INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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held on Thursday, 4 September 2014, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Shunji Yanai presiding

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)

(Request for Advisory Opinion submitted to the Tribunal)

Verbatim Record

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
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		P. Chandrasekhara Rao
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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
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Ms Mame Fatou Toure, Head of the Communication and Public Relations Service of the SRFC
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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
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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.

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 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 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), 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, suffuse 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 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 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, 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.

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).

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,

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[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.

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 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.

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[8] *See* Thailand WS2 at [22].
[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].

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, 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 loquitor* – 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

[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).
[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].

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 Micronesia[26] and Chile.[27] The 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]

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[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.
[28] *Contra* EU WS at [89].
[29] *Cf* EU WS2 at [26].
[30] *See* New Zealand WS at [54]-63].

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.

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

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[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.

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

[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].

its EEZ in accordance with the general rights and duties relating to fisheries management by a coastal State in its EEZ.[42]

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.

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.

[42] Churchill & Lowe *The Law of the Sea* (3rd ed, Manchester University Press, 1999) at p294.
[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] C*ontra* EU WS2 at [23].

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

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[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.

arguments seeking to establish the jurisdiction of the Tribunal. They are, in our respectful submission, unconvincing.

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 officially[5] 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

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[5]For 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

[6] Treves, "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 Petrič* (2011), p. 365.

[7] Germany WS, para. 5; Federated States of Micronesia WS, paras 4-7; Sri Lanka WS, paras. 6-7.

[8] United 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.

[9] C F Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff, 2002), p. 503, cited in UK second WS, para. 6.

[10] Thirlway, in *The Statute of the International Court of Justice: A Commentary*, 2012 (ed. Zimmermann, Tomuschat, Oellers-Frahm, Tams), pp. 517-8.

[11] See, 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.").

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.

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

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[12] Ki-jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited", 39 (2008) *ODIL* p. 360.
[13] G 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.
[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.

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, 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.

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.

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[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).
[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.

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

[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 (Bèye 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.").

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 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

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[7] Ibid, footnote 30.
[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).

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 States[18]), that States had no intention to confer an advisory 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 useful[21] 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]

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[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.
[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.

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 it[26]). 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.

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.

[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.
[28] UN Charter, Art . 96.
[29] UN Charter, Art . 96.

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.

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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[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.

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 191[1] of UNCLOS. In contrast, nothing in UNCLOS indicates that States have consented to the advisory jurisdiction of the full bench of this Tribunal.

Article 138[2] 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

[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

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 16[3] of the Statute of the Tribunal, which appears as Annex VI of UNCLOS. Article 16 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 SRFC[4] was misguided to rely on article 21[5] 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 288[6] 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.

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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."

[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.

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 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

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[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.
[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

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 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

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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 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. …").

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.

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

[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.

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 respective 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 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.

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 Tribunal in particular: the so-called "fisheries control

[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

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 rules[6] 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

[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).

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.

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.

[7] See article 20(4) of Council Regulation 1005/2008.
[8] See *mutatis mutandis* ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries of 2001, at Article 3, Commentary 17.

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 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.

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[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

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. 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]

[12] Article 216 paragraph 2, TFEU.

[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),

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*

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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.

and Others, which concerns the scope of an exclusivity clause of an existing EU fisheries agreement.[17]

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,

[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 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 Morrocan 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 Parellel (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/acceuil

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 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.

[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.).

(The sitting was closed at 1.05 p.m.)