

[Translation by the Registry]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

(CASE NO. 21)

COMMENTS PRESENTED BY FRANCE

29 November 2013

I. Introduction

In its Order of 24 May 2013, the International Tribunal for the Law of the Sea (hereinafter the “Tribunal”) invited the States Parties to the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter the “Convention”) to present written statements on the request submitted by the Sub-Regional Fisheries Commission (hereinafter the “SRFC”) for an advisory opinion on the following questions:

- 1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
- 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
- 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?*
- 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

France comments as follows on the request for an advisory opinion.

II. The Tribunal’s jurisdiction to rule on the request for opinion submitted to it

* Note by the Registry: This is the English wording of the third question as submitted by the SRFC. The SFRC phrased this question in French as follows: “*Une organisation internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l’Etat côtier par les bateaux de pêche bénéficiant desdites licences?*”

For the first time since its founding, the Tribunal has before it a request for an advisory opinion submitted pursuant to an international agreement other than the Convention.

The French Government notes that article 138 of the Rules of the Tribunal is meant to endow the Tribunal with jurisdiction to deal with a request for advisory opinion submitted in accordance with the terms of an international agreement related to the purposes of the Convention and specifically providing for the possibility of submitting such a request.

It also notes that article 21 of the Tribunal's Statute (contained in Annex VI to the Convention), which governs the jurisdiction of the Tribunal, states: "The jurisdiction of the Tribunal comprises all disputes and all applications [*demandes*] submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". As worded, this article does not expressly afford the Tribunal the possibility of responding to requests [*demandes*] for advisory opinion submitted on the basis of specific international clauses conferring jurisdiction on it to do so.

The French Government further observes that the only references within the body of the Convention itself to the advisory jurisdiction conferred upon the Tribunal are found in articles 159 (paragraph 10) and 191. Pursuant to these articles, the International Seabed Authority may seek advisory opinions from the Tribunal's Seabed Disputes Chamber. There is however no provision in the body of the Convention itself on the basis of which the Tribunal enjoys advisory jurisdiction of any other sort.

The French Government therefore considers that it does not clearly follow from the above-cited provisions when read together that the Tribunal has jurisdiction to entertain the request for an advisory opinion submitted to it in the present instance.

III. The questions put to the Tribunal

In regard to preventing and suppressing illegal fishing, flag States of fishing vessels have jurisdiction ensuing from, in particular, the provisions of general scope in article 94 of the Convention. The responsibility of the flag State in respect of fishing vessels was later

detailed in the 1995 Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement,¹ which provides in article 18(3) that the flag State must ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States. It is thus for the flag State to adopt suitable rules and regulations in this area and to ensure compliance with them.

However the coastal State is at the same time also given major jurisdiction in the fight against illegal fishing in its exclusive economic zone; this jurisdiction follows from, in particular, articles 56 and 61 of the Convention. In the context of this jurisdiction it is the responsibility of the coastal State to adopt rules and regulations preventing and suppressing illegal fishing and to ensure compliance with them and to do so, where appropriate, by making use of the possibilities available to it under article 73 of the Convention. In this connection the coastal State plays a key role because of its proximity to the fishing grounds.

Within the exclusive economic zone, the penalties laid down by the flag State should be in addition to the action taken by the coastal State only where the coastal State has been unable to impose proportionate and dissuasive penalties on the offender. Accordingly, the interrelation of these concurrent jurisdictions and any resulting liability can be assessed only in light of the facts and circumstances specific to each situation, the notion of subsidiarity being crucial in this connection.

¹United Nations 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.