴ See New Zealand WS n50.

⁴⁵ *Contra* EU WS2 at [23].

STATEMENT OF MS SMITH – 4 September 2014, a.m.

STATEMENT OF MS SMITH
UNITED KINGDOM
[ITLOS/PV.14/C21/3/Rev.1, p. 16–20]

Ms Smith:

Mr President, Members of the Tribunal, it is an honour to appear before you, and to do so on behalf of the United Kingdom. I shall be making some general remarks. With your permission, Sir Michael Wood will then follow with some more detailed comments.

Mr President, Members of the Tribunal, when an international court or tribunal considers a request for an advisory opinion, it usually addresses two preliminary questions. First, does the request fall within its jurisdiction to give advisory opinions? Second, if it does, is there any compelling reason why it should exercise its discretionary power not to give the opinion requested? That is the ICJ's approach, most recently in the *ILO Administrative Tribunal Judgment* case.¹

The present case is different. Here there are three preliminary questions. First, and we would say, crucially, does the full Tribunal have any advisory jurisdiction? Second, if the answer is "yes", what are the limits on that jurisdiction? Third, how should the Tribunal exercise its discretionary power?

We will not address the merits of the request. We shall be confining ourselves, as we did in our two written statements, principally to the full Tribunal's jurisdiction to give advisory opinions.

Mr President, as can be seen from many of the written statements, and as is apparent from this hearing, the present request for an advisory opinion is very problematic. States from all regions have expressed a firm position that the full Tribunal does not have jurisdiction.² They have given convincing, and consistent, legal reasons for this position. In addition, a majority of States participating in these proceedings argue, either in the alternative or as their primary submission, that the Tribunal should exercise its discretionary power not to give an opinion on the questions asked, and almost all participating States have called for caution on the part of the Tribunal.

The United Kingdom is fully aware of the severe problems created by illegal, unregulated and unreported fishing, including off the coast of West Africa but our position in these proceedings is one of principle concerning the jurisdiction of the Tribunal. The United Kingdom is already assisting with capacity-building (both nationally and through the European Union). We remain very happy to discuss with the members of the Sub-Regional Fisheries Commission the possibility of engaging consultants to provide advice to the Commission and its members about the issues raised by the present request.³

The United Kingdom's position on jurisdiction, as well as other matters, has been set out in its two written statements.⁴ We shall not repeat all that we said there, although we maintain it in full.

Instead, we shall seek to respond to what others have said, in the written statements and orally. We agree with much that has been said, but not with those few arguments seeking to establish the jurisdiction of the Tribunal. They are, in our respectful submission, unconvincing.

¹ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, I.C.J. Reports 2012, p. 10.

² Argentina, Australia, China, Ireland, Portugal, Spain, Thailand, United States of America, United Kingdom.

³ Letter from Mr C Whomersley to the Registrar, 28 November 2013, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/21_uk.pdf

⁴ UK first Written Statement (WS), 28 November 2013; UK second WS, 5 March 2014.

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At the same time, we are also of course aware that certain Members of the Tribunal, both past and present, have expressed differing views on this matter, both officially⁵ and in their private writings.⁶ So too have others. The fact that so much has been written on the issue reflects the grave doubts and controversy that exist.

It has been suggested that “[t]he jurisdiction of the Tribunal to issue advisory opinions derives from article 138 of the Rules”.⁷ That cannot be right. The Rules cannot confer broader jurisdiction upon the Tribunal than does the Convention.⁸

As C.F. Amerasinghe has aptly written, “[i]n the international legal system a judicial tribunal does not have inherent advisory jurisdiction unless its constitutive instruments expressly give it that jurisdiction”.⁹

To adopt Thirlway’s words about article 30 of the ICJ Statute, article 16 of the Tribunal’s Statute does not make it possible for the Tribunal, by enacting a rule, “to confer upon itself a jurisdiction which it did not otherwise possess”.¹⁰ The jurisdiction of an international court or tribunal, whether contentious or advisory, depends upon consent.¹¹ So article 138 of the Rules of the Tribunal cannot establish the jurisdiction of the Tribunal to give an advisory opinion. Yet that is precisely what it purports to do. It is not even cast in the form of a procedural rule, but as an assertion of jurisdiction.¹² It reads: “The Tribunal may give an advisory opinion”. Eiriksson, for example, is quite open on the matter. He writes that this was “an option introduced by the Law of the Sea Tribunal”. It was “a modest expansion of the powers of the Tribunal with regard to advisory opinions.”¹³ Modest or not, the Tribunal has no power to expand its own jurisdiction.

⁵For example, President Jesus, in his 2009 Gilberto Amado lecture, at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/gilberto_amado_memorial_lecture150709_eng.pdf

⁶Treves, “Advisory Opinions Under the Law of the Sea Convention, in M H Nordquist, J N Moore, *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001), p. 290; Chandrasekhara Rao, “ITLOS: The First Six Years”, 6 (2002) *Max Planck UNYB*, p. 183; Jesus, in *The Rules of the International Tribunal for the Law of the Sea. A Commentary*, ed. Chandrasekhara Rao, Gautier, 2006, p. 393; Ndiaye, “The Advisory Function of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal Revisited”, 9 *Chinese Journal of International Law* (2010), p. 565; Chandrasekhara Rao, “International Tribunal for the Law of the Sea”, in Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. VI, pp. 188-199, para. 29); Wolfrum, “Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?”, in Wolfrum and Gätzschmann, *International Dispute Settlement: Room for Innovations?*, 2013, p. 35; Kateka, “Advisory Proceedings before the Seabed Disputes Chamber and before ITLOS as a Full Court”, 17 *Max Planck Yearbook of United Nations Law* (2013), p. 159; Türk, “Advisory Opinions and the Law of the Sea”, in: Pogačnik (ed.), *Challenges of Contemporary International Law and International Relations. Liber Amicorum in Honour of Ernest Petrić* (2011), p. 365.

⁷Germany WS, para. 5; Federated States of Micronesia WS, paras 4-7; Sri Lanka WS, paras. 6-7.

⁸United States of America WS, para. 11; Jianjun Gao, “The Legal Basis of the Advisory Function of the International Tribunal for the Law of the Sea as a Full Court: An Unresolved Issue” 4 *KMI International Journal of Maritime Affairs and Fisheries* (2012), p. 83, at p. 85.

⁹C F Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff, 2002), p. 503, cited in UK second WS, para. 6.

¹⁰Thirlway, in *The Statute of the International Court of Justice: A Commentary*, 2012 (ed. Zimmermann, Tomuschat, Oellers-Frahm, Tams), pp. 517-8.

¹¹See, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 2006, p. 6, at p. 32, para. 64 (“Under the Court’s Statute, that jurisdiction is always be based on the consent of the parties.”).

¹²Ki-jun You, “Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited”, 39 (2008) *ODIL* p. 360.

¹³G Eiriksson, “The Case of Disagreement between a Coastal State and the Commission on the Limits of the Continental Shelf”, in: *Legal and Scientific Aspects of Continental Shelf Limits* (2004), p. 251, at pp. 259-260.

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Any doctrine of inherent functions or implied powers has no place here.¹⁴ We would respectfully endorse Spain’s careful analysis of this point yesterday.¹⁵ As is clear in the jurisprudence of the International Court, implied powers exist when they are necessary for the safeguard of judicial functions conferred upon the court.¹⁶ However, the issue here is whether ITLOS has the capacity to render an advisory opinion. The issue is whether such powers were invested in the Tribunal by the States that created it. They were not. The issue is also whether an advisory function is deemed necessary for the Tribunal to exercise its express functions. That can only be answered in the negative.¹⁷ Such a power can certainly not be implied from the absence of any provision excluding or rejecting such jurisdiction,¹⁸ as Australia explained yesterday.¹⁹

Mr President, the practice in respect of other international courts and tribunals confirms that advisory jurisdiction is always expressly conferred, and it is expressly conferred by clear provisions and within precise limits set forth in the constituent instruments.²⁰ For this Tribunal to exercise such a power would fly in the face of that practice.

Any power of the Tribunal to give an advisory opinion must be located within UNCLOS itself.²¹ Yet “the Convention makes no provision for advisory opinions by the [full] Tribunal.”²² UNCLOS does of course provide for one particular advisory jurisdiction, that of the Tribunal’s Seabed Disputes Chamber. That is under article 159, paragraph 10, and article 191, at the request of the Assembly or the Council of the International Seabed Authority. In linking the advisory jurisdiction to the activities of a particular international organization, UNCLOS follows the pattern of the United Nations Charter and the ICJ Statute.²³

It will further be noted that the Chamber’s advisory jurisdiction is expressly regulated by article 40, paragraph 2, of the Tribunal’s Statute. Neither the Convention nor the ITLOS Statute makes any provision for regulating other advisory opinions. As China said in its written statement, “UNCLOS is not silent on the advisory function of the ITLOS, but confines it to one of its chambers.”²⁴

Mr President, reference has been made to “a general movement amongst States in favour of the Tribunal’s jurisdiction to issue advisory opinions”²⁵ and we have been told that article 138 has been mentioned on various occasions and that no firm objection has been made.²⁶ Such references as are given do not begin to show any such support, a point underlined by the position of many States in the present proceedings. Even if there were such a “movement” or support, that could not establish a jurisdiction that did not otherwise exist. Rather, it might indicate a wish to amend UNCLOS to confer such jurisdiction. In a legal system where jurisdiction is consent-based, that would be the proper course.

Nor could such a “movement” amount to a subsequent agreement between all the parties to UNCLOS regarding the interpretation of UNCLOS, within the meaning of article 31,

¹⁴ China WS, paras. 56-63; Australia WS, para. 7, 34-39; Portugal WS, paras. 13-14; Spain WS, paras. 5-6; Thailand second WS, para. 7; Gao, pp. 93-94.

¹⁵ ITLOS/PV.14/C21/2, pp. 31-32 (Martín y Pérez de Nanclares).

¹⁶ *Nuclear Tests (New Zealand v. France)*, I.C.J. Reports 1974, at p. 457, para. 23.

¹⁷ Gao, pp. 90, 94-95.

¹⁸ UK second WS, para. 6; You; Gao, pp. 89-90. *Contra*, New Zealand WS, para. 8; Türk, p. 379.

¹⁹ ITLOS/PV.14/C21/2, pp. 14-15 (Campbell).

²⁰ UK first WS, paras. 29-33, China WS, para. 14; Australia WS, para. 9 and Annex A; Spain WS, para. 6; United States of America WS, paras. 14-16.

²¹ Spain WS, paras. 13-23.

²² New Zealand WS, para. 8.

²³ *Virginia Commentary*, Vol. VI, p. 643; United States of America WS, para. 18.

²⁴ China WS, para. 28; United States of America WS, para. 18; see also Gao, p. 90.

²⁵ Germany WS, para. 8; see also You, pp. 363-4; Ndiaye, pp. 582-3; Türk, p. 380.

²⁶ ITLOS/PV.14/C21/1, pp. 9-10 (Bèye Traoré).

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paragraph 3(b), of the Vienna Convention on the Law of Treaties.²⁷ This is especially so given the clear opposition of many UNCLOS parties to such an interpretation.²⁸

Nor can the suggestion that UNCLOS and the Statute of the Tribunal are “living instruments”²⁹ be a basis for a jurisdiction of a court or tribunal having a jurisdiction that is not otherwise there. The “living instrument” notion simply has no role in matters of jurisdiction.

The Tribunal’s Rules of Procedure were adopted without any State involvement. The fact that no State formally objected to article 138 until the present case is of no legal significance. States had no reason to react earlier, absent the present case. This is a point Australia made yesterday.³⁰ In any event, it has long been well-known, including from the writings, that article 138 was strongly questioned.³¹ It cannot therefore be said that States have acquiesced or consented to that provision.

Mr President, that concludes what we have to say on our first proposition, that any power for the full Tribunal to give an advisory opinion has to be found in UNCLOS. I would now request that you give the floor to Sir Michael Wood.

I thank you, Mr President.

The President:

Thank you, Ms Smith.

I now give the floor to Sir Michael Wood.

²⁷ You, pp. 363-4; Türk, pp. 380-381.

²⁸ See draft conclusion 4 and commentary, *Yearbook of the International Law Commission 2013* (A/68/10), pp. 31-41.

²⁹ Germany WS, para. 8.

³⁰ ITLOS/PV.14/C21/2, pp. 15-16 (Campbell).

³¹ Gao, p. 93.

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STATEMENT OF SIR MICHAEL WOOD
UNITED KINGDOM
[ITLOS/PV.14/C21/3/Rev.1, p. 20–25]

Sir Michael Wood:

Mr President, Members of the Tribunal, it is an honour to appear before you and to do so on behalf of the United Kingdom.

I shall address the various arguments that have been put forward to suggest that UNCLOS does indeed make provision for the advisory jurisdiction of the full court. I will also, briefly, address the limits of any such jurisdiction, as well as the exercise of discretion.

The written and oral statements made in this case canvass a range of possible legal bases within the Convention for the power to give advisory opinions. Mostly, however, States and commentators focus on article 21 of the Statute and its concluding words “all matters”.

