INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)
List of cases: No. 21

ADVISORY OPINION OF 2 APRIL 2015

2015

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RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE D'AVIS CONSULTATIF SOUMISE PAR LA COMMISSION SOUS-RÉGIONALE DES PÊCHES (CSRP) (DEMANDE D'AVIS CONSULTATIF SOUMISE AU TRIBUNAL)
Rôle des affaires : No. 21

AVIS CONSULTATIF DU 2 AVRIL 2015

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2 APRIL 2015
ADVISORY OPINION

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2 AVRIL 2015
AVIS CONSULTATIF

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2015

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List of cases:
No. 21

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

(Request for Advisory Opinion submitted to the Tribunal)

ADVISORY OPINION

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ADVISORY OPINION

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

On the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission,

THE TRIBUNAL,

composed as above,

gives the following Advisory Opinion:

I Introduction

Request

1. By letter dated 27 March 2013, received electronically by the Registry on 28 March 2013, the Permanent Secretary of the Sub-Regional Fisheries Commission (hereinafter "the SRFC") transmitted to the Tribunal a Request for an advisory opinion (hereinafter "the Request"), pursuant to a resolution adopted by the Conference of Ministers of the SRFC at its fourteenth session, held on 27 and 28 March 2013. The originals of that letter and of the resolution were filed with the Registry on 2 April 2013.

2. The resolution adopted by the Conference of Ministers of the SRFC reads:

> **14TH SESSION OF THE CONFERENCE OF THE MINISTERS**
> **27TH to 28TH MARCH 2013, DAKAR, SENEGAL**
>
> **Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory opinion pursuant to Article 33 of the *Convention on the definition of the minimum access conditions and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC Member States* (*MAC Convention*)**

The Conference of Ministers of the Sub-Regional Fisheries Commission,

Considering the United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982;

Reaffirming their commitment to supporting the principles and standards stipulated in the Code of Conduct for Responsible Fisheries of the United Nations Food and Agriculture Organization (FAO);

Recalling their resolve to implement the International Plan of Action for preventing, opposing and eliminating illegal, unreported and unregulated fishing adopted in 2001 by the FAO Conference;

Considering the Convention of 29 March 1985 on the establishment of the SRFC, and as amended in 1993 especially with respect to its articles on enhancing cooperation between its member States for the wellbeing of their respective populations;

Considering that the Convention of 14 July 1993 on the Definition of the Conditions of Access and Exploitation of Fisheries Resources off the Coastal zones of SRFC member States (MAC Convention), plays an essential role in the harmonization of fisheries policies and legislations of the States in the sub-region;

Desirous to aligning the Convention of 14 July 1993 to the technical and legal changes which have occurred since its adoption, in particular with respect to the definition of the conditions for responsible fishing, the use of the eco-systemic approach for a sustainable management of fisheries resources and the fight against illegal, unreported and unregulated fishing, in accordance with international law;

Considering the Convention of 8 June 2012 relating to the definition of the minimum conditions of access and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC member States (CMAC) on the review of the MAC Convention, which entered into force on 16 September 2012;

Considering the provisions of Article 33 (Seizure of the International Tribunal for the Law of the Sea for advisory opinion) of the CMAC of 8 June 2012, which stipulates as follows: « *The Conference of Ministers of the SRFC shall authorize the Permanent Secretary of the SRFC to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion* »;

Considering Article 20 of the Statute of the Tribunal and Article 138 of its Rules of Procedure;

Decides, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:

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?

(*Signed*)
His Excellency Moussa CONDE,
Minister of Fisheries and Aquaculture, Republic of Guinea
And Chairman in office of the Conference of Ministers of the SRFC

(*Signed*)
His Excellency Adalberto VIEIRA,
Secretary of State of Marine Resources, Republic of Cape Verde

(*Signed*)
His Excellency Axi GYE,
Minister of Fisheries, Water Resources and National Assembly, Republic of The Gambia

(*Signed*)
His Excellency Jose BIAI,
Minister of Economy and Regional Integration, Republic of Guinea Bissau

(*Signed*)
His Excellency Aghdhefna Ould EYIH,
Minister of Fisheries, and Marine Economy, Islamic Republic of Mauritania

(*Signed*)
His Excellency Papa DIOUF,
Minister of Fisheries and Marine Affairs, Republic of Senegal

(*Signed*)
His Excellency Charles ROGERS,
Vice-Minister of Fisheries and Marine Resources, Republic of Sierra Leone

3. In his letter dated 27 March 2013, the Permanent Secretary of the SRFC stated that the Conference of Ministers of the SRFC had authorized him to submit a request for advisory opinion to the Tribunal on the basis of article 138 of the Rules of the Tribunal (hereinafter "the Rules") and article 20 of the Statute of the Tribunal (hereinafter "the Statute"). By letter dated 9 April 2013, the Permanent Secretary of the SRFC corrected this to read "article 21" of the Statute.

4. In his letter of 27 March 2013, the Permanent Secretary of the SRFC informed the Tribunal of the appointment of Ms Diénaba Bèye Traoré, Head of the Department for the Harmonization of Fisheries Policies and Legislation of the Permanent Secretariat of the SRFC, as the representative of the SRFC for the proceedings.

5. On 28 March 2013, the Request was entered into the List of cases as Case No. 21, which was named "Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission".

Chronology of the procedure

6. By letter dated 28 March 2013, the Registrar informed the Permanent Secretary of the SRFC that the Request had been filed with the Registry on 28 March 2013 and entered into the List of cases as Case No. 21. In the same letter, the Registrar, pursuant to article 131 of the Rules, invited the Permanent Secretary of the SRFC to transmit to the Tribunal all documents likely to throw light upon the questions contained in the Request. In that letter, the Registrar also requested the Permanent Secretary of the SRFC to submit to the Tribunal documents referred to in the Request.