Of the various options canvassed, arguments based on the following provisions can, I believe, be dismissed summarily, for reasons given in the written statements and during this hearing:

- article 16 of the Statute, which simply provides for the Rules of the Tribunal;¹
- article 288, paragraph 2, of UNCLOS, which deals only with disputes;²
- article 20 of the Statute, which only deals with access to the Tribunal *ratione personae*.³

That leaves article 21. Various arguments are deployed by those who would see the legal basis of an advisory jurisdiction in this provision but they are, with respect, confusing and unconvincing. For example, article 21, it has been argued, “provides an *implicit* legal basis for the competence of the full Tribunal to issue advisory opinions”.⁴ On Tuesday the Sub-Regional Fisheries Commission itself seemed to rely chiefly on the word “applications”⁵ as to some extent did the representative of Micronesia this morning but, as we and others have already shown, this word refers to applications in contentious cases, such as requests for provisional measures or applications for prompt release.⁶

As I have said, most seem to rely on the concluding words of article 21: “All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

The argument appears to turn on the use in the English text of the word “matters”. It has been argued that the PCIJ Statute, while it “did not refer expressly to the advisory function,” contained a similar provision to article 36.⁷ However, that provision was not the basis for the Permanent Court’s advisory jurisdiction. The argument overlooks the fact that it was

¹ UK first WS, paras. 16-18 and 31; Australia WS, paras. 11; Thailand second WS, para. 5; ITLOS/PV.14/C21/2, pp. 18-19 (Campbell).

² UK first WS, para. 19; China WS, paras. 29-31; Ireland WS, para. 2.2; Australia WS, paras. 16-20; Portugal WS, para. 8; Spain WS, paras. 9-10; ITLOS/PV.14/C21/2, pp. 4-5 (Ney); ITLOS/PV.14/C21/2, pp. 16-17 (Campbell). See also You, pp. 361-3; Doo-young Kim, “Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea”, *Issues in Legal Scholarship/Symposium: Frontier Issues in Ocean Law: Marine Resources, Maritime Boundaries, and the Law of the Sea* (2010), pp. 3-4.

³ UK first WS, para. 20; China WS, paras. 41-42.

⁴ Germany WS, para. 8 (emphasis added).

⁵ ITLOS/PV.14/C21/1, pp. 6-7 (Bèze Traoré).

⁶ UK first WS, paras. 21-23; China WS, paras. 34-35; Kim, p. 4 (“Given the ordinary meaning and usage of the words “disputes” and “applications” in this first part, it seems quite obvious that the first part covers only the contentious jurisdiction of the Tribunal.”).

⁷ *Ibid*, footnote 30.

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article 14 of the Covenant of the League of Nations that provided for the advisory jurisdiction of the Permanent Court, and did so expressly.⁸

The concluding words of article 21 first appeared in a working paper circulated informally at the third session of the Law of the Sea Conference.⁹ They remained essentially unchanged right through to the final text of the Convention.¹⁰ The Statute of the Tribunal was largely based on that of the ICJ, and article 21 in particular mirrors the corresponding provision of the ICJ Statute. Article 36, paragraph 1, is the corresponding provision. The wording of the ICJ Statute in turn was the same as that of the Permanent Court Statute. It is clear that in all these provisions the wording referred to contentious cases.¹¹ It does not cover the advisory jurisdiction, which is dealt with separately in other provisions.¹² It has, to my knowledge, never been suggested that in the ICJ or PCIJ Statutes “matters” might include advisory opinions – not by Rosenne,¹³ not by Tomuschat in the Zimmermann *Commentary*,¹⁴ not in the case law of the Court.

This is confirmed to some degree by article 12 of the Covenant of the League, under which the members of the League agreed that: “If there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to judicial settlement or to inquiry by the Council.”

The concluding words of article 21 have to be read in the context of the Statute and Part XV as a whole.¹⁵ If one reads the Statute as a whole and in the various languages, it is clear that “matters” refers back to “disputes and applications” and that article 21 deals not with advisory proceedings but with contentious cases. Any other reading would lead to an absurd result; that the Statute provides for a jurisdiction which it does not regulate. Such central provisions as article 13 (quorum) and article 23 (applicable law) regulate only disputes and applications. The key procedural provision on the advisory jurisdiction, article 40, paragraph 2, deals only with the advisory jurisdiction of the Chamber.

Article 21 is intended to encapsulate the Tribunal’s contentious jurisdiction, which is set out more fully in the Convention, in particular in article 288. The reference to “all matters specifically provided for in any other agreement” could not have so broad a scope as to extend jurisdiction to areas beyond the scope of the Convention.¹⁶ It has to be interpreted consistently with article 288, paragraph 2, which refers to “[a]ny dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention”.¹⁷ Article 21 makes no reference, express or implied, to advisory opinions.

The conclusion that nothing in UNCLOS empowers the Tribunal to give advisory opinions is confirmed by the *travaux préparatoires*, and by well-informed writings such as the *Virginia Commentary*. It is clear from the proceedings of the Conference, and from those of the Preparatory Commission (which may be taken as reflecting an interpretation of the Statute by the participating States¹⁸), that States had no intention to confer an advisory

⁸ Manley O Hudson, *The Permanent Court of International Justice, 1920-1942, A Treatise*, pp. 483-484, cited in UK second WS, para. 6(d). See also China WS, paras. 9-10; Kim, p. 10 (“... article 14 of the Covenant of the League of Nations, which was the legal basis for the advisory jurisdiction of the PCIJ, ...”); Gao, p. 85.

⁹ SD.Gp/2nd Session/No. 1/Rev.5 (1975, mimeo), reissued as A/CONF.62/Background Paper (1976, mimeo): reproduced in XII *Platzöder* 108.

¹⁰ *Virginia Commentary*, Vol. V, pp. 378-380, paras. A.VI.122-A.VI.128.

¹¹ China WS, para. 36; Ireland WS, para. 2.7; You, pp. 362-3.

¹² Portugal WS, para. 10.

¹³ S. Rosenne’s *The Law and Practice of the International Court, 1920-2005* (2006), vol II, pp. 638-641.

¹⁴ Tomuschat, “Article 36”, in: Zimmermann et al (eds., 2nd ed., 2012), *The Statute of the International Court of Justice. A Commentary*, pp. 660-675.

¹⁵ ITLOS/PV.14/C21/2, p. 17 (Campbell).

¹⁶ United States of America WS, para. 25.

¹⁷ Ireland WS, para. 2.6; Australia WS, para. 26; Portugal WS, para. 9.

¹⁸ *Virginia Commentary*, vol V, p. 337, para. A.VI.11; Ireland WS, para. 2.12; Portugal WS, para. 6.

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jurisdiction upon the full Tribunal. There was no proposal to do so, beyond an early suggestion of references from national courts or from arbitral tribunals, which were not pursued.¹⁹ Had the negotiating States intended to confer an advisory jurisdiction, the inclusion of an express provision would have been straightforward; but they did not do so.

“There does not seem to be any evidence suggesting that the drafters considered Article 21 to confer advisory jurisdiction on the full Tribunal by operation of other international agreements.”²⁰

Mr President, Members of the Tribunal, the fact that such jurisdiction may be considered to be useful²¹ does not mean that it exists. I hope I have said enough to show that “the Tribunal itself has no advisory jurisdiction”.²² If you were to exercise such a jurisdiction, you would, in our respectful submission, be acting *ultra vires*. Such an *ultra vires* assertion of a jurisdiction cannot be cured by invoking the *compétence de la compétence* principle reflected in article 288, paragraph 4, of UNCLOS.²³ *Compétence de la compétence* can only be used to determine whether a given issue falls within the scope of an existing jurisdiction, not to create a new jurisdiction.

Mr President, without prejudice to that preliminary submission, I now turn briefly to the limits that must apply to the exercise of any jurisdiction to give advisory opinions. Limits must therefore be read into article 238 of the Rules.

First, we note and share the view that the potentially very broad wording of the concluding words of article 21 have to be read consistently with article 288, paragraph 2. In other words, any jurisdiction to give an advisory opinion should be limited to the interpretation or application of the international agreement conferring jurisdiction in the particular case.²⁴

Second, the opinion should not relate to the rights and obligations of third States. An advisory opinion is given to the requesting body to assist it in carrying out its own functions.

Mr President, I will now move to our further alternative submission that if the Tribunal were to hold that it had jurisdiction, it should nevertheless decline to answer the questions put by the SRFC.²⁵

It is clear from the wording of article 138 that, like the International Court of Justice, the Tribunal would have a discretion if that article was effective, but the Tribunal, as others have said, is a court. It is modelled closely on the ICJ, and the ICJ’s approach, we would suggest, to its discretion, would be similar. Above all, an advisory opinion is a “judicial opinion” (as Thirlway put it²⁶). Most recently, the Court has noted that the International Court and its predecessor, “have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies”.²⁷

I simply recall what the International Court said on this in the 2013 *Burkina Faso/Niger* judgment, where it recalled paragraph 29 of its *Northern Cameroons* judgment.

¹⁹ Gao, pp. 90-91.

²⁰ United States of America WS, para. 20.

²¹ ITLOS/PV.14/C21/2, p. 1 (Ney).

²² Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. v (Martinus Nijhoff Publishers, 1989), p. 416, para. A.VI.204.

²³ Contrary to the assertion in New Zealand’s Written Statement, para. 7. See Gao, pp. 85-86; ITLOS/PV.14/C21/2, p. 10 (Martinsen).

²⁴ Ireland WS, para. 2.11; Australia WS, paras. 27-32; United States of America WS, para. 19, 21-28.

²⁵ UK first WS, paras.43-54.

²⁶ Thirlway, “Advisory Opinions”, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), MN 1.

²⁷ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, I.C.J. Reports 2012*, p. 10, at p. 25, para. 34; *Status of Eastern Carelia, P.C.I.J. Ser. B, No. 5*, p. 29.

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In the case of the ICJ, there are important statutory limits on the power to give advisory opinions. First, the Statute provides that advisory opinions may be given only at the request of certain UN organs and specialized agencies explicitly authorized either by the UN Charter or by the Assembly.²⁸ Second, in the case of authorized specialized agencies or UN organs other than the General Assembly or the Security Council, the opinion must be given on “legal questions arising within the scope of their activities”.²⁹ Third, the opinion is given to the requesting organ to assist that organ in carrying out its own functions.

Article 138, on its face, contains none of these safeguards, but they must surely be read into it if the judicial function of the Tribunal is to be maintained.

A further point particular to UNCLOS, is this. It would be inappropriate to use the advisory opinion jurisdiction to circumvent provisions about the settlement of disputes in other agreements.

I will now turn very briefly to the Request placed before you by the SRFC. Here, I make just four points.

First, the four questions may be couched as legal questions, but what they actually seek is not answers *lex lata* but *lex ferenda*. That is outside your functions as a judicial body. Your task is not to legislate.³⁰

Second, even as legal questions, they are vague, general and unclear.³¹ Here, I refer to the conclusion of the impressive presentation by the distinguished representative of the SRFC, Ms Bèye Traoré, where she described in her final paragraph the Commission’s objective in making the present request. Given the time, I will not read it out, but it is on page 26 of the verbatim record of Tuesday’s hearing.

It is a very sweeping request. It effectively asks the Tribunal to act as legal advisor to the Commission. As the representative of Micronesia effectively admitted this morning, not to give a judicial opinion on a particular problem, arising in the context of particular facts, to assist the Commission in its day-to-day work, it would ask the Tribunal, with all the weight of its judicial authority, to determine whole swathes of the international law of the sea, both *lex lata* and *lex ferenda*, in a way that might be taken to be authoritative for all States Parties to UNCLOS (and even non-parties, since mention has been made of customary international law).

Third, it is not clear that anything in the Request actually seeks advice on the MCA Convention, which, as we and others have explained, would be the limits of the advisory jurisdiction, if any.

Fourth, it would not be right for the Tribunal to seek to pronounce on the rights and obligations of third States not members of the SRFC. We share the view of other States that the Tribunal must not, indeed cannot, enter upon questions concerning the relationship between States members of the SFRC and third States.³²

Mr President, Members of the Tribunal, in conclusion, the United Kingdom invites the Tribunal to hold that it is without jurisdiction to give the opinion requested, either because it has no jurisdiction to give advisory opinions, which is our primary submission, or because the request does not fall within such jurisdiction as it may have; or, in the alternative, to decline to exercise its discretion to give the opinion requested.

Mr President, Members of the Tribunal, that concludes the United Kingdom’s statement. I thank you for your attention.

²⁸ UN Charter, Art . 96.

²⁹ UN Charter, Art . 96.

³⁰ ITLOS/PV.14/C21/2, pp. 8-9 (Martinsen).

³¹ UK first WS, paras. 48-51.

³² *Ibid.*, para. 53; Australia WS, paras. 43-50; United States of America WS, paras. 30-37.

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The President:

Thank you, Sir Michael Wood.

The hearing will now be suspended for a break until noon.

(Break)

The President:

I now give the floor to Mr Kriangsak Kittichaisaree, who will present the statement of Thailand.

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STATEMENT OF MR KITTICHAISAREE

THAILAND

[ITLOS/PV.14/C21/3/Rev.1, p. 26–32]

Mr Kittichaisaree:

Mr President, distinguished Members of the Tribunal, it is an honour to appear before you in these proceedings on behalf of the Kingdom of Thailand.

Thailand is a distant fishing nation that takes international legal obligations binding on it very seriously. Thailand also strongly supports international efforts to end IUU fishing activities, as detailed in the Annex to Thailand's second written statement, which was submitted to the Tribunal on 14 March this year. Thailand is, therefore, very sympathetic to and shares the concerns of the Member States of the Sub-Regional Fisheries Commission regarding IUU fishing activities.

At the same time, Thailand wishes to assist the Tribunal in discharging its mandate. For this reason, Thailand has submitted two written statements to the Tribunal, setting out its position in this Case No. 21. In the proceedings today I will address the questions of jurisdiction, admissibility and applicable law, which Thailand considers to be at the heart of this case. I will then make some brief remarks on the merits of the case.

Mr President, Thailand respectfully submits as follows:

First, the Tribunal has no jurisdiction to give the advisory opinion requested by the SRFC.

Second, and in the alternative, the Tribunal should, for reasons of judicial propriety, decline to exercise any advisory jurisdiction that it might find.