7. By letter dated 4 April 2013, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request.

8. By note verbale dated 8 April 2013, in accordance with article 133, paragraph 1, of the Rules, the Registrar notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter "States Parties") of the Request.

9. By letter dated 9 April 2013, the Permanent Secretary of the SRFC transmitted to the Tribunal documents in support of the Request. By letters dated 18 April and 23 May 2013, the Permanent Secretary of the SRFC submitted additional documents. All of these documents were posted on the Tribunal's website.

10. By Order dated 24 May 2013, pursuant to article 133, paragraph 2, of the Rules, the Tribunal decided "that the SRFC and the intergovernmental organizations listed in the annex to the [. . .] order are considered likely to be able to

furnish information on the questions submitted to the Tribunal for an advisory opinion". Accordingly, pursuant to article 133, paragraph 3, of the Rules, the Tribunal invited the States Parties, the SRFC, and the aforementioned intergovernmental organizations to present written statements on those questions, and fixed 29 November 2013 as the time-limit within which written statements could be presented to the Tribunal.

11. In the same Order, the Tribunal decided that, in accordance with article 133, paragraph 4, of the Rules, oral proceedings would be held. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations listed in its annex.

12. On 28 November 2013, the Registry received a written statement from the United States of America, a State not party to the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

13. By letter dated 29 November 2013 addressed to the Registrar, the World Wide Fund for Nature (hereinafter "the WWF") requested permission to file, as *amicus curiae,* a statement with respect to the proceedings before the Tribunal. A copy of the statement was attached to the said letter.

14. By letter dated 3 December 2013, the Registrar notified the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements of the submission of a statement by the United States of America, informing them that the said statement would be placed on the Tribunal's website in a separate section of documents relating to the case and that its status would be considered by the Tribunal at a later stage. The same information was communicated to the United States of America, by letter from the Registrar dated 4 December 2013.

15. By the above-mentioned letter dated 3 December 2013, the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements were informed of the submission of a statement by the WWF. At the request of the President, the Registrar, by letter dated 4 December 2013, informed the WWF that its statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements, and placed on the website of the Tribunal in a separate section of documents relating to the case.

16. By Order dated 3 December 2013, in light of a request submitted to the Tribunal and pursuant to article 133, paragraph 3, of the Rules, the President extended the time-limit within which written statements could be presented to the Tribunal up to 19 December 2013. The Order was notified to States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of 24 May 2013.

17. Within the time-limit fixed by the President, written statements were submitted by the following twenty-two States Parties: Saudi Arabia, Germany, New Zealand, China, Somalia, Ireland, the Federated States of Micronesia, Australia, Japan, Portugal, Chile, Argentina, the United Kingdom, Thailand, the Netherlands, the European Union, Cuba, France, Spain, Montenegro, Switzerland and Sri Lanka. Within the same time-limit, written statements were also submitted by the SRFC and the following six organizations: the Forum Fisheries Agency, the International Union for Conservation of Nature and Natural Resources (hereinafter "the IUCN"), the Caribbean Regional Fisheries Mechanism, the United Nations, the Food and Agriculture Organization of the United Nations (hereinafter "the FAO") and the Central American Fisheries and Aquaculture Organization.

18. By letter dated 3 December 2013, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies of the written statements to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

19. Pursuant to article 134 of the Rules, the written statements submitted to the Tribunal were made accessible to the public on the Tribunal's website.

20. By Order dated 20 December 2013, the President decided that, in accordance with article 133, paragraph 3, of the Rules, States Parties, the SRFC and the intergovernmental organizations having presented written statements could submit written statements on the statements made, and fixed 14 March 2014 as the time-limit within which such statements would have to be submitted to the Tribunal. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

21. Within the prescribed time-limit, additional written statements were submitted by the following five States Parties: the European Union, the Netherlands, New Zealand, Thailand and the United Kingdom. Within the same time-limit, an additional written statement was also submitted by the SRFC.

22. By letter dated 20 March 2014, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies of these additional statements to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements. In addition, pursuant to article 134 of the Rules, these statements were made accessible to the public on the Tribunal's website.

23. By letter dated 14 March 2014, the WWF requested permission from the Tribunal to file a further statement, as *amicus curiae,* with respect to the proceedings before the Tribunal. A copy of the statement was attached to the said letter. By letter dated 20 March 2014, at the request of the President, the Registrar informed the WWF that, although its statement would not be included in the case file since it had not been transmitted under article 133 of the Rules, the statement would be notified to the States Parties, the SRFC and the intergovernmental organizations that had presented written statements, and would be placed on the Tribunal's website in a separate section of documents relating to the case. By separate letter dated 20 March 2014, the Registrar transmitted this information to the States Parties, the SRFC and the intergovernmental organizations that had presented written statements.

24. On 1 April 2014, the Tribunal decided that the statement presented by the United States of America should be considered as part of the case file and should be posted on the Tribunal's website, in a separate section of documents related to the case, entitled "States Parties to the 1995 Straddling Fish Stocks Agreement". By letter dated 2 April 2014, the Registrar communicated this decision to the United States of America and, by letter dated 7 April 2014, to the States Parties, the SRFC and the intergovernmental organizations that had submitted written statements.

25. By Order dated 14 April 2014, in accordance with article 133, paragraph 4, of the Rules, the President fixed 2 September 2014 as the date for the opening of the oral proceedings and invited the States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of the Tribunal of 24 May 2013 to participate in these proceedings. By the same Order, the above-mentioned States, the SRFC and the intergovernmental organizations listed in the annex to the Order of the Tribunal of 24 May 2013 were also invited to indicate to the Registrar, no later than 5 August 2014, whether they intended to make oral statements at the hearing. The Order was notified to the States Parties, the SRFC and the intergovernmental organizations listed in the annex to the Order of 24 May 2013.

26. Within the prescribed time-limit, ten States Parties expressed their intention to participate in the oral proceedings, namely Argentina, Australia, Chile, the European Union, Germany, the Federated States of Micronesia, New Zealand, Spain, Thailand and the United Kingdom. Within the same time-limit, the SRFC, the Caribbean Regional Fisheries Mechanism and the IUCN also expressed their intention to participate in the oral proceedings.

27. By letter dated 23 June 2014 addressed to the Registrar, the WWF transmitted to the Tribunal a request to make a statement as *amicus curiae* in the oral proceedings of the case. By letter dated 24 June 2014, the Registrar informed the WWF that the President had decided that, in light of articles 133 and 138 of the Rules, it would not be possible to grant the organization the status of participant in the proceedings.

28. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 29 August and 1 September 2014.

29. The Tribunal held four public sittings on 2, 3, 4, and 5 September 2014, at which it heard oral statements, in the following order, by:

For the SRFC:	Mr Lousény Camara, Minister of Fisheries and Aquaculture of the Republic of Guinea; Chairman-in-Office of the Conference of Ministers of the SRFC;
	Ms Diénaba Bèye Traoré, Head of the Department for Harmonization of Policies and Legislation, SRFC;
	and
	Mr Papa Kebe, Expert, Specialist in pelagic species;
For Germany:	Mr Martin Ney, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office;
For Argentina:	Mr Holger F. Martinsen, Deputy Legal Adviser, Office of the Legal Adviser, Ministry of Foreign Affairs and Worship;

For Australia:	Mr William McFadyen Campbell QC, General Counsel (International Law), Office of International Law, Attorney-General's Department,
	and
	Ms Stephanie Ierino, Principal Legal Officer, Office of International Law, Attorney-General's Department;
For Chile:	Mr Eduardo Schott S., Consul-General of Chile in Hamburg;
For Spain:	Mr José Martín y Pérez de Nanclares, Director of the International Law Department, Ministry of Foreign Affairs and Cooperation;
For the Federated States of Micronesia:	Mr Clement Yow Mulalap, Esq., Legal Adviser, Permanent Mission of the Federated States of Micronesia to the United Nations in New York;
For New Zealand:	Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade;
For the United Kingdom of Great Britain and Northern Ireland:	Sir Michael Wood, Member of the English Bar and Member of the International Law Commission,
	and
	Ms Nicola Smith, Assistant Legal Adviser, Foreign and Commonwealth Office;
For Thailand:	Mr Kriangsak Kittichaisaree, Executive Director, Thailand Trade and Economic Office (Taipei); Member of the International Law Commission;

For the European Union:	Mr Esa Paasivirta, Member of the Legal Service, European Commission;
For the Caribbean Regional Fisheries Mechanism:	Mr Pieter Bekker, Professor of International Law, Graduate School of Natural Resources Law, Policy and Management, University of Dundee, United Kingdom; Member of the New York Bar;
For the International Union for the Conservation of Nature:	Ms Cymie Payne, Assistant Professor, School of Law, Camden, and Bloustein School of Planning and Public Policy, Rutgers University, United States of America, Ms Nilufer Oral, Faculty of Law, Istanbul Bilgi University, Turkey, and Ms Anastasia Telesetsky, Associate Professor, College of Law, Natural Resources and Environmental Law Program, University of Idaho, United States of America.

30. The hearing was broadcast on the internet as a webcast.

31. In the course of the hearing, on 2 September 2014, pursuant to article 76, paragraph 3, of the Rules, questions were put to the SRFC by Judges Cot, Pawlak and Gao. Subsequently, by letter dated 2 September 2014, the Registrar communicated these questions in writing to the SRFC.

32. By letter dated 5 September 2014, the SRFC transmitted its written responses to the questions put by the judges. These responses were placed on the Tribunal's website.

33. By letter dated 9 September 2014, the Registrar invited the States Parties and the intergovernmental organizations which had participated in the oral proceedings to submit comments on the written responses of the SRFC by 16 September 2014. Comments were received from Australia by letter dated 16 September 2014. By letter dated 19 September 2014, the Registrar transmitted these comments to the participants in the oral proceedings.

34. At the hearing held on 4 September 2014, the European Union stated that it would "remain at the disposal of the Tribunal" to provide an update "on the status of some specific measures regarding non-cooperating third States" and "copies of the relevant decisions". By letter dated 20 October 2014, received by the Registry on 21 October 2014, the European Union transmitted a number of additional documents. In the said letter, the European Union stated that these documents were submitted "for the information and update of the Tribunal, as it was indicated on behalf of the European Union at the hearing on 4 September [2014]". By letter dated 23 October 2014, the Registrar invited the States Parties, the SRFC and the intergovernmental organizations which had participated in the oral proceedings to submit comments on those documents by 3 November 2014.

35. In an electronic communication dated 3 November 2014, the SRFC requested an extension of the time-limit for the submission of its comments on the additional documents submitted by the European Union. By letter dated 4 November 2014, the Registrar informed the SRFC that the President had agreed to an extension of the time-limit to 5 November 2014. The States Parties and the intergovernmental organizations which had participated in the oral proceedings were informed accordingly. The SRFC submitted comments on the additional documents by letter dated 6 November 2014, the filing of which was accepted by decision of the President. By letter dated 11 November 2014, the Registrar transmitted these comments to the participants in the oral proceedings. By letter dated 13 November 2014, the Registrar, at the request of the President, informed the SRFC that the comments contained in its letter dated 6 November 2014 would be considered by the Tribunal to the extent that they related to the Request as submitted to it by the SRFC on 28 March 2013.