Third, in the event that the Tribunal decides to give an advisory opinion, it should confine itself to the applicable law binding on all the SRFC Member States, namely, the United Nations Convention on the Law of the Sea of 1982 and any relevant rules of customary international law, and only insofar as it is necessary to interpret or apply the MCA Convention.

Mr President, on the first question of jurisdiction, I will begin by making a preliminary but fundamental point, namely that a State must consent to the Tribunal's jurisdiction. This consent is to be found in the Tribunal's constituent instruments. Therefore, States have expressly consented to the advisory jurisdiction of the Seabed Disputes Chamber of the Tribunal in relation to specific matters by virtue of article 191¹ of UNCLOS. In contrast, nothing in UNCLOS indicates that States have consented to the advisory jurisdiction of the full bench of this Tribunal.

Article 138² of the Rules of the Tribunal purports to establish advisory jurisdiction for the Tribunal. However, the powers of the Tribunal must be established in the treaty that brought the Tribunal into existence. The Rules of the Tribunal, which were adopted by Members of the Tribunal itself, cannot override the provisions of UNCLOS, which bind States Parties. This does not change simply because UNCLOS does not expressly exclude such jurisdiction.

It follows that article 138 of the Rules of the Tribunal must be read in conjunction with article 16³ of the Statute of the Tribunal, which appears as Annex VI of UNCLOS. Article 16

¹ "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."

² "1. The 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.

2. A 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.

3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137."

³ "The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure."

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of the Statute does nothing more than authorize the Tribunal to “frame rules for carrying out its functions”, namely the functions set out in UNCLOS. As I have explained, these functions do not include, even implicitly, the giving of advisory opinions except by the Seabed Disputes Chamber. Article 16 of the Statute does not and cannot serve as an independent source of any implied power for the Tribunal to confer upon itself a jurisdiction that it does not otherwise possess.

This brings me to my next point, which is that the SRFC⁴ was misguided to rely on article 21⁵ of the Statute of the Tribunal as a basis for the Tribunal’s advisory jurisdiction. Australia yesterday and the United Kingdom today have explained the matter very clearly, and Thailand respectfully adopts what Australia and the United Kingdom have said on this point. Thailand wishes to emphasize that article 21 of the Statute could not have been intended by its drafters to confer a broader jurisdiction than that already fully set out elsewhere in UNCLOS. In particular, as explained by Australia yesterday, there is a clear link between article 21 of the Statute and article 288⁶ of UNCLOS, entitled “Jurisdiction”. Article 288 of UNCLOS provides for the contentious jurisdiction of the Tribunal in clear and express terms. There is no mention of the advisory jurisdiction of the Tribunal in article 21 of the Statute or, as I have already submitted, anywhere else in UNCLOS.

I will make one last point, which is that the Tribunal does not possess “inherent advisory jurisdiction”. Like other international courts and tribunals, this Tribunal only possesses inherent jurisdiction where it is necessary for it to carry out its functions in a case over which it has primary jurisdiction. In other words, any inherent jurisdiction of the Tribunal must be ancillary in nature. It does not extend beyond the limits of the Tribunal’s constituent instruments to confer a new form of primary jurisdiction upon the Tribunal.

Mr President, I turn now to the second question of admissibility. This question arises even if UNCLOS can be treated as a “living document” to grant the Tribunal jurisdiction in the present case. At stake here are the cardinal principles governing the exercise of jurisdiction by international judicial bodies, of which the Tribunal is one. As the Permanent Court of International Justice stated in its 1923 advisory opinion in the *Status of Eastern Carelia* case: “The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.”⁷

These words have guided the International Court of Justice since it took over from its predecessor; they should also guide this Tribunal. In this regard, if the Tribunal finds that it does somehow possess advisory jurisdiction, Thailand’s alternative submission is that the Tribunal should decline to exercise such jurisdiction for reasons of judicial propriety.

The Tribunal’s power to give an advisory opinion is discretionary. Article 138, paragraph 1, of the Rules of the Tribunal merely provides that the Tribunal “may” give

⁴ 1st Written Statement of the SRFC, November 2013, p. 6; 2nd Written Statement of the SRFC, March 2014, pp. 11-12.

⁵ “The 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.”

⁶ Article 288 of UNCLOS appears in Part XV, Section 2 entitled “Compulsory Procedures Entailing Binding Decisions”. The Article provides in its pertinent part:

“1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

2. 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.

⁷ Advisory Opinion of 23 July 1923, (1923) PCIJ Series B, No. 5, p. 29; cited with approval by the International Court of Justice in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep 403, ¶29.

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advisory opinions. This is in contrast to article 191 of UNCLOS, which stipulates that the Seabed Disputes Chamber of the Tribunal “shall” give advisory opinions. Such language points to the existence of an obligation to give advisory opinions in the latter case but not in the former case. Furthermore, the wording of article 138, paragraph 1, appears to be modelled on article 65, paragraph 1,⁸ of the ICJ’s Statute, which also merely provides that the ICJ “may” give advisory opinions, and the ICJ itself has consistently emphasized that even where it has jurisdiction to render an advisory opinion, it is not obliged to exercise such jurisdiction.⁹ Likewise, this Tribunal should find that it has discretion to accept or reject a request for an advisory opinion under article 138, paragraph 1, of the Rules of the Tribunal. Indeed, this is the position taken by the SRFC as well.¹⁰

Next, the Tribunal should exercise its discretion to reject the SRFC’s request for an advisory opinion. According to the jurisprudence of the ICJ, a request for an advisory opinion should be refused when there are “compelling reasons”¹¹ to do so. In the present case, there are at least three compelling reasons for refusing the SRFC’s request.

First, all four questions from the SRFC are too abstract and broad for the Tribunal to answer. None of the questions is confined to the competence of the SRFC in relation to its Member States or in maritime areas under its jurisdiction. Instead, they raise questions under general international law and relevant international legal instruments that are unspecified. This Tribunal simply does not have the information necessary to give answers to the questions posed.

Second, in part because the questions posed by the SRFC are so broad, they entail consideration of the rights and obligations of third parties that are not Member States of the SRFC. It is well established that an international court or tribunal cannot exercise its jurisdiction in a manner that directly decides on the legal rights of third States in the absence of their consent. This position was taken by the ICJ, for example, in the 1995 *Case concerning East Timor* between Portugal and Australia.¹² These proceedings in the present

⁸ “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.”

⁹ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136, ¶44 (“The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that “The Court may give an advisory opinion...”, should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. (citations omitted)”; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep 403, ¶29 (“The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it ... The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function and its nature as the principal judicial organ of the United Nations. (citations omitted)”).

¹⁰ 2nd Written Statement of the SRFC, March 2014, p. 15.

¹¹ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136, ¶44 (“The Court however is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”. Given its responsibilities as the “principal judicial organ of the United Nations”, the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only “compelling reasons” should lead the Court to refuse its opinion. (citations omitted)”; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep 403, ¶30 (“The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”. Accordingly, the consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction. (citations omitted)”).

¹² *Case concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep 90, ¶¶34-35 (“The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. ... However, in this case, the

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case before the Tribunal are not an appropriate channel for the SRFC to seek advice about the rights and obligations of third States.

Third, if the SRFC's questions concern an existing dispute, they should be resolved in contentious proceedings rather than the current advisory proceedings being pursued by the SRFC. It is a well-established principle in international judicial practice that advisory proceedings should not be used as a substitute for contentious proceedings. Moreover, in this case the efficacy of the constitution for the oceans, UNCLOS, also depends on the Tribunal's adherence to this principle. Part XV of UNCLOS has already provided a comprehensive regime for dispute settlement. Any State Party, including a Member State of the SRFC, is free to resort to any of the dispute settlement mechanisms under Part XV, including this Tribunal. What it cannot be permitted to do, if there is a dispute, is circumvent the relevant provisions of UNCLOS using advisory proceedings. For instance, if a State Party chooses to entrust the Tribunal with settling a dispute, it must observe the compulsory procedures entailing binding decisions under section 2 of Part XV as well as the limitations and exceptions to their applicability under section 3 of Part XV. In the event of a dispute involving the SRFC or any of its Member States, all parties must play by the rules that they have accepted.

In summary, Thailand's position is that the Tribunal is unable to give appropriate answers to the questions in the SRFC's Request. So long as the Tribunal finds any of the reasons that I have just outlined to be a compelling reason, it can refuse to give an advisory opinion and it should do so to remain faithful to its judicial character.

Mr President, if those two submissions do not find favour with the Tribunal, Thailand has one last submission on the question of applicable law in this case. Should the Tribunal decide to give an advisory opinion, Thailand is of the view that UNCLOS and any relevant rules of customary international law are the applicable law in relation to the SRFC's questions. I wish to emphasize here that the Tribunal must only apply the law binding upon the States Parties seeking the advisory opinion. This means that in the circumstances of the present case there are several areas where the Tribunal should show caution.

One is the problem created by the SRFC's questions. The Tribunal may observe that none of the four questions posed by the SRFC refers to any specific international agreement or part of an agreement. This is in spite of the fact that State participation differs from one agreement to another, even among the SRFC Member States. Of the international instruments of universal application which are not specifically confined to the West African region cited in the SRFC's submissions, only UNCLOS binds all the Member States of the SRFC. Therefore, I respectfully urge the Tribunal to confine itself to the questions arising out of UNCLOS if it wishes to give an advisory opinion and, as cogently argued by Australia yesterday, only insofar as it is necessary to interpret or apply the MCA Convention. The Tribunal need not and should not address any other law of the sea issues unless all the parties to a particular instrument have made clear their wish that the Tribunal be requested to give an advisory opinion on that instrument and provided that no third party will suffer any prejudice as a result.

effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" ... The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. ...").

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Another area that requires caution is the nature of the instruments that have been cited in this case. The SRFC has specifically asked the Tribunal for an advisory opinion in order to “support the SRFC Member States to derive the maximum benefit from the effective implementation of international and sub-regional legal instruments.”¹³ I must draw the Tribunal’s attention to the fact that most of the international instruments cited by the SRFC are “soft law” instruments.¹⁴ Both the 1995 FAO Code of Conduct for Responsible Fisheries and the 2001 International Plan of Action on IUU Fishing are voluntary instruments, whereas the 2009 FAO Port State Measures Agreement has not been ratified by any Member State of the SRFC and is not yet in force. These instruments cannot form a basis for new rules, let alone “major innovations to classic international law”. International instruments must constitute treaty law or customary international law before they can bind the relevant States. I have no doubt that the Tribunal will take care to distinguish *lex lata* (the law as it is) from *lex ferenda* (the law as it should be) if it decides to give an advisory opinion. I raise this point only to make it clear that no State should expect the Tribunal to create new law in this field.

Mr President, those are Thailand’s submissions on the central questions of jurisdiction, admissibility and applicable law.

For the sake of completeness, and strictly without prejudice to what I have respectfully submitted thus far, I will remark briefly on the merits of the case. I will not attempt to answer any of the questions posed by the SRFC in full; I have already implied that the questions require clarification before they can be properly answered. However, since the case raises questions about State responsibility in the context of IUU fishing activities in exclusive economic zones and on the high seas, I will make a few general remarks in this regard.

The Tribunal may already be aware that UNCLOS does not expressly address whether the flag State is responsible for IUU fishing activities by vessels flying its flag. As the SRFC rightly pointed out on Tuesday, UNCLOS stipulates multifarious duties of the flag State in articles 94, 97, 98, 99, 108, 109, and 217, none of which relates to IUU fishing. The SRFC nevertheless would rely on the very broad wording of articles 87, paragraph 1(e), 116, 119 and 120 of UNCLOS to incur direct responsibility of the flag State for IUU fishing by vessels flying its flag. With due respect, this is too far-fetched and unsubstantiated by State practice. If these UNCLOS provisions had been sufficient to incur such responsibility of the flag State, one may ask: Why would it have been found necessary to conclude additional agreements such as the 1995 Fish Stocks Agreement and many “soft law” instruments to close the gaps in UNCLOS in this matter?

Besides, it has been argued that article 94, paragraph 2(b), of UNCLOS is a source of State responsibility of the flag State regarding IUU fishing by vessels flying its flag. On closer scrutiny, however, this provision stipulates that “every State shall assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship”.

The aforesaid “administrative, technical and social matters” cannot be construed to encompass the obligation to exercise the so-called “effective control” over any fishing activity undertaken by such ship, and there is no international legal precedent to substantiate a conclusion contrary to what I have just respectfully submitted.

Mr President, I will now briefly touch upon the arguments regarding international law of State responsibility. It has been contended that the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts could be cited in support of the argument that the flag State could be responsible for IUU fishing by vessels

¹³ 1st Written Statement of the SRFC, November 2013, p. 69; 2nd Written Statement of the SRFC, March 2014, p. 51.

¹⁴ 1st Written Statement of the SRFC, November 2013, fn. 18; 2nd Written Statement of the SRFC, March 2014, fn. 23.

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flying its flag. With due respect, such contention is not well-grounded. The problem of IUU fishing is essentially caused by private conduct. Insofar as IUU fishing vessels are privately owned and privately operated, they do not satisfy the test of attribution of conduct to a State for the purposes of State responsibility as stipulated in Chapter II of the ILC's aforesaid Draft Articles. As the conduct involving IUU fishing is not *per se* attributable to the flag State, the flag State cannot be said to be responsible for internationally wrongful conduct relating to IUU fishing. The flag State only bears responsibility to the extent that its own conduct is in breach of its international obligations under treaty law or customary international law and, as I have just submitted, neither UNCLOS nor customary international law gives rise to State responsibility of the flag State for IUU fishing by vessels flying its flag. Whether a fishing vessel has violated the laws and regulations of the coastal State or of the flag State is an entirely separate question.

If there arises a further question about the responsibility of the State of nationality of the beneficial owners or operators of the IUU fishing vessel, the same principles would apply.

There are also some who have suggested that the principle *sic utere tuo ut alienum non laedas* could apply to flag States in relation to IUU fishing. However, this principle must be understood with reference to the specific contexts in which it has been applied, such as transboundary pollution. To extend it to the context of IUU fishing may lead to far-reaching and unexpected consequences, especially for flag States and States of nationality of the beneficial owners or operators of IUU fishing vessels. As it is, the *sic utere* principle is too vague to be of direct applicability in the present case.

Mr President, that concludes Thailand's comments. On this unprecedented occasion in which the advisory function of the full Tribunal has been invoked, I hope that these comments will assist the Tribunal in its tasks. It is also my sincere hope that the Member States of the SRFC will become parties to all the relevant international conventions concerning IUU fishing activities. Those conventions offer measures and mechanisms, including enforcement and dispute settlement, that are more ideal than the present proceedings for pursuing the responsibility of the flag State and other States in the matter of IUU fishing activities.

Finally, I would like to reiterate Thailand's commitment to its obligations under international law, as well as Thailand's readiness to assist the SRFC Member States and the international community, within its national capacity, in the fight against IUU fishing activities.

Mr President, Members of the Tribunal, thank you very much for your kind attention.

The President:

Thank you, Mr Kittichaisaree, for your statement.

I now give the floor to the representative of the European Union, Mr Paasivirta.

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[ITLOS/PV.14/C21/3/Rev.1, p. 32–40]

Mr Paasivirta:

Mr President, honourable Members of the Tribunal, on behalf of the European Union, I have the honour to address this Tribunal on the four questions that have been submitted to it by the Sub-Regional Fisheries Commission for an advisory opinion.

Let me first of all stress that, in the view of the European Union, IUU fishing can be considered as one of the greatest threats to sustainable fisheries. The problem of IUU fishing causes global concern, and it calls for global answers. As the European Union, which is the most important market for fish and fishing products, shares these concerns, it has taken a number of steps towards addressing effectively the problem, both in terms of legislation and its bilateral and regional treaty practice in the fisheries area. IUU fishing is a matter where all parties concerned, including flag States, coastal States, port States and market States need to act together to address the problem.

Mr President, Members of the Tribunal, in this statement on behalf of the European Union, I will not be addressing the issue of jurisdiction. The written statement of the European Union was made “without prejudice to the question of the jurisdiction of the Tribunal”¹ and I will follow the same line today.

The issue of jurisdiction aside, we have noted the general nature of the questions posed to the Tribunal, and that they involve liability and other issues without providing facts and contexts, and potentially touching on a variety of legal instruments. Therefore, should the Tribunal confirm its jurisdiction, its replies should, in any event, be appropriately focused on limited questions of law. It is clear that an advisory opinion procedure should not replace a proper dispute settlement process.

Mr President, honourable Members of the Tribunal, with those caveats, I will now first address questions 1 and 4 jointly, and then turn to questions 2 and 3.

Questions 1 and 4 raise the issue of IUU fishing both from the viewpoint of flag States and of coastal States. Although question 4 does not mention explicitly IUU fishing, this phenomenon constitutes one of the most serious threats to the sustainable management of shared fisheries resources.

Let me start by dealing with the role of the flag State. The flag State duties remain important in addressing IUU activities, as most recently stressed in the FAO Voluntary Guidelines for Flag State Performance,² which were endorsed by the FAO Committee on Fisheries in June and are in the process of formal adoption in the FAO Plenary.

The obligation of the flag State is to ensure “effective control” over the ships flying its flag, in accordance with the relevant international instruments. These responsibilities include *inter alia*: to ensure that the fishing vessels are authorized to fish by the coastal State; to ensure monitoring; to ensure that its vessels comply with the laws and regulations of the coastal State; to investigate; and to sanction violations.

These are obligations of conduct, requiring that they are applied with due diligence, which the flag State must respect in order to ensure compliance of its ships with international fisheries obligations. The European Union has incorporated these obligations in its internal provisions and through the policing of their implementation. Allow me to point out to the

¹ See European Union first Written Statement, page 6, point 4 and second Written Statement, page 4, point 6.

² FAO Committee on Fisheries, 31st Session, Rome 9–13 June 2014; see link: <http://www.fao.org/cofi/24005-0a794406c6747d10850eb7691593b6147.pdf>

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Tribunal in particular: the so-called “fisheries control regulation” of the EU;³ its “fishing authorization regulation”;⁴ the “IUU Regulation” of the European Union.⁵

Let me now come to the role of the coastal State. The European Union wishes to stress that the coastal State has the central role in the exercise of jurisdiction in its own EEZ, but this is to be seen concurrently with the flag State jurisdiction. The Convention gives the coastal States sovereign rights in the conservation and management of the living aquatic resources, but such rights and powers of the coastal States inevitably entail important responsibilities, including with regard to IUU fishing.

The coastal State has, as corollary of its sovereign rights, an important operational task in the monitoring, control, surveillance and enforcement of activities related to IUU fishing in its EEZ. Some of the coastal States’ obligations flow already from the Convention, others are elaborated more explicitly in subsequent instruments.

As a reflection of these coastal States’ obligations the European Union has, in addition to the control instruments already mentioned before, included in its legislation the setting of Total Allowable Catches (TAC) and provisions on technical conservation measures for fisheries.

The duty of cooperation between the different States is critical in this context. For a global problem like IUU fishing to be addressed adequately, the different jurisdictional roles of States, as flag States and coastal States, but also port States, need to be coordinated. Cooperation between all States needs to be ensured. This is especially so when common interests are affected, as in the case of joint stocks, straddling stocks and highly migratory stocks.

International instruments, including the Convention and the Fish Stocks Agreement, put a special emphasis, though at different levels of detail, on the duty of cooperation between the flag and coastal States (and with other States). Fulfilment of the duty of cooperation is crucial when addressing suspected cases of IUU fishing, including by way of communication of information, and notifications of suspected cases with requests to assist and intervene.

Also, the IPOA-IUU makes a broad-based call on all States to coordinate their action and cooperate directly or through RFMOs.

The IUU Regulation of the European Union and its implementing rules⁶ provide for an effective system of mutual cooperation between the competent EU authorities and third States where a case of IUU fishing is suspected. With regard to catch certificates by the flag State, which are necessary for imports, arrangements have been made by the European Union with over 90 third countries on dedicated procedures and administrative structures for certification by the flag State.⁷

I turn now to question 2. Mr President, honourable Members of the Tribunal, question 2 makes a transition from primary obligations to secondary obligations. We note that there is a broad coherence in the replies of those who have commented on this question. The primary obligations, resting above all on article 94 of the Convention and article 18 of the UN Fish Stocks Agreement, set forth duties for the flag States: to regulate the activities of its vessels, and to ensure the application of the relevant rules by its vessels through appropriate measures.

³ Council Regulation 1224/2009 (Official Journal of the EU L 343 of 22.12.2009). See Annex 1 to the European Union first Written Statement.

⁴ Council Regulation 1006/2008 (Official Journal of the EU L 286 of 29.10.2008).

⁵ Council Regulation 1005/2008 (Official Journal of the EU L 286 of 29.10.2008).

⁶ See Article 51 of Council Regulation 1005/2008 which was annexed to the European Union first Written Statement and Article 51 of Commission Regulation 1010/2009 (Official Journal of the EU L 280 of 27.10.2009).

⁷ See article 20(4) of Council Regulation 1005/2008.

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The secondary obligations, determining the legal consequences of violation of primary rules (“international liability”) are reflected in particular in the International Law Commission’s Draft Articles on State Responsibility. Taking into consideration the criteria developed in these Draft Articles, among the interveners there is clearly a shared view that individual or isolated acts of IUU fishing by private vessels do not as such engage the international responsibility of the flag State.

By way of contrast, the failure of the flag State to regulate or control which results in IUU fishing may be attributed to it and thus engage international responsibility. This would be so, for instance, in the case of failure to apply its control and monitoring measures with due diligence and to establish to that effect the necessary administrative structures having the human, legal and material resources for such task, as can be expected from a good government.⁸

Mr President, honourable Members of the Tribunal, in our written observations we described in some detail the practices under the IUU Regulation of the European Union, in relation to the listing of vessels practising IUU fishing as well as the identification of non-cooperating States. We have reported on the EU practice because we believe it reflects how the international community reacts to IUU activities today. Such practice is an indication of what are seen as the main flag State duties or coastal State duties, failing which the international community is ready to react.

To summarize, the main elements reflected in the EU practice are the following. Reaction to IUU fishing means above all reacting to general and systemic failures, which are tantamount to a breach of the due diligence obligations previously discussed. Isolated IUU events do not normally provoke listing of States.

In this context, the EU examines: whether recurrent IUU fishing activities are shown to be carried out; whether the country concerned effectively cooperates by providing responses to requests to cooperate, investigate, provides feedback or follow-up; whether the country concerned has taken effective enforcement measures in respect of the operators responsible for IUU fishing, including sufficiently dissuasive sanctions; the history, nature, circumstances, context and gravity of the manifestations of IUU fishing.

We would wish to update the Tribunal on the status of some specific measures regarding non-cooperating third States:

On 24 March 2014 the Council of the European Union established the list of non-cooperating countries, which includes Belize, Cambodia, Guinea.⁹

On 10 June the European Commission notified two other States of the possibility of being identified and listed because of insufficient action to fight illegal fishing.¹⁰

We remain at the disposal of the Tribunal to complete this update, and to provide copies of the relevant decisions.

A similar listing practice is familiar and is followed in different degrees by most RFMOs and by other States. These kinds of measures are flexible and subject to regular review. The European Union continues to cooperate with both listed countries, and countries warned of their possibility of being listed. Thanks to continuous dialogue,¹¹ progress can be achieved, and listing can be avoided or reversed. Therefore, even if this process may require steps

⁸ See *mutatis mutandis* ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries of 2001, at Article 3, Commentary 17.

⁹ Council Decision 2014/170 (Official Journal of the EU, L 91 of 27 March 2014, p. 43).

¹⁰ Commission Decisions of 10 June 2014, (Official Journal, C 185 of 17 June 2014, pp. 2 and 17). See also Press Memo of 10 June 2014 at: http://europa.eu/rapid/press-release_MEMO-14-408_en.htm

¹¹ See for more details on the information campaigns on the then new IUU Regulation in 2009, on the administrative cooperation to establish catch certificates and points of contact via designated competent authorities, on the establishment of the list of designated ports, on the establishment of lists of recognised economic operators, etc. at: http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/index_en.htm

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initiated autonomously, it remains always an interactive exercise with due process, and therefore it cannot be qualified as a unilateral action, as some might have feared.

Listing, or notification of potential listing, has proven to be an effective tool fostering compliance with the cooperation duties of States and international organizations. Such improved cooperation increases the chances to make concrete progress towards sustainable management of the common fisheries resources.

On question 3, Mr President, honourable Members of the Tribunal, it is appropriate to clarify from the outset the exact scope of the question.

Question 3 concerns potential international liability of an international organization as a result of violations by fishing vessels of the fisheries legislation of the coastal State, in a situation where the licence of the vessel has been obtained in the framework of an international agreement between the organization and the coastal State (or, as the case may be, an agreement concluded between a flag State and a coastal State).

In essence, we understand that question 3 addresses the issue whether the international organization can be held internationally liable for domestic law violations by a vessel just on the basis of the fact that the licence of the said vessel has been obtained in the framework of an international agreement.

There is a broad convergence in the rationale of the comments received on this question: that is, that the requisite international law standard is the same one as addressed in the context of question 2.

In general it is, above all, systemic failures that count. It is only an established breach of the due diligence obligation that can cause liability of the international organization party to the agreement. Therefore, the circumstances, as indicated in the English version of the question, would not give rise to international liability.

Mr President, honourable Members of the Tribunal, question 3 is about an international organization having the competence to conclude international agreements with coastal States for fishing purposes.

The European Union is an example of such an organization. Let me therefore explain how the European Union acts in the fisheries sector.

In this area, it is the European Union, the organisation, that acts on the international scene, based on the conferral of competences from its member States, in particular by concluding bilateral fisheries partnership agreements with coastal States (now called “sustainable fisheries partnership agreements”).

In the European Union, international agreements concluded by the EU are binding on its institutions and its member States.¹²

As envisaged in question 3, the European Union is the only contracting party with the coastal State, exercising competence in respect of the EU member States.

It follows from that that it is only the EU - the organisation - that is potentially liable under international law for violations of the obligations under these agreements.

In these oral hearings, the SRFC has raised, on the basis of the “*Virginia G*” case law, the issue whether States can empower an organization so that this latter can incur an own liability for IUU acts of vessels flying the flag of a member State. First, the issue of granting nationality to ships is not at stake in question 3, as it was in the “*Virginia G*” case. By contrast, the issue seems rather to be the implementation of flag State duties in fisheries activities. Such implementation falls under the normal competence of the European Union, under the control of its own court, the Court of Justice of the European Union.

In fact, it is not that uncommon in international practice that an organization that has concluded an agreement is assimilated to the flag State in the context of that agreement.

¹² Article 216 paragraph 2, TFEU.

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Allow me, in this context, to point out that several conventions on the establishment of RFMOs explicitly foresee that the European Union is considered, for the functioning of that agreement, as the flag State for the vessels flying the flag of one of its member States.¹³

Mr President, honourable Members of the Tribunal, let me now describe the main features of these bilateral fisheries agreements concluded by the European Union.

These agreements establish a coordinated governance and cooperation system between public authorities in order to ensure responsible fishing. These fisheries agreements implement and consolidate the duty of cooperation and they further the rule of law in respect of fishing activities in the waters of the coastal State. Fishing operations need to be authorized and conducted in conformity with the law of coastal States, as the agreements concluded by the European Union consistently provide. These agreements also advance mechanisms for the exchanges of information in case of any suspected IUU fishing that needs to be addressed.