36. President Yanai, whose term of office as President expired on 30 September 2014, continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules. In accordance with article 17 of the Rules, Judges Nelson and Türk, whose term of office expired on 30 September 2014, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion.

II Jurisdiction

37. The Tribunal will first consider whether it has jurisdiction to give the advisory opinion requested by the SRFC.

38. The Tribunal wishes to draw attention to articles 16 and 21 of the Statute and article 138 of the Rules with regard to the jurisdiction of the Tribunal to deliver advisory opinions. Article 16 of the Statute reads as follows:

> The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.

Article 21 of the Statute reads:

> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 138 of the Rules reads:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

39. While some participants have argued in favour of the jurisdiction of the Tribunal to entertain the Request, other participants have contended that the Tribunal is not competent to entertain the Request. The Tribunal will proceed to examine these arguments.

40. The main arguments against the advisory jurisdiction of the Tribunal are that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting *ultra vires* under the Convention.

41. It has also been contended that the Tribunal has no implied powers to serve as an independent source of authority to confer upon itself an advisory jurisdiction that it does not otherwise possess.

42. It has been argued that article 138 of the Rules cannot serve as a basis for the exercise of any jurisdiction to give advisory opinions since the Rules of the Tribunal, being procedural provisions, "cannot override" the provisions of the Convention.

43. It has been contended that article 21 of the Statute is intended to encapsulate the contentious jurisdiction of the Tribunal, which is set out more fully in the Convention, in particular article 288 thereof. Accordingly, it has been argued that article 21 of the Statute has to be interpreted consistently with article 288, paragraph 2, of the Convention, which reads:

> 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.

44. It has also been contended that article 288, which is contained in Part XV of the Convention dealing with "Settlement of Disputes", provides for the contentious jurisdiction of the Tribunal in clear and express terms and so does article 21 of the Statute.

45. It has been argued that, had the States which negotiated the Convention intended to confer advisory jurisdiction on the Tribunal, the inclusion of an express provision in the Convention would have been straightforward, but they did not do so.

46. It has also been argued that the word "matters" in the concluding phrase of article 21 of the Statute, i.e. "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal", refers to contentious cases, as may be seen from the use of a same word in article 36, paragraph 1, of the Statute of the International Court of Justice (hereinafter "the ICJ") and article 36 of the Statute of the Permanent Court of International Justice (hereinafter "the PCIJ").

47. It has been further contended that the Request does not fulfil the essential conditions set out in article 138 of the Rules.

48. Other participants have spoken in favour of the advisory jurisdiction of the Tribunal. They have argued that article 21 of the Statute by itself serves as a sufficient legal basis for the competence of the full Tribunal to accept a request for an advisory opinion if it is specifically provided for by a relevant international agreement and that there is no reason to assume that the wording "all matters" does not cover a request for an advisory opinion. They have added that the arguments that the expression "all matters" must be read as meaning "all disputes" and that the jurisdiction of the Tribunal is limited by article 288, paragraph 2, of the Convention cannot be accepted. They have pointed out that article 288 of the Convention is complemented by the Statute, including its article 21.

49. It has also been argued that the purpose of article 21 of the Statute is to shape the Tribunal as a living institution and to expressly provide room for States to enter into bilateral or multilateral agreements conferring jurisdiction on the Tribunal.

50. It has been pointed out that article 138 of the Rules does not create a new type of jurisdiction but only specifies the prerequisites that the Tribunal has established for exercising its jurisdiction.

51. It has been contended that, if the drafters of the Convention had intended to limit the Tribunal's jurisdiction under article 21 of the Statute to contentious jurisdiction, they would have used the expression "confers contentious jurisdiction on the Tribunal" as opposed to "confers jurisdiction on the Tribunal", the words employed in article 21 of the Statute.

52. At the outset, the Tribunal wishes to clarify the relationship between the Statute in Annex VI to the Convention and the Convention. As specified by article 318 of the Convention, Annexes "form an integral part of this Convention". As stated in article 1, paragraph 1, of the Statute, "[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute." It follows from the above that the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention.

53. Neither the Convention nor the Statute makes explicit reference to the advisory jurisdiction of the Tribunal. Those who argued against the advisory jurisdiction of the Tribunal as also those who considered that the Tribunal has such jurisdiction centred their arguments on article 21 of the Statute.

54. Article 21 of the Statute, which is reproduced in paragraph 38, deals with the "jurisdiction" of the Tribunal. It provides that the jurisdiction of the Tribunal comprises three elements: (i) all "disputes" submitted to the Tribunal in accordance with the Convention; (ii) all "applications" submitted to the Tribunal in accordance with the Convention; and (iii) all "matters" ("toutes les fois que cela" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

55. The use of the word "disputes" in article 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word "applications" refers to applications in contentious cases submitted to the Tribunal in accordance with the Convention. This is made clear by article 23 of the Statute, which provides: "The Tribunal shall decide all disputes and applications in accordance with article 293." Article 293 is found in Part XV of the Convention, dealing with "Settlement of Disputes". Reference may also be made to articles 292 on "Prompt release of vessels and crews" and 294 on "Preliminary proceedings" in this Part, which make provision for "applications".

56. It is the third element which has attracted diverse interpretations. The words all "matters" ("toutes les fois que cela" in French) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That something more must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal."