Typically, the Union's bilateral agreements contain clauses such as: "The contracting parties ... shall cooperate to prevent and combat IUU fishing, in particular through the exchange of information and close administrative cooperation."¹⁴ These agreements commit the Union "[t]o take appropriate steps required to ensure that its vessels comply with the Agreement and the legislation governing fisheries."¹⁵

On that basis the EU would investigate alleged violations of such legislation by the Union vessels and take additional measures, as necessary, in line with both the content of the agreement and with the due-diligence obligation discussed.

It is through the legal framework established by these agreements that the European fishermen gain access to the maritime areas of coastal States in order to conduct fishing activities.

Such access under the EU's bilateral agreements is covered by so-called "exclusivity clauses", typically included in the agreements.

Exclusivity clauses provide that applications for fishing authorization are transmitted and validated via the public authorities of both parties, through the means established by the agreement, and not outside the agreement.

We believe that the practice of adopting these so-called "exclusivity clauses" followed by the EU bilateral agreements is an indication of a developing international practice, which in turn points to the importance of the involvement of public authorities on both sides of the agreement. Such practice is consistent with the progressive affirmation of a system of double authorization, from the coastal and the flag State, as recommended in the FAO *Voluntary Guidelines for Flag State Performance* in order to properly ensure sustainability and a precautionary approach.¹⁶

In connection with these exclusivity clauses, the attention of the Tribunal can be drawn to an upcoming ruling of the EU Court of Justice in Case C-565/13 *Ahlström and Others*, which concerns the scope of an exclusivity clause of an existing EU fisheries agreement.¹⁷

¹³ See article 1(m) of the Convention on conservation and management of fishery resources in the South-East Atlantic Ocean (SEAFO), article I, paragraph 4 of the Convention for the strengthening of the Inter-American Tropical Tuna Commission (Antigua Convention 2003) (IATTC), article I, paragraph i of the (revised) Convention on cooperation in the Northwest Atlantic Fisheries (NAFO), and article 1, paragraph i of the Convention on Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO).

¹⁴ See point 87 and Annex 5 to the European Union first Written Statement (with further references).

¹⁵ See point 90 and Annex 5 to the European Union first Written Statement (with further references).

¹⁶ See points 9, 29, 40, 41 and Annex I of the Voluntary Guidelines.

¹⁷ Questions referred to the Court of Justice of the European Union:

"Is Article 6(1) of the fisheries partnership agreement between the European Community and the Kingdom of Morocco exclusive in that it excludes Community vessels from being authorised to fish in Moroccan fishing

STATEMENT OF MR PAASIVIRTA – 4 September 2014, a.m.

In the light of the original French version of the question, it should be clarified that the EU is not the “holder” of the fishing licence; it is always the fishing vessel that holds the permit, based on the decision of the coastal State. Under the fisheries agreements, the European Commission transmits applications for fishing authorizations that it receives from EU Member States to the coastal State concerned. The verification that the European Commission does in this context aims *inter alia* to ascertain that the applications conform to the provisions of the bilateral fisheries agreement. Such verification is yet another example of the way in which the European Union fulfils its obligations.

In this context it is also to be noted that the specific position of developing countries is recognised by EU fisheries measures, and therefore capacity-building efforts are part of fisheries cooperation agreements.

Should the Union fail to meet the obligations set out in its fisheries agreements, as envisaged in question 3, the Union would be liable under international law.

Mr President, honourable Members of the Tribunal, as to the operation of these bilateral fisheries agreements within the European Union, I note that these agreements are an integral part of the EU legal order and that they are implemented within the Union by the Member States’ authorities. Implementation is in this sense decentralized within the European Union.

This is, by the way, the reason why some of the EU fisheries agreements may contain provisions referring to the EU Member States’ authorities for purposes of practical implementation of the agreement. This serves practical interests of day-to-day functioning of the fisheries agreement. However, such provisions do not, of course, render the EU Member States contracting parties to these agreements, and thus they cannot be liable on the basis of these agreements.

If a member State of the European Union fails to fulfil the obligations stemming from the agreement, it is still the Union which is internationally liable.

In the same vein, in the multilateral area, the EU is party to most RFMOs, and it participates in regard to the measures on compliance and illegal fishing taken by these organizations. If there are suspected cases of over-fishing, or of IUU fishing, which might have been committed by member States’ vessels, the EU will take the necessary measures or provide the necessary explanation which may mitigate the suspicion. In one case, excess fishing by certain member States’ vessels had to be compensated by reduced Union quotas for the subsequent years.¹⁸

Mr President, honourable Members of the Tribunal, I have explained at some length the European Union practice in connection with question 3. However the international

zones on the basis of licences issued exclusively by the competent Moroccan authorities for Moroccan owners of fishing quotas?

Is Article 6(1) of the fisheries partnership agreement between the European Community and the Kingdom of Morocco exclusive in that it excludes Community vessels from being chartered to Moroccan companies on a bareboat charter (on the standard ‘Barecon 2001’ BIMCO Standard Bareboat Charter form) for fishing in Moroccan fishing zones carried out on the basis of a licence issued exclusively by the competent Moroccan authorities to Moroccan owners of quotas?

Is the answer to question 2 affected in the event that the chartering party also gives competence in the form of administration and crewing of the fishing vessel and technical support to the Moroccan company?

Does the fisheries partnership agreement between the European Community and the Kingdom of Morocco mean that the Kingdom of Morocco is entitled to develop and carry out its own domestic industrial pelagic fishing alongside the agreement below the 29th Parallel (N)? If that is the case, does the agreement entitle the Kingdom of Morocco to charter or grant licences directly to Community fishing vessels for its domestic fishing without there being a need for a permit from the European Community?” (Official Journal of the EU, C 15 of 18 January 2014, p.9). The Ruling of the Court of Justice will be made available on the website of the Court at: http://curia.europa.eu/jcms/jcms/j_6/accueil

¹⁸ See e.g. point 14d of ICCAT Recommendation Rec 08-05 and Commission Regulation 446/2008 (Official Journal of the EU, L 134 of 23 May 2008, p. 11.).

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agreements referred to do not form part of the applicable international law of question 3, in the event that the Tribunal would render an advisory opinion.

Mr President, honourable Members of the Tribunal, as a final remark, the European Union would like to stress that all interveners are clearly committed to combating IUU fishing.

This is regardless of whether or not this Tribunal has jurisdiction in this matter. In the fight against IUU fishing, international cooperation is of paramount importance. However, sometimes cooperation fails in achieving concrete results in preventing IUU fishing.

We have therefore reported on international practice involving listing of vessels and non-cooperating States, as a form of reaction, which is endorsed by many RFMOs as well as some States. This avenue has also been followed by the EU.

It is clear that the more States cooperate, the less there is need for any listing measures.

Mr President, honourable Members of the Tribunal, thank you for your attention and thank you for the honour of having been able to address this Tribunal.

The President:

I thank you, Mr Paasivirta, for your statement.

We have come to an end of today's oral statements.

The hearing will continue tomorrow morning at 10 a.m. to listen to the last two statements: the Caribbean Regional Fisheries Mechanism and the International Union for the Conservation of Nature.

I wish you a nice afternoon.

(The sitting closes at 1.05 p.m.)

5 September 2014, a.m.

PUBLIC SITTING HELD ON 5 SEPTEMBER 2014, 10.00 A.M.

Tribunal

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, KELLY, ATTARD, KULYK; Registrar GAUTIER.

List of delegations: [See sitting of 2 September 2014, 3.00 p.m.]

AUDIENCE PUBLIQUE TENUE LE 5 SEPTEMBRE 2014, 10 HEURES

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, Mme KELLY, MM. ATTARD, KULYK, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 2 septembre 2014, 15 heures]

The President:

Good morning. We will hear today the last two oral statements in Case No. 21 concerning the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

The Caribbean Regional Fisheries Mechanism will first take the floor and will be followed by the International Union for the Conservation of Nature.

I now invite Mr Bekker to present the statement of the Caribbean Regional Fisheries Mechanism. Mr Bekker, you have the floor.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

STATEMENT OF MR BEKKER
CARIBBEAN REGIONAL FISHERIES MECHANISM
[ITLOS/PV.14/C21/4/Rev.1, p. 1–9]

Mr Bekker:

Mr President, honourable Members of the Tribunal, it is a very great honour to appear before this Tribunal and to do so on behalf of the Caribbean Regional Fisheries Mechanism, or CRFM, in this Case No. 21. The CRFM is pleased to note that, through Judges Lucky and Nelson, the Tribunal includes two Members from the Caribbean region.

This oral presentation supplements our written statement dated 27 November 2013, which focused on the substance of the request for advisory opinion submitted by the Sub-Regional Fisheries Commission. Today, I shall address key issues of jurisdiction and admissibility with which the Tribunal is confronted for the first time in this case concerning illegal, unreported and unregulated (IUU) fishing before making a few brief remarks on the substance of the questions posed by the SRFC. My goal is to be as responsive as possible to the various statements submitted in this case and to be of assistance to the Tribunal in its task of answering the questions posed by the SRFC. Any references are to be found in the transcript of my statement.

Mr President, Members of the Tribunal, this is a landmark case, if only because of the fact that this is the first time in its history that the full Tribunal has been requested to render an advisory opinion, and that this proceeding involves no fewer than 30 participants having submitted a total of 36 written statements.

While those facts may be of academic or historical interest, the request of the SRFC raises issues that are anything but academic. The questions posed by the SRFC confront this Tribunal with certain law of the sea issues that are of vital interest to the peoples of the region represented by the requesting body, and indeed to the international community at large. The International Union for Conservation of Nature and Natural Resources (IUCN) has helpfully reminded us that it has been estimated that as much as one third of the total global marine fish catch is taken illegally,¹ which is a staggering figure.

The Global Oceans Action Summit for Food Security and Blue Growth, which took place in The Hague in April of this year, described IUU fishing as “[o]ne of the greatest challenges of our time in terms [of] contributing significantly to the depletion of fish stocks worldwide in a major barrier towards achieving sustainability of fish stocks and jeopardizing efforts to return over-exploited or collapsed stocks to good health”.²

Indeed, IUU fishing is a multi-billion dollar enterprise inflicting great economic and environmental harm on States that are victims, especially developing countries with limited capacity for monitoring, control and enforcement of their fisheries laws. It is because of the magnitude of the problem underlying the request of the SRFC and its commitment to the rule of law that the Caribbean Regional Fisheries Mechanism, an intergovernmental body for regional fisheries cooperation comprising 17 developing countries and small island developing States, was pleased to accept the Tribunal’s invitation to participate in this proceeding, including by submitting a comprehensive written statement supporting the Tribunal’s jurisdiction and the substance of the request of the SRFC.

¹ See written statement of the IUCN, para. 31 (citing D.J. Agnew, J. Pearce, G. Pramod, T. Peatman, R. Watson, J.R. Beddington and T.J. Pitcher, “Estimating the Worldwide Extent of Illegal Fishing” (2009) 4(2) *PLos One*, available at <<http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004570>>).

² *Global Oceans Action Summit for Food Security and Blue Growth*, April 22–25, 2014, The Hague, The Netherlands, Chair’s Summary, p. 33, available at <www.globaloceansactionsummit.com>, accessed 22 August 2014.

STATEMENT OF MR BEKKER – 5 September 2014, a.m.

Mr President, at the outset, it must be stressed that the Tribunal is not called upon in this proceeding to answer the question whether a general advisory jurisdiction has been conferred on the Tribunal or whether it enjoys an inherent advisory jurisdiction. The Tribunal will not have to pronounce on such issues generally. The only question before this Tribunal in this case is whether it has the jurisdiction to issue the advisory opinion requested by the SRFC. Among the 30 participants having submitted written statements in this case, nine have remained silent on this question.

At least a dozen participants support the Tribunal's jurisdiction in this case either enthusiastically or while urging the Tribunal to adopt a more or less cautious or conservative approach. The CRFM has full confidence that the Tribunal will apply the requisite caution in performing its judicial function in this case and it invites other participants to approach this issue with the same level of confidence.

The Caribbean Regional Fisheries Mechanism notes with regret that some eight participants, all of them States, have appeared solely to oppose the Tribunal's exercise of advisory jurisdiction in this important case. They represent a clear minority.

The CRFM respectfully submits that there are at least two flaws associated with the argumentation employed by those participants having taken the position that the Tribunal is without jurisdiction in this case. First, they fail to acknowledge that it is for the Tribunal alone to decide the question of its jurisdiction based on the *Kompetenz-Kompetenz* principle recognized in article 288, paragraph 4, of the United Nations Convention on the Law of the Sea, or UNCLOS. The President of this Tribunal referred to "the well-established 'principle of the *compétence de la compétence*'" in his most recent statement to the United Nations General Assembly.³ Remarkably, only New Zealand, the requesting body and the CRFM have referred to this principle in their written statements.⁴ The Caribbean Regional Fisheries Mechanism has full confidence in the Tribunal's application of this fundamental principle associated with the judicial function in the present case.

Second, those participants opposing the Tribunal's advisory jurisdiction, either for the purpose of this case or in general, also fail to make reference to the rule of *effet utile* in their written statements. In fact, the CRFM is the only participant having referred to this fundamental principle of international law. As the International Court of Justice has stated: "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify [an interpretation of a text] contrary to [its] letter and spirit."⁵

In this case, two treaty texts are of relevance for purposes of the rule of *effet utile*, and both must be interpreted to ensure the effectiveness of their terms. First, article 21 of the Tribunal's Statute, included in Annex VI of the UNCLOS, states, in the relevant part: "The jurisdiction of the Tribunal comprises ... all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

The second provision of interest to the rule of effectiveness is article 33, entitled "Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion," which is included in the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC, or MCA Convention. That Convention is the "other agreement" meant in article 21 of the Tribunal's Statute, and it is the

³ Statement by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea, on Agenda item 75(a) "Oceans and the Law of the Sea," at the Plenary of the Sixty-eighth Session of the United Nations General Assembly, 9 December 2013, para. 5.

⁴ See written statement of New Zealand, para. 7; written statement of the Sub-Regional Fisheries Commission, p. 12; written statement of the Caribbean Regional Fisheries Mechanism, para. 47.

⁵ *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

“international agreement related to the purposes of the Convention” to which article 138 of the Rules of the Tribunal refers.

Article 33 of the MCA Convention, to which the request of the SRFC makes reference, provides: “The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion.”

Both article 33 of the MCA Convention and article 21 of the Tribunal’s Statute refer to “matters”. As the record shows, the present matter does not involve an underlying dispute and the issue of State consent simply does not arise in this advisory proceeding.

In sum, any conclusion that the combination of article 33 of the MCA Convention, article 21 of the Tribunal’s Statute, and article 138 of the Rules of the Tribunal does not support the Tribunal’s advisory jurisdiction over the matter submitted by the SRFC would contravene the rule of *effet utile*.

Mr President, Members of the Tribunal, there is no reference in any of the written statements submitted by those participating States opposing the Tribunal’s jurisdiction to those States having raised any objection to the adoption of rule 138 by the Tribunal prior to this proceeding. We are confronted with 17 years of silence since the adoption of the Rules by the Tribunal on 28 October 1997.

The opposing States can point to no formal source of international law, as meant by article 38 of the ICJ Statute, providing that the full Tribunal has no advisory jurisdiction, that this jurisdiction is exclusively held by the Seabed Disputes Chamber, that the Tribunal can only consider questions that arise within the scope of the activities of the body requesting an advisory opinion, or that bodies submitting requests for advisory opinion can only pose questions that may be directly derived from the international agreement forming the basis for the request to the Tribunal.

Some opposing States have confused the role of the requesting body or organization under the UN Charter and ICJ Statute with that of the requesting body under rule 138 of this Tribunal. As Judge Jesus, speaking in his capacity as ITLOS President, has helpfully explained, “such body is only the conveyor of the request” and “[i]ts legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature and any other structure or institutional considerations.”⁶

Mr President, if the drafters of the UNCLOS, including its Annex VI, had intended to limit the Tribunal’s jurisdiction under article 21 of its Statute to contentious jurisdiction, they would have used the words “confers contentious jurisdiction on the Tribunal” as opposed to “confers jurisdiction on the Tribunal,” the words employed by article 21.

According to China, “[i]t is necessary for the Tribunal to satisfactorily explain the basis and rationale for claiming advisory competence for its full bench.”⁷

It is recalled that consecutive Presidents of this Tribunal have confirmed and explained the full Tribunal’s special advisory jurisdiction through a series of official statements⁸ and that the Tribunal’s website and the Tribunal’s own booklet *A Guide to Proceedings before the Tribunal* unequivocally confirm this jurisdiction. The CRFM cannot imagine that those statements would not be given effect in the present case. You cannot advertize a product or service and then tell an interested customer that you are unable to sell it to him.

⁶ Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 10.

⁷ Written statement of China, para. 5.

⁸ See written statement of the Caribbean Regional Fisheries Mechanism, n. 51 and accompanying text.

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Just as the advisory competence of the Permanent Court of International Justice, to quote China again, “was an innovation in international judicial practice at the time”,⁹ so is the competence conferred on the Tribunal by article 21 of its Statute, the exact language of which is not found in the constituent instrument of any other court or tribunal, “a significant innovation in the international judicial system, as Judge Wolfrum, speaking in his capacity as ITLOS President, has repeatedly put it.¹⁰ Judge Jesus, himself speaking in his capacity as ITLOS President, has explained that the full Tribunal’s “[j]urisdiction to entertain requests for advisory opinions [is] based on a procedure which has no parallel in previous adjudication practice ...”¹¹ and “represents a ‘procedural novelty’.”¹²

The members of the international community owe a debt of gratitude to the various Presidents of this Tribunal for taking pains to publicly explain the uniqueness and jurisdictional peculiarities of this judicial institution.

Mr President, Members of the Tribunal, with regard to the issue of admissibility, just as it is for the Tribunal to decide the question of its jurisdiction, it is for the requesting body alone to decide whether the Tribunal’s answers to the questions posed by that body can or will assist it and its member States. Whatever flaws can be identified in the questions as formulated by the SRFC, such flaws do not justify the Tribunal’s refusal to exercise its jurisdiction altogether. While general, broadly worded questions may pose a challenge to an international court or tribunal exercising advisory jurisdiction and might be more difficult to answer than specific questions, the SRFC’s questions are not impossible to answer, as is demonstrated by the answers suggested in the various written statements submitted in this case.

Advisory proceedings often involve less specific questions, as is shown by Case No. 17 and the case law of other international courts and tribunals. As Case No. 17, also an advisory proceeding, makes clear, an assessment of issues of liability is not necessarily closely connected with factual situations, and so the CRFM respectfully disagrees with the European Union that this might form an impediment to rendering an opinion in this case.¹³ The Request of the SRFC squarely involves specific legal obligations, particularly under the MCA Convention and the UNCLOS, being two treaty instruments binding on all SRFC Member States.

Mr President, the Caribbean Regional Fisheries Mechanism agrees with Judge Jesus, speaking in his capacity as ITLOS President, that “interpretation of certain provisions of the Convention [on the Law of the Sea] by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention.”¹⁴ The SRFC’s request relating to IUU fishing clearly concerns such a matter.

The Tribunal itself stated in its Judgment in the “*Volga*” Case more than a decade ago that it “understands the international concerns about illegal, unregulated and unreported

⁹ Written statement of China, para. 9.

¹⁰ Statement by Judge Rüdiger Wolfrum, President of the ITLOS, before the 55th Plenary Meeting of the UNGA (A/60/PV.55), Agenda item 75, “Oceans and the Law of the Sea,” 28 Nov. 2005, para. 15. The exact same words were employed by Judge Wolfrum, speaking in his capacity as ITLOS President, as part of his statement delivered at the Asia-Pacific Ambassador’s Luncheon held at the Intercontinental Hotel in Berlin on 17 January 2008, at p. 18, and as part of his statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs held in New York on 23 October 2006, at p. 7.

¹¹ Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 4.

¹² *Id.*, p. 6.

¹³ Cf. written statement of the European Union, para. 15.

¹⁴ Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 9.

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fishing and appreciates the objectives behind the measures taken by States ... to deal with the problem.”¹⁵

The Request of the SRFC offers this Tribunal an important and timely opportunity to clarify core law of the sea questions arising in the context of IUU fishing and the management of fish stocks. The Caribbean Regional Fisheries Mechanism, which itself is actively engaged in the fight against IUU fishing in the Caribbean region in the western hemisphere, hopes, therefore, that the Tribunal will pronounce itself on those questions and will do so in a way that is helpful to all subjects of international law that are confronted with the legal questions raised by the request of the SRFC.

While it is beyond controversy that a number of rules and instruments addressing IUU fishing exist today, the exact meaning of the international law rights and obligations of flag States and coastal States with regard to IUU fishing is not clear, as the written statements submitted in this case underscore.

Mr President, Members of the Tribunal, I shall devote the remainder of my presentation to substantive issues. The world fisheries community owes a profound debt of gratitude to those participating States and international organizations that have contributed substantive statements regarding the four questions posed by the SRFC in the course of these proceedings. The Request of the SRFC and the statements that it has attracted before this Tribunal already have put a most welcome spotlight on the global problem of IUU fishing and will serve to advance our understanding of the legal issues arising in this context. However, those statements lack the authority that would be associated with this Tribunal’s pronouncements on these issues.

As the written statements submitted in this case highlight, there are a number of legal questions arising from the SRFC’s four questions relating to IUU fishing that would profit from the Tribunal’s clarification by means of authoritative statements set forth in an advisory opinion. Legal questions that have emerged from among the 36 written statements submitted to the Tribunal include the following:

Exactly what activities are covered by the concept of IUU fishing in the areas covered by the Request of the SRFC?

What is the law applicable to IUU fishing activities by a vessel flagged in one State within a coastal State’s areas of territorial sovereignty or sovereign rights and on the high seas?

Which of the relevant rules and instruments concerning IUU fishing reflect a codification of existing international law, or *lex lata*, rather than being more in the nature of a progressive development?

What is the meaning of the concept of “sustainable management” as mentioned in the relevant provisions of the UNCLOS within the context of IUU fishing as meant by the Request of the SRFC? To what extent does it encompass ecosystem management, requiring consideration of the whole system rather than individual components, in that context, and what are a State’s duties associated with the ecosystem approach in the area of IUU fishing?

How does the principle of sustainable development affect the rights and duties of flag States and coastal States in the context of the legal regime governing IUU fishing activities in the areas covered by the request of the SRFC, and how are the rights and obligations of flag States and coastal States to be balanced in that context?

What does the duty of States to ensure effective jurisdiction and control of vessels flying their flag mean in practice?

Which concrete measures are to be taken by States in order to comply with their duty to apply the precautionary approach and to ensure sustainable management of marine living

¹⁵ “*Volga*” (*Russian Federation v. Australia*), *Prompt Release, Judgment, ITLOS Reports 2002*, p. 10, para. 68.

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resources in the context raised by the Request of the SRFC? Is the precautionary approach implicit in Part V of the UNCLOS?

What is the meaning of the duty to cooperate under Part V of the UNCLOS in relation to IUU fishing as meant by the Request of the SRFC? What general and specific duties to cooperate exist in this context, and what does it mean, within the context of the Request of the SRFC, for States to have “due regard” to the rights and duties of other States under the relevant instruments? It is recalled that the ICJ referred in its 1974 judgment in the *Fisheries Jurisdiction* case to “a duty to have due regard to ... the needs of conservation for the benefit of all.”¹⁶

Does the flag State’s responsibility to ensure that any laws and regulations enacted by a coastal State in relation to fishing in its exclusive economic zone be complied with extend to its vessels as well as its nationals owning or operating vessels, and how is the term “nationals” in article 62, paragraph 4, of the UNCLOS to be defined?

To what extent do the applicable conventional rules pertaining to IUU fishing activities taking place in areas under national jurisdiction or control of a coastal State or on the high seas reflect customary international law that is not incompatible with the UNCLOS? Concretely, does the practice of listing individual vessels engaged in IUU fishing and of identification or listing of non-cooperating States form part of contemporary international law?

What criteria are to be applied in determining whether a State has met its due diligence obligations in the context of IUU fishing as meant by the request of the SRFC? Does international law expect an increased level of due diligence from flag States whose vessels conduct fishing activities in areas where the coastal States exercise only limited control over their natural resources?

What is the meaning of general principles of international law, including the principle of good neighbourliness, in the context of the Request of the SRFC?

What are the implications on the coastal State’s rights and obligations of States having declared 200-nautical-mile exclusive fisheries zones rather than exclusive economic zones in this context?

What is the meaning of what the Request describes as “shared stocks” and “stocks of common interest” under the applicable law, and what does that law stipulate with regard to a coastal State’s rights and obligations in relation to such fish stocks?

Can isolated occurrences of IUU fishing trigger the international responsibility of a State, or must there be proof of “a general and systemic failure to fulfil the obligations as flag, coastal, port or market State”, as the European Union has suggested?¹⁷

What circumstances will exonerate from international responsibility a State that fails to comply with its direct or due diligence obligations in relation to IUU fishing as meant by the Request of the SRFC?

In what circumstances is there room for joint responsibility of States and/or international organizations in the case of the violation of a licence issued within the framework of an access agreement to which they are parties?

What remedies are appropriate under international law for IUU fishing as meant by the Request of the SRFC? What options are available for restitution? When is compensation the appropriate remedy in a case of IUU fishing?

Finally, what subjects are entitled to claim damages for IUU fishing in the different maritime zones covered by the request for an advisory opinion? Does the “*erga omnes*” character of the obligations relating to preservation of the environment of the high seas” to

¹⁶ *Fisheries Jurisdiction Case (UK v. Iceland)*, Judgment, I.C.J. Reports 1974, p. 3, 32.

¹⁷ Written statement of the European Union, para. 80.

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which the Seabed Disputes Chamber referred in Case No. 17 extend to IUU fishing as meant by the Request of the SRFC?¹⁸ It is recalled that this Tribunal observed in the *Southern Bluefin Tuna* cases that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”¹⁹

The Caribbean Regional Fisheries Mechanism and its 17 Member States would welcome the Tribunal’s clarifying answers to these and other questions arising within the context of the Request submitted by the SRFC.

Mr President, honourable Members of the Tribunal, I have come to the end of my presentation. I thank you very much for your attention – or, as they say in my native language and that of Hugo Grotius, “dank u wel”.

That concludes the presentation of the Caribbean Regional Fisheries Mechanism this morning.

The President:

Thank you, Mr Bekker, for your statement.

I now give the floor to the delegation of the International Union for the Conservation of Nature, which has requested to speak for 45 minutes. Ms Oral, you have the floor.

¹⁸ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 180.

¹⁹ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70.

STATEMENT OF MS ORAL – 5 September 2014, a.m.

STATEMENT OF MS ORAL
INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE
[ITLOS/PV.14/C21/4/Rev.1, p. 9]

Ms Oral:

Mr President, distinguished Members of the Tribunal, we have the great honour to appear before this Tribunal on behalf of the International Union for Conservation of Nature, which we will refer to as the IUCN, the oldest and largest global conservation organization, and we thank the Tribunal for affording us this opportunity to contribute to these proceedings, which my colleague has referred to as a landmark case on important questions of international law and conservation.

I would like to introduce Professor Cymie Payne who will address the basis for the Tribunal's advisory jurisdiction through the Convention, Statute and Tribunal Rules and the structure of the regime of the law of the sea.

I will address substantive questions 1 and 2 of the Request for an advisory opinion submitted by the SRFC, where I will identify key flag State obligations related to IUU fishing in the EEZ and high seas and questions of liability within the context laid by the distinguished counsel for the SRFC on Tuesday.

Finally, Professor Telesetsky, in question 3, will address when an international organization may be held responsible for IUU fishing conducted by a member State and, in question 4, highlight five key obligations of the coastal State in relation to shared, straddling or highly migratory stocks, and finally conclude our comments.

Mr President, I would respectfully request that you call upon my colleague Professor Payne.

The President:

Thank you, Professor Oral, for your statement.

I now invite Professor Payne to take the floor.

REQUEST FOR ADVISORY OPINION - SUB-REGIONAL FISHERIES COMMISSION

STATEMENT OF MS PAYNE
INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE
[ITLOS/PV.14/C21/4/Rev.1, p. 9–12]

Ms Payne:

Mr President, distinguished Members of the Tribunal, it is an honour for me to appear before you today on behalf of the International Union for Conservation of Nature.

We appreciate that much has been said about advisory jurisdiction, as counsel for CRFM reminds us, largely in support of the Tribunal's competence, and we do not intend to belabour points that have been made many times. However, in our view there has not been sufficient attention to the role of the Tribunal's advisory jurisdiction in the law of the sea regime and the role that jurisdiction-conferring agreements like the MCA Convention perform to define and constrain jurisdiction.

The Law of the Sea Convention sets out jurisdiction in Part XV and in Annex VI, which provides this Tribunal's Statute. Annex VI does more than simply amplify Part XV; like most of the annexes, it contains independent substantive provisions. The relevant portion of Annex VI is the second part of article 21, which states that the jurisdiction of the Tribunal includes "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." For convenience, I will refer to this "other agreement" as the "additional agreement".

Thus advisory jurisdiction of the full Tribunal rests on article 21 of the Statute plus an additional agreement. This additional agreement expressly states the Tribunal's jurisdiction to give an advisory opinion and establishes the scope of the Tribunal's competence.

Article 21 of Annex VI to the Convention is sufficient to establish the Tribunal's advisory jurisdiction when it is properly requested in accordance with such additional agreements. Without the second part of article 21, the Tribunal's competence would be circumscribed in a way that would undermine its role within the regime of the law of the sea.

To appreciate this interpretation of the text, we invite you to consider what kind of international agreement the Convention was designed to be. The Convention provides not just substantive rules but also a framework for the further development and integration of the law of the sea.

This is very different from the role of the International Court of Justice, which has been referred to so often in these proceedings. The Court and the Tribunal are different courts with different histories and different structures. Therefore we should be cautious in drawing parallels. The Tribunal has its own history, structure and objectives.

The principles that the Convention articulates are often intended to be implemented by other agreements, particularly in the area of fisheries management. Some of those are global and others are regional in scope.

Many articles of the Convention direct States to cooperate to achieve its objectives. Several call on States to cooperate through competent international organizations and to form "agreements or other arrangements." These agreements, arrangements and international organizations include 17 regional fisheries management organizations and the global Fish Stocks Agreement. The MCA Convention is an example of an international agreement, amended in 2011 to better advance the Law of the Sea Convention's objectives and to provide authority and a procedure for submitting a request for an advisory opinion to the Tribunal.

The MCA Convention itself establishes a system of cooperative fisheries management, implementing articles 61, 62, 63, and 64 of the Convention. This is an evolving area of international law, where legal questions will inevitably arise. As with other international legal arrangements, an authoritative judicial body is needed to resolve disputes and, should the

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States Parties so desire, provide legal advice to guide their implementation. It has been said that advisory opinions are used “for the better assurance of the legality of proposed administrative or legislative measures.” It is for the parties to these agreements to decide whether to accept the Tribunal’s advisory jurisdiction by adopting a provision conferring that jurisdiction and to provide the terms on which a request for an advisory opinion may be submitted to the Tribunal. We respectfully submit that it is not for third party States to limit the rights of these States by challenging the Tribunal’s competence.

It is consistent with the text, object and purpose of the Convention for the Tribunal to act as an arbiter in case of disputes and as a source of legal advice for the parties to these agreements. In fact, it would be more surprising if the Tribunal’s jurisdiction were so narrow that it excluded these agreements.

The Tribunal itself understood the importance of its advisory role and provided clarification of this component of its jurisdiction when it adopted rule 138 in 1997, pursuant to its Statute. (It is worth noting that the Tribunal did not alter rule 138 when it amended its Rules in 2001 and 2009). The terms of the jurisdiction-conferring provision in any agreement that authorizes the Tribunal to exercise jurisdiction under UNCLOS Annex VI, article 21, must comply with the Tribunal’s Rules, the relevant parts of the Law of the Sea Convention and other relevant rules of international law. The Tribunal’s decision whether to accept an advisory request will include this analysis of the agreement, providing the guarantees sought by some of those who object to jurisdiction.

Does this Request by the Sub-Regional Fisheries Commission under article 33 of the MCA Convention satisfy the requirements of rule 138? We submit that it does. They are: that an additional international agreement related to the purposes of UNCLOS confer jurisdiction; that the request address a legal question; and that it be transmitted in accordance with the procedures specified by the additional agreement.

Rule 138 states that the agreement conferring advisory jurisdiction must be “related to the purposes of” the Convention. The purposes of UNCLOS, stated in its preamble, include establishing

a legal order for the seas and oceans which will ... promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

In particular, UNCLOS gives a coastal State sovereign rights over the living resources of its EEZ and spells out how those rights are to be exercised.

The MCA Convention is related to those purposes because it establishes legally appropriate conditions for access to the EEZs of its Member States. It does this by requiring that Member States adopt consistent practices for access to surplus fishery resources, licensing, equipment standards, vessel regulation, artisanal fishery regulation, port State measures and enforcement. In this way it reflects a regionally specific effort to integrate the substantive obligations of the Law of the Sea Convention into Central East African law and practice. The 2011 revisions of the MCA Agreement further clarify that the agreement is intended by its members to assist States in meeting their basic Law of the Sea Convention obligations for fisheries conservation and management.

Article 33 of the MCA Convention provides the basis for the Tribunal’s advisory jurisdiction, the scope of the advice that may be sought, and the procedures to make the request by stating that “[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion.”

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It is uncontroversial that this is a valid request: the SRFC Technical Note provides the details to verify that the Council of Ministers did authorize the Permanent Secretary of the SRFC to submit the questions according to the specified procedures, and he did so.

The scope of jurisdiction established by the Tribunal's rule 138 and article 33 of the MCA Convention is for "a given legal matter," the natural reading of which is "a given legal matter relating to the activities of the SRFC and the provisions of the MCA Convention." The four questions submitted by the SRFC raise questions that concern fisheries in the region managed by the SRFC. They ask the Tribunal to address legal rights, obligations, and consequences of breach. They do not ask the Tribunal to decide matters of fact. Therefore, the four issues submitted for the Tribunal's advisory opinion should be considered legal matters.

To conclude, while it may not invent competence where none is authorized, the Tribunal is the judge of its own competence. Article 21 of the Statute is reasonably read to include advisory jurisdiction over matters that are specifically provided for in other agreements. When they voted to adopt rule 138, the Judges of the Tribunal, many of whom contributed to the drafting of the Convention on the Law of the Sea, determined that the Tribunal did have advisory jurisdiction for the limited situation when an international agreement related to the purpose of the Convention conferred it. As we have demonstrated, the Tribunal's legal advice will contribute immeasurably to the development of the law of the sea, a role necessitated by the unique structure of the Law of the Sea Convention and its implementing global and regional agreements.

We submit, therefore, that article 21 of Annex VI of the Law of the Sea Convention, read with article 33 of the MCA Convention, confers on this Tribunal jurisdiction to give an advisory opinion on any legal matter related to the activities of the SRFC under the MCA Convention, referring as relevant to the Law of the Sea Convention and other sources of international law.

Thank you, Mr President and Members of the Tribunal for your attention. I would ask you, Mr President, to give the floor to Professor Oral.

The President:

Thank you, Professor Payne.

I will call Professor Oral to take the floor again.

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STATEMENT OF MS ORAL
INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE
[ITLOS/PV.14/C21/4/Rev.1, p. 12–16]

Ms Oral:

Thank you. Mr President and Members of the Tribunal, it is now my privilege to make a few points regarding the substantive questions referred to the Tribunal by the SRFC. We read these questions within the context of the Minimal Conditions for Access (MCA) Convention provisions, such as article 25, which requires Member States to take all the necessary measures to prevent, deter, and eliminate IUU fishing, which would include taking actions against flag States.

I will not summarize all the arguments made in our written submission but only highlight those points we regard as having particular significance for the conservation of the environment and natural resources, the mandate of IUCN.

In question 1, SRFC seeks clarification of flag State obligations and liability in cases where IUU fishing has been conducted in the EEZ of another State. This is a vitally important issue for effective implementation of conservation measures, which is why we regard this case as so important.

The two principal flag State obligations related to fishing activities can be found in the 1982 Law of the Sea Convention. The first is the flag State duty to ensure compliance by its vessels with conservation measures, laws and regulations of the coastal State. The second obligation is the duty to exercise effective jurisdiction and control over ships flying its flag.

I will focus principally on the first obligation.

Article 62, paragraph 4, of the Law of the Sea Convention expressly requires that foreign nationals comply with the conservation measures and other conditions and terms established under its laws and regulations when fishing in the EEZ of a coastal State.

While no express reference has been made to the flag State in this provision, we submit that a requirement can be read into the Convention that a flag State is under an obligation to ensure that vessels having its nationality comply with the coastal State's fisheries laws and regulations when fishing in a foreign EEZ.

This reading flows from the Convention itself. I refer to article 91, which expressly states that the flag State fixes the conditions of granting nationality of ships, including registration and the right to fly its flag. A ship is thus a "national" of the flag State. The drafting history of articles 116-118 of the Convention further supports this interpretation. We would also draw attention to the fact that private individuals cannot be the subject of the Law of the Sea Convention. Consequently, an interpretation of article 62, paragraph 4, that excluded fishing vessels would undermine its purpose and object, which is to garner compliance with coastal State laws.

Therefore, while the coastal State has sovereignty rights and the competence to regulate fishing activities in its EEZ, parallel to this is the flag State obligation to take the necessary measures to ensure that fishing vessels flying its flag, in other words, its nationals, comply with the conservation measures as provided under article 62, paragraph 4. This obligation to ensure compliance with the coastal State laws is, we argue, an obligation of conduct and due diligence. Drawing on the jurisprudence of the International Court of Justice in the *Pulp Mills* case and this Tribunal's Seabed Dispute Chamber Advisory Opinion it can be concluded that a State's obligation "to ensure" is an obligation of conduct, that is, "to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result." The State is not required to achieve the specific result.

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In the context of the present matter, this means that the flag State is not obliged to guarantee full compliance by each of its vessels with the foreign coastal State laws but rather must adopt those measures that demonstrate “best possible efforts” to achieve compliance.

Further, as underlined by the International Court of Justice in the *Pulp Mills* case, “a certain level of vigilance in their enforcement and the exercise of administrative control ...” is required. In other words, *pro forma* adoption of rules and measures alone would not suffice to meet “due diligence” obligations.

In summary, the obligation to ensure compliance requires both a legislative component and a robust administrative and enforcement component. Words alone will not suffice; action is also required.

In our written submission, paragraphs 27-30, we have sought to demonstrate that the flag State’s obligation to ensure compliance with coastal State fisheries laws and regulations has become customary international law through widespread State practice, embodied in various soft law instruments and compliance clauses in numerous sub-regional fisheries treaties, access agreements, and coastal States’ domestic legislation, which we have listed in the annex to our written submission.

We submit further that, drawing on this range of instruments, the actual content of these flag State obligations at minimum can be distilled to the following six obligations: to prohibit unauthorized fishing; not to authorize fishing in the EEZ of another State unless it can exercise effective jurisdiction and control over its vessels; to adopt legislation requiring that its fishing vessels comply with the coastal State conservation laws in its EEZ; to implement effective mechanisms to detect possible breaches of the coastal State’s fisheries laws and regulations; to take administrative and/or criminal proceedings against vessels that are reasonably suspected of having violated the laws and regulations of the coastal State when fishing in the EEZ; and finally, to impose sanctions with adequate deterrence against future violations of the coastal State laws.

We submit that these six measures, while not derived from binding instruments, have developed normative force and provide the substance of what measures need to be taken by the flag State to meet its due diligence obligations as outlined by the Seabed Disputes Chamber and the International Court of Justice for the fulfilment of the flag State obligation, which in the present case is to ensure compliance with the coastal State’s laws and regulations.

As to the second obligation of the flag State to exercise effective control and jurisdiction over its vessels, which has been addressed in detail in several submissions, we submit that it is an obligation that follows the flag regardless of jurisdiction. This Tribunal recently stated in the *M/V “Virginia G”* case that

once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operated in accordance with generally accepted international regulation, procedures and practices.

The duty begins from the moment of registration and for purposes of this advisory opinion, we believe that such duty would apply to fishing vessels.

I will now examine the application of flag State liability within the context of the present question taking into account specific cases provided by the SRFC.

For example, if the flag State fails to take action following notification by the coastal State of IUU fishing activities in its EEZ, we are of the view that the flag State would be in violation of an international obligation as stated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

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We are also of the view that a single incident could entail State liability. A single incident of IUU fishing can result in significant economic harm through revenue loss to the coastal State as well as damage to the ecosystem itself. For example, a single serious incident of IUU fishing of an over-exploited stock could cause significant, if not irreparable, damage to the integrity of the ecosystem.

An example of valuation can be found in the “*Hoshinmaru*” prompt release case, decided by this Tribunal, where Russia had valued from a single incident of IUU fishing, US\$350,000- 400,000 (7,927,500 roubles) as damage to the marine environment.

To predicate liability only on systematic failures, as some have argued – that is, multiple incidents of IUU fishing – we submit, would have negative consequences for the efforts to promote sustainable fisheries and would undermine the purpose and objective of many treaties concluded in this vein.

I will leave the question of appropriate reparation by referring to our written submission and also to the statements made by our distinguished colleagues representing Micronesia and New Zealand.

In conclusion, the flag State is required to exercise effective control and jurisdiction over its vessels and to adopt the necessary measures to ensure compliance of its fishing vessels with the laws of the coastal State, which includes the six due diligence measures we have outlined.

I now turn to question 2. As indicated in our written statement, we interpreted question 2 to include IUU fishing in the high seas. The second written statement submitted by the SRFC confirmed this, and it is the high seas regime which is of particular interest in this context to the IUCN.

Having identified the flag State obligations applicable to fishing in the EEZ of another State in question 1, we would now go on to ascertain those obligations under international law specific to fishing vessels operating in the high seas.

First, while all States enjoy the freedom to fish on the high seas, as codified in article 87 of the Convention, this right is subject to a number of qualifications. Under article 192 all States are obligated to protect and preserve the marine environment, which includes the living resources of the high seas. Further, in addition to treaty-created obligations, exercise of the right to fish on the high seas, as stated in article 116, is subject to the rights, duties and interests of the coastal State as provided in the Convention as well as other instruments. States, under article 117, are also required individually or in cooperation with other States to adopt the necessary measures for their nationals – that is, fishing vessels – for conservation of the living resources of the high seas. Article 118 also mandates cooperation in the management and conservation of living resources in the high seas.

We would also add that protection of the marine living resources of the high seas is recognized as an obligation *erga omnes* that concerns the interest of the international community, which would include the Member States of the SRFC. It is clear that the flag State has primary responsibility to fulfil these obligations. The next question is: through which measures?

In our written statement, we suggest key provisions of the 1995 United Nations Fish Stock Agreement, the Compliance Agreement and other FAO instruments, which have been adopted by various RFMOs and endorsed frequently by the United Nations General Assembly and the FAO, provide for six main flag State obligations for fishing in the high seas. However, in the interest of time I will refer the Tribunal to paragraph 47 of our written statement where we outline the six obligations.

The matter is important for RFMOs dealing with IUU fishing by flag States in high seas adjacent to their EEZ. We would further conclude that infringement of these obligations by

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flag States could entail liability, as we have detailed in our written statement in paragraphs 59-62.

Mr President, distinguished Members of this Tribunal, I thank you again for your attention and for this privilege. I now ask you to give the floor to Professor Telesetsky.

The President:

Thank you, Professor Oral.

I give the floor to Professor Telesetsky.

STATEMENT OF MS TELESETSKY – 5 September 2014, a.m.

STATEMENT OF MS TELESETSKY
INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE
[ITLOS/PV.14/C21/4/Rev.1, p. 16–20]

Ms Telesetsky:

Mr President, distinguished Members of the Tribunal, thank you for this opportunity to address you today on the IUCN responses to questions 3 and 4.

In question 3 the SRFC asks the Tribunal this week for advice on whether an international organization that has concluded a fishing access agreement with a non-member coastal State can be held responsible when a member State fishing vessel violates the fishing laws of the non-member coastal State. If the international organization is not exclusively responsible, should the responsibility either be shared with the member State or instead assigned exclusively to the member State? We might ask this question in a more specific way.

Can an international organization, such as the European Union, that enters into fishing access agreements with SRFC countries such as Mauritania be held liable if a vessel flagged to a European Union Member violates the domestic fishing laws of Mauritania; or does the European Union jointly share international responsibility for the violation of Mauritanian law with its Member State; or is the Member State alone held responsible under the principles of flag State responsibility that we discussed in question 1?

This is an important question for the Tribunal to consider in its deliberations because many coastal States, including many of those who are Members of the Sub-Regional Fisheries Commission, have limited resources to effectively prosecute IUU fishing vessels in their jurisdictional waters or on the high seas. It is important for these States to know which entities can be held responsible for violations of domestic coastal law.

The IUCN agrees with the EU that the short answer to question 3 is that international organizations can be held responsible for breaches of their obligations under an access agreement with a non-member coastal State as well as for breaches of any other relevant general obligations of international law. It is not uncommon for international organizations to detail in treaties specific obligations for their organizations. For example, in the Fisheries Partnership Agreement between the European Union and Mauritania, the European Union has agreed that:

The Community undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Mauritania has jurisdiction, in accordance with the United Nations Convention on the Law of the Sea.

Here, the EU has committed itself to providing oversight to ensure that European Union vessels comply not only with various measures of the agreement but also with domestic Mauritanian fishing law.

Applying articles 3, 4, 6 and 31 of the International Law Commission's Draft Articles on the Responsibility of International Organizations to an International Fishing Access Agreement, it is clear that a breach of a legal obligation contained in a treaty with an international organization may give rise to the responsibility of the international organization.

Assuming, based on our analysis, that international organizations can breach an international agreement and be held responsible for a breach, for what kinds of acts and omissions might an international organization be held exclusively responsible? We return to the European Commission's language in a sample fisheries partnership agreement – in this case the Mauritanian agreement – to help provide answers. In this agreement, the Community has agreed to undertake “to take all the appropriate steps required to ensure that its vessels

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comply with this Agreement and the legislation governing fisheries” in the waters of a non-EU coastal State. Based on the choice of language in this treaty and the interpretation of the plain meaning of the term “undertake” by the International Court of Justice in its 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, it appears that the EU in its treaties has agreed, as an international organization, to take affirmative steps to ensure compliance with both the fishing access agreement and Mauritanian domestic legislation.

The partnership agreement requires, for example, that all community vessels must be in possession of a fishing licence issued under the agreement. On the basis of this substantive requirement, the European Union may have either (1) an obligation of conduct to ascertain directly whether “its vessels” operating in the non-EU member State’s coastal waters have legitimate fishing licences; or (2) an obligation of conduct to collect information from individual EU States regarding fishing licences that can be relayed to the non-EU coastal State. The EU must also be prepared to share with a treaty party any information that it may have regarding vessels that do not have a fishing licence operating within the jurisdiction of a treaty partner. A failure by the European Union to have a policy and a practice to ensure that its vessels have licences or to ensure compliance with provisions under domestic fishing legislation may be considered a breach under an international fishing agreement and be subject to liability.

Regarding responsibility, if the international organization has clear competence over a subject in an international agreement with a third party coastal State, the international organization will be responsible. If a member State has clear competence over a given subject matter and there is a breach of international law, the member State will be held responsible. The more challenging question regarding responsibility is who should be held responsible in the case of a breach of domestic coastal law when the division of competence between an international organization and a member State is not clear to third parties. If the international organization and a member State fail to clearly define competences at the request of a State party under UNCLOS Annex IX, article 6, paragraph 2, then the Convention identifies responsibility for both the international organization and the member State and assigns joint and several liability.

On question 4 the SRFC asks the Tribunal today to provide guidance regarding the rights and obligations of a coastal State managing shared stocks and stocks of common interest.

The question posed makes clear that the Tribunal is being called upon to provide its expert advice on coastal States’ rights and obligations, under several key provisions including but not limited to article 62, paragraph 5, article 63, paragraph 1, article 64, and article 192 of the Convention on the Law of the Sea. An evaluation of these laws and general principle of international environmental law suggest that States and in particular coastal States have at least one right and five duties associated with managing shared, straddling, and migratory stocks.

A number of law of the sea provisions, including articles 63, paragraph 1, and 64 of the Convention clarify that coastal States have a right to engage other States in creating cooperative conservation and management measures for shared stocks, straddling stocks, and migratory species either directly through bilateral negotiations or through a sub-regional organization such as the SRFC. In principle, this means that a coastal State which in good faith approaches another coastal State to negotiate conservation measures for a shared stock or a stock of common interest must be given a fair opportunity to express its interests and to negotiate for an agreement of mutual interest.

At least five duties accompany this right. First, there is a duty by coastal States which host shared stocks or stocks of common interest to seek to coordinate various national conservation and sustainable development measures with conservation and sustainable development measures from other States that have an interest in the resource. This obligation

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of coordination arises because of a duty to prevent harm to transboundary resources and is most likely to manifest where either only one party has promulgated measures for a shared resource or where the measures set by the two or more parties are radically divergent in terms of protection of the resource.

Second, States have a duty to negotiate in good faith. It is not enough to physically attend a negotiation with no intent or authority to coordinate measures that will ensure the conservation and sustainable development of shared stocks, straddling stocks, or migratory stocks. While we know that the obligation to negotiate in good faith underlies all international relations, the content of this duty remains undefined. From the perspective of the IUCN, we believe that part of good faith negotiation should be an obligation to protect the long-term sustainability of a marine natural resource.

Third, States have an obligation under existing international environmental law principles, as implemented under articles 5, 6, and 7 of the UN Fish Stocks Agreement, to take into consideration the precautionary principle, the ecosystem approach, and biodiversity protection when developing conservation and management measures related to shared stocks and stocks of common interest. The logic of restricting fishing and applying the precautionary principle to straddling and migratory species also applies to shared stocks that either regularly cross a border or that have separate life stages in two or more countries. What this means in practice is that States should not provide fishing licences for shared, straddling or highly migratory stocks to either their own national vessels or foreign vessels until there has been a good faith effort to create conservation and sustainable development measures for a particular stock that protect not just the stock itself but also the ecosystem as a whole. It is also our position that long-term viability for any marine stock depends on coastal States not only implementing species-appropriate conservation and management measures but also habitat protection measures and pollution reduction measures.

Fourth, under article 62, paragraph 5, of the Convention, coastal States must give advance notice of their conservation management laws and procedures to ensure that other States are aware of their obligations under the coastal State's law. This obligation is true for all stocks including shared, straddling, and migratory stocks.

Finally, coastal States have a duty to monitor their fisheries and to enforce their laws regarding conservation and management of shared, straddling and migratory stocks. This includes a duty to enforce against ships that are flagged to the coastal State whether they are operating within coastal State waters or in distant fishing waters. This coastal State enforcement duty also extends to third-party State vessels operating within coastal State waters that are in violation of conservation and management measures.

Mr President, distinguished Members of the Tribunal, thank you for granting the IUCN the opportunity to share these legal points.

In summary, we ask you to find competence to deliver an advisory opinion under Annex VI, article 21, of UNCLOS and article 33 of the MCA Agreement.

On question 1 we suggest that the Tribunal should recognize two primary obligations of the flag State operating in the exclusive economic zone. First, each flag State has a duty to ensure compliance by its vessels with the conservation measures of any coastal State where vessels from the flag State are operating. We have distilled this duty into six distinct due diligence obligations. Second, a flag State has a duty to exercise effective jurisdiction and control over ships flying its flag. A breach of any primary flag State obligation triggers State responsibility leading to liability.

On question 2, we suggest the Tribunal should find that flag States operating on the high seas have the six distinct obligations that we have included in our written statement.

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On question 3, we ask that you will advise the SRFC that an international organization may be held responsible for a breach of an obligation that arises under an international fishing access agreement if the international organization has clear competence.

On question 4, we ask you to recognize that the duties of coastal States in relation to shared, straddling, and migratory stocks include at least five duties, including devising conservation measures that take into consideration the precautionary principle.

Mr President, distinguished Members of the Tribunal, we thank you for your attention to these matters of great importance to the conservation of living marine resources. With this, IUCN concludes its oral submission.

The President:

Thank you, Professor Telesetsky, for your statement.

CLOSURE OF THE ORAL PROCEEDINGS – 5 September 2014, a.m.

Closure of the Oral Proceedings

[ITLOS/PV.14/C21/4/Rev.1, p. 20–21; TIDM/PV.14.A21.4.Rev.1, p. 22-23]

The President:

This concludes the oral presentations of today and also brings us to the end of the oral proceedings in Case 21.

I wish to seize this opportunity to thank all delegations who have addressed the Tribunal for the high quality of their statements made in the course of these four days. In addition, the Tribunal would like to convey its appreciation to all delegations for the great professionalism and courtesy shown during the hearing. I also thank the States and organizations participating in the written proceedings.

The Registrar will now address questions in relation to transcripts.

Le Greffier :

Monsieur le Président, conformément à l'article 86, paragraphe 4, du Règlement du Tribunal, les représentants qui ont participé à l'audience peuvent, sous le contrôle du Tribunal, apporter des corrections au compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Les corrections concernent uniquement les exposés dans la langue originale utilisée au cours de l'audience. Ces corrections sont à soumettre au Greffe le plus tôt possible et au plus tard en tout cas le mercredi 10 septembre 2014, à 18 heures, heure de Hambourg.

Merci Monsieur le Président.

The President:

Thank you, Mr Gautier.

The Tribunal will now withdraw to deliberate on the case. The advisory opinion will be read on a date to be notified to all participants. The Tribunal currently plans to deliver its advisory opinion in spring 2015.

In accordance with the usual practice, I request the participants to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery its advisory opinion. I thank you in advance.

The hearing is now closed.

(The hearing closes at 11.23 a.m.)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques dans *Demande d'avis consultatif soumise par la Commission Sous-Régionale des Pêches (CSRP) (Demande d'avis consultatif soumise au Tribunal)*.

Le 21 décembre 2015
21 December 2015



Le Président
Shunji Yanai
President



Le Greffier
Philippe Gautier
Registrar