57. The argument that the expression all "matters" should have the same meaning here as it has in the Statutes of the PCIJ and ICJ is not tenable. As the Tribunal held in the *MOX Plant Case*,

> the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.
> (*MOX Plant* (*Ireland* v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 106, para. 51)

58. The Tribunal wishes to clarify that the expression "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the "other agreement" which confers such jurisdiction on the Tribunal. When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement". Article 21 and the "other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.

59. The argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal and that, being a procedural provision, article 138 cannot form a basis for the advisory jurisdiction of the Tribunal is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.

60. These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on "a legal question" .

61. In the present case, the prerequisites specified in article 138 of the Rules are satisfied.

62. The Tribunal notes that, in the present case, the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (hereinafter "the MCA Convention") is an international agreement concluded by seven States.

Article 33 of this agreement provides that "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion." The Tribunal further notes that, at its fourteenth extraordinary session, the Conference of Ministers of the SRFC adopted a resolution by which it decided, in accordance with article 33 of the MCA Convention, to authorize the Permanent Secretary of the Commission to seize the Tribunal in order to obtain an advisory opinion. The text of that resolution was transmitted to the Tribunal by a letter from the Permanent Secretary of the Commission dated 27 March 2013, which was received by the Registry on 28 March 2013.

63. As stated in its preamble, the objective of the MCA Convention is to implement the Convention "especially its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector as well [as] the other relevant international treaties" and ensure that the policies and legislation of its Member States "are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under their respective jurisdictions, for the benefit of current and future generations". The MCA Convention is thus closely related to the purposes of the Convention.

64. A further issue is whether the questions asked of the Tribunal are legal in nature. The questions read as follows:

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?

65. These questions have been framed in terms of law. To respond to these questions, the Tribunal will be called upon to interpret the relevant provisions

of the Convention and of the MCA Convention and to identify other relevant rules of international law. As stated by the Seabed Disputes Chamber of the Tribunal (hereinafter "the Seabed Disputes Chamber") in its Advisory Opinion:

> The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter "the ICJ") has stated that "questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law'" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion, I.C.J. Report*[*s*] *1975*, p. 12, at paragraph 15).
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 25, para. 39)

66. For these reasons, the Tribunal considers that the questions raised by the SRFC are of a legal nature.

67. A further question is to what matters the advisory jurisdiction extends. Article 21 of the Statute lays down that such jurisdiction extends to "all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal." It is necessary for the Tribunal to assess whether the questions posed by the SRFC constitute matters which fall within the framework of the MCA Convention.

68. The questions relate to activities which fall within the scope of the MCA Convention. The questions need not necessarily be limited to the interpretation or application of any specific provision of the MCA Convention. It is enough if these questions have, in the words of the ICJ, a "sufficient connection" (see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 77, para. 22) with the purposes and principles of the MCA Convention. In this respect, there is no reason why the words "all matters specifically provided for in any other agreement" in article 21 of the Statute should be interpreted restrictively.

69. For the reasons given above, the Tribunal finds that it has jurisdiction to entertain the Request submitted to it by the SRFC. As held later in this Advisory

Opinion, the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States.

III Discretionary power

70. The Tribunal will now turn to the issue of its discretionary power to render an advisory opinion in the present case.

71. Article 138 of the Rules, which provides that "the Tribunal may give an advisory opinion", should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.

72. It has been argued that the questions raised by the SRFC, though legal, are vague, general and unclear. In the view of the Tribunal, these questions are clear enough to enable it to deliver an advisory opinion. It is also well settled that an advisory opinion may be given "on any legal question, abstract or otherwise" (see *Conditions of Admission of a State to Membership in the United Nations* (*Article 4 of the Charter*), *Advisory Opinion, 1948, I.C.J. Reports 1947–1948*, p. 57, at p. 61).

73. It has also been contended that, while the four questions may be couched as legal questions, what the SRFC actually seeks is not answers *lex lata*, but *lex ferenda* and that is outside the functions of the Tribunal as a judicial body.

74. The Tribunal does not consider that, in submitting this Request, the SRFC is seeking a legislative role for the Tribunal. The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions.

75. It has been argued that in this case the Tribunal should not pronounce on the rights and obligations of third States not members of the SRFC without their consent. It has also been observed that the present Request for an

advisory opinion does not involve an underlying dispute and that the issue of State consent simply does not arise in this advisory proceeding.

76. The Tribunal wishes to clarify in this regard that in advisory proceedings the consent of States not members of the SRFC is not relevant (see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 71). The advisory opinion as such has no binding force and is given only to the SRFC, which considers it to be desirable "in order to obtain enlightenment as to the course of action it should take" (*ibid.,* p. 71). The object of the request by the SRFC is to seek guidance in respect of its own actions.

77. The Tribunal is mindful of the fact that by answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 24, para. 30).

78. In view of what is stated above, the Tribunal does not find any compelling reasons to use its discretionary power not to give an advisory opinion.

79. Accordingly, the Tribunal deems it appropriate to render the advisory opinion requested by the SRFC.

IV Applicable law

80. The Tribunal will now proceed to indicate the applicable law concerning its advisory jurisdiction. Attention has been drawn earlier to article 138, paragraph 3, of the Rules, which states: "The Tribunal shall apply *mutatis mutandis* articles 130 to 137" of the Rules in the exercise of the Tribunal's functions relating to advisory opinions. These articles lay down the rules applicable to the Seabed Disputes Chamber in the exercise of its functions relating to advisory opinions.

81. Article 130, paragraph 1, of the Rules states:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent

to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

82. The Tribunal also refers in this regard to article 23 of the Statute, which reads: "The Tribunal shall decide all disputes and applications in accordance with article 293."

83. Article 293 of the Convention reads:

Article 293
Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

84. Therefore, the Tribunal concludes that the Convention, the MCA Convention and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case.

V Question 1

85. The first question submitted to the Tribunal is as follows:

What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?

86. Before dealing with the flag State obligations, the Tribunal wishes to examine certain preliminary issues. They concern the scope of application of Question 1, the meaning of the wording "[IUU] fishing activities . . . conducted within the Exclusive Economic Zones of third party States", the definition of IUU fishing, and the issue of conservation and management of living resources within the exclusive economic zone.

87. In accordance with article 1, paragraph 2, and article 2, paragraph 11, of the MCA Convention, that Convention "is applicable to the maritime area under jurisdiction of the SRFC Member States." Consequently, the Tribunal considers that the first question in terms of geographical scope relates only to the exclusive economic zones of the SRFC Member States and the expression "[IUU] fishing activities . . . conducted within the Exclusive Economic Zones of third party States" means such activities conducted within the exclusive economic zones of the SRFC Member States.

88. The Tribunal observes that article 2, paragraph 9, of the MCA Convention defines the expression "[f]ishing vessels belonging to non-Member States or third Party States" as "fishing vessels operating under the flag of a State which is not a member of the SRFC . . .". Consequently, the term "flag State" in the first question refers to a State which is not a member of the SRFC, as the MCA Convention addresses matters related to access by fishing vessels belonging to non-Member States to fisheries resources within the exclusive economic zones of the SRFC Member States.

89. The Tribunal, therefore, concludes that the first question relates only to the obligations of flag States not parties to the MCA Convention in cases where vessels flying their flag are engaged in IUU fishing within the exclusive economic zones of the SRFC Member States. It does not relate to the obligations of flag States in cases of IUU fishing in other maritime areas, including the high seas.

90. With regard to the notion of IUU fishing, the MCA Convention defines it in article 2, paragraph 4. This provision reads as follows:

> 4. Illegal, unreported and unregulated fishing or IUU fishing[:]
>
> 4.1 "Illegal fishing": fishing activities:
>
> - conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
> - conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

- in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

4.2 "Unreported fishing": fishing activities:

- which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

4.3 "Unregulated fishing": fishing activities[:]

- in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
- in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

91. The "Technical Note" on the MCA Convention annexed to the Request explains that when the MCA Convention was revised the SRFC Member States were specifically guided by the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "the IPOA-IUU"), adopted by the FAO in 2001, and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "the Port States Measures Agreement").

92. The Tribunal notes that the revised MCA Convention, which was signed on 8 June 2012 and entered into force on 16 September 2012, reproduces in article 2, paragraph 4, verbatim the definition of IUU fishing contained in paragraph 3 of the IPOA-IUU. Although the IPOA-IUU, which was drawn up within the framework of the FAO Code of Conduct for Responsible Fisheries of 1995 is voluntary, as envisaged by article 2(d) of the Code of Conduct, it should be noted that this definition of IUU fishing was subsequently incorporated and reaffirmed in article 1(e) of the Port States Measures Agreement. This definition has also been included in decisions of some regional fisheries management organizations (hereinafter "RFMOs"), the national legislation of a number of States and the law of the European Union.

93. The Tribunal further notes that the MCA Convention states in article 31, paragraph 1, that IUU fishing constitutes one of the infringements enumerated in that article which "shall be integrated in the national legislations of the Member States". The MCA Convention further requires, in article 25, paragraph 1, that its "Member States shall commit themselves to take all the necessary measures to prevent, deter and eliminate illegal, unreported and unregulated fishing."

94. It follows from the above provisions of the MCA Convention that IUU fishing, as defined in its article 2, paragraph 4, constitutes not only a violation of this convention but also a violation of the national legislation of the SRFC Member States.

95. The definition of IUU fishing, as contained in article 2, paragraph 4, of the MCA Convention, thus plays an important role in the context of the consideration of the obligations borne within the area of application of the MCA Convention by the flag States which are not members of the SRFC. As noted above, that area encompasses the exclusive economic zones of the SRFC Member States.

96. With respect to "unregulated fishing" as referred to in article 2, paragraph 4.3, of the MCA Convention, the Tribunal wishes to point out that, in accordance with the Convention, the adoption by the coastal State of conservation and management measures for all living resources within its exclusive economic zone is mandatory. Article 61, paragraph 2, of the Convention requires that the coastal State "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."

97. Article 9 of the MCA Convention states that "[i]n giving access to fishing vessels, the Member States shall take into account their national management and conservation measures and policies". It follows from article 9 of the MCA Convention that all the SRFC Member States accordingly must have in place national management and conservation measures and policies in relation to fishing resources. In accordance with article 2, paragraph 5, of the MCA Convention, conservation and management measures mean "measures aimed at conserving and managing marine biological resources and adopted and applied in a manner that is compatible with the relevant rules of international law, including those stipulated in the present Convention".

98. In light of the foregoing provisions of the MCA Convention, the Tribunal finds it appropriate to reiterate the conclusions it reached in the *M/V "Virginia G" Case* concerning activities that in accordance with the Convention may be regulated by the coastal State in the exercise of its sovereign rights for the purpose of conserving and managing living resources in the exclusive economic zone. The Tribunal stated:

> The use of the terms "conserving" and "managing" in article 56 of the Convention indicates that the rights of coastal States go beyond conservation in its strict sense. The fact that conservation and management cover different aspects is supported by article 61 of the Convention, which addresses the issue of conservation as its title indicates, whereas article 62 of the Convention deals with both conservation and management.
>
> The Tribunal emphasizes that in the exercise of the sovereign rights of the coastal State to explore, exploit, conserve and manage the living resources of the exclusive economic zone the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone (articles 56, paragraph 1, and 62, paragraph 4, of the Convention). Under article 62, paragraph 4, of the Convention, the laws and regulations thus adopted must conform to the Convention and may relate to, *inter alia*, the matters listed therein. The Tribunal notes that the list of matters in article 62, paragraph 4, of the Convention covers several measures which may be taken by coastal States. These measures may be considered as management. The Tribunal further notes that the wording of article 62, paragraph 4, of the Convention indicates that this list is not exhaustive.

(*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment of 14 April 2014*, paras. 212 and 213)

99. On the subject of access by foreign fishing vessels to the living resources of the exclusive economic zone of the coastal State, referred to in the preceding paragraph, article 3, paragraph 1, of the MCA Convention explicitly provides that access by fishing vessels belonging to non-Member States to the allowable surplus of resources in the maritime areas under the jurisdiction of an SRFC Member State must be authorized by the Member State "through agreements and other arrangements." In this regard, the MCA Convention defines, in article 2, paragraph 6, the term "fishing vessels" to include "[a]ny vessel that is used for fishing or for that purpose including support vessels, commercial vessels, and any other vessel participating directly in fishing activities" and, in paragraph 8 of the same article, the term "support vessels" as "vessels which transport fuel and food for ships carrying out fishing activities."

100. In the *M/V "Virginia G" Case*, the Tribunal concluded that "it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing" (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment of 14 April 2014,* para. 215).

101. The Tribunal will now address the issue of conservation and management of living resources within the exclusive economic zone in view of the negative impact of IUU fishing thereon.

102. One of the goals of the Convention, as stated in its preamble, is to establish "a legal order for the seas and oceans which . . . will promote" *inter alia* "the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". Consequently, laws and regulations adopted by the coastal State in conformity with the provisions of the Convention for the purpose of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention and therefore must be complied with by other States Parties whose ships are engaged in fishing activities within that zone.

103. The Convention provides in article 55 that the exclusive economic zone is an area beyond and adjacent to the territorial sea which is subject to the specific legal regime established in Part V of the Convention, "under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of [the] Convention."

104. Under the Convention, responsibility for the conservation and management of living resources in the exclusive economic zone rests with the coastal State, which, pursuant to article 56, paragraph 1, of the Convention, has in that zone sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. In this regard, in accordance with article 61, paragraphs 1 and 2, of the Convention, the coastal State is entrusted with the responsibility to determine the allowable catch of the living resources in its exclusive economic zone and to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation." Pursuant to article 62, paragraph 2, of the Convention, the coastal State is required through agreements or other arrangements to give other States access to the surplus of the allowable catch if it does not have the capacity to harvest the entire allowable catch. To meet its responsibilities, in accordance with article 62, paragraph 4, of the Convention, the coastal State is required to adopt the necessary laws and regulations, including enforcement procedures, which must be consistent with the Convention.

105. To ensure compliance with its laws and regulations concerning the conservation and management measures for living resources pursuant to article 73, paragraph 1, of the Convention, the coastal State may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

106. Thus, in light of the special rights and responsibilities given to the coastal State in the exclusive economic zone under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State.

107. This responsibility of the coastal State is also acknowledged in the MCA Convention, which states in article 25 that the SRFC Member States commit

themselves to take such measures, and, to this end, to strengthen cooperation to fight against IUU fishing, in accordance with international law.

108. The Tribunal wishes to emphasize that the primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard.

109. The Tribunal will now turn to the examination of the obligations of flag States in the exclusive economic zones of the SRFC Member States in relation to the living resources in these zones. These will be considered from two perspectives: that of general obligations of States under the Convention with regard to the conservation and management of marine living resources and that of specific obligations of flag States in the exclusive economic zone of the coastal State.

110. The Tribunal observes that the issue of flag State responsibility for IUU fishing activities is not directly addressed in the Convention. Therefore, this issue is examined by the Tribunal in light of general and specific obligations of flag States under the Convention for the conservation and management of marine living resources.

111. The Convention contains provisions concerning general obligations which are to be met by the flag State in all maritime areas regulated by the Convention, including the exclusive economic zone of the coastal State. These general obligations are set out in articles 91, 92 and 94 as well as articles 192 and 193 of the Convention. At the same time, the Convention imposes specific obligations on the flag State in article 58, paragraph 3, and article 62, paragraph 4, of the Convention with regard to its activities within the exclusive economic zone of the coastal State, in particular in respect of fishing activities conducted by nationals of the flag State.

112. The Tribunal wishes to observe that general and specific obligations of flag States for the conservation and management of marine living resources set out in the Convention are further specified in fisheries access agreements concluded between coastal States and flag States concerned. The Tribunal also observes, in this regard, that the MCA Convention contains specific provisions on the minimum conditions for access and exploitation of marine resources within the maritime zones under the jurisdiction of the SRFC Member States.

113. The Tribunal notes that the provisions of the MCA Convention require, *inter alia*, that fishing vessels belonging to a non-Member State obtain a fishing licence issued by the SRFC Member State concerned and land all their catches in the ports of the SRFC Member State that issued the fishing licence. Such provisions also require fishing vessels to carry out any transhipment in harbours designated by the SRFC Member State, provide declarations of catches in their logbook, and refrain from employing prohibited gear or equipment. In addition, the provisions of the MCA Convention require fishing vessels to give notice of their entry into and exit from maritime zones under the jurisdiction of an SRFC Member State and to take on board observers or inspectors from the SRFC Member State.

114. The Tribunal further notes that bilateral fisheries access agreements concluded by the SRFC Member States contain provisions setting out obligations for the flag State and vessels flying its flag. Such obligations require the flag State, *inter alia*, to: ensure compliance by its vessels with the laws and regulations of the SRFC Member State governing fisheries in the maritime zone under the jurisdiction of the SRFC Member State as well as with the relevant fisheries access agreements; ensure that its vessels undertake responsible fishing on the basis of the principle of sustainable exploitation of fishery resources; and, with regard to highly migratory species, ensure compliance with measures and recommendations of the International Commission for the Conservation of Atlantic Tunas (hereinafter "ICCAT"). Vessels of the flag State are required, *inter alia*, to: possess a valid fishing authorization issued by the SRFC Member State; forward to the SRFC Member State statements of their catches; report to the SRFC Member State the date and time of their entry into and exit from the maritime zones; allow on board officials from the SRFC Member State for the inspection and control of fishing activities; take on board observers appointed by the SRFC Member State; be equipped with a satellite monitoring system. In addition, such vessels are required to send the position messages to the SRFC Member State when they are in the maritime zones under its jurisdiction.

115. Article 92 of the Convention stipulates that, save in exceptional cases expressly provided for in international treaties or in the Convention, ships are subject to the exclusive jurisdiction of the flag State on the high seas; by virtue

of article 58, this also applies to the exclusive economic zone in so far as it is not incompatible with Part V of the Convention.

116. Article 94, paragraph 1, of the Convention requires the flag State to effectively exercise its jurisdiction and control over ships flying its flag in "administrative, technical and social matters". To achieve this purpose, the flag State is required by article 94, paragraph 2, subparagraph (b), to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship." Article 94 specifies in paragraphs 2, subparagraph (a), 3 and 4, that such exercise of jurisdiction and control by the flag State must include, in particular, maintaining a register of ships containing the names and particulars of the ships flying its flag, and taking necessary measures: to ensure safety of navigation and periodical surveying by a qualified surveyor of ships; to ensure that each ship flying its flag is in the charge of a master and officers who possess appropriate qualifications; and to ensure that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship.

117. The Tribunal holds the view that, since article 94, paragraph 2, of the Convention starts with the words "[i]n particular", the list of measures that are to be taken by the flag State to ensure effective exercise of its jurisdiction and control over ships flying its flag in administrative, technical and social matters is only indicative, not exhaustive.

118. Further, under article 94, paragraph 6, of the Convention, if a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the facts to the flag State and the latter is obliged to investigate the matter upon receiving such a report and, if appropriate, take any action necessary to remedy the situation. The Tribunal is of the view that the flag State is under the obligation to inform the reporting State about the action taken.

119. It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters,

must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

120. Article 192 of the Convention imposes on all States Parties an obligation to protect and preserve the marine environment. Article 193 of the Convention provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." In the *Southern Bluefin Tuna Cases*, the Tribunal observed that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan*), *Provisional Measures*, *Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70). As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.

121. As to the specific obligations of flag States in the exclusive economic zone of the coastal State, article 58, paragraph 3, of the Convention provides that:

> In exercising their rights and performing their duties . . . in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

122. The Convention further stipulates, in article 62, paragraph 4, that "[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

123. The Tribunal is of the view that article 62, paragraph 4, of the Convention imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.

124. It follows from article 58, paragraph 3, and article 62, paragraph 4, as well as from article 192, of the Convention that flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities. In accordance with the MCA Convention and the national legislation of the SRFC Member States, such activities also constitute an infringement of the conservation and management measures adopted by these States within their exclusive economic zones. In other words, while under the Convention the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal State in this regard, rests with the coastal State, flag States also have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the exclusive economic zones of the SRFC Member States.

125. In this regard, the Tribunal draws attention to the clarifications given by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. Although the relationship between sponsoring States and contractors is not entirely comparable to that existing between the flag State and vessels flying its flag which are engaged in fishing activities in the exclusive economic zone of the coastal State, the Tribunal holds the view that the clarifications provided by the Seabed Disputes Chamber regarding the meaning of the expression "responsibility to ensure" and the interrelationship between the notions of obligations "of due diligence" and obligations "of conduct" referred to in paragraph 129 are fully applicable in the present case.

126. With reference to the meaning of the expression "responsibility to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at pp. 40–41, para. 108)

127. In the present case, as has been explained earlier, the flag State has the "responsibility to ensure", pursuant to articles 58, paragraph 3, and 62, paragraph 4, of the Convention, compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. The flag State must meet this responsibility by taking measures defined in paragraphs 134 to 140 as well as by effectively exercising its jurisdiction and control in "administrative, technical and social matters" over ships flying its flag in accordance with article 94, paragraph 1, of the Convention.

128. As to the meaning of the term "to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> 110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".
> 111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay: "*An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon,

> under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).
>
> 112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).
>
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, paras. 110–112)

129. In the case of IUU fishing in the exclusive economic zones of the SRFC Member States, the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation "of conduct". In other words, as stated in the Advisory Opinion of the Seabed Disputes Chamber, this is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag. However, as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result". This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The flag State is under the "due diligence obligation" to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.

130. The Tribunal will now address the question of what constitutes the "due diligence obligation" of the flag State in the present case.

131. As to the meaning of "due diligence obligation", the Seabed Disputes Chamber referred to the following clarification provided by the ICJ in the *Pulp Mills on the River Uruguay* case:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.
> (*Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), *Judgment, I.C.J. Reports 2010*, p. 14, at p. 79, para. 197)

132. The Seabed Disputes Chamber in its Advisory Opinion pointed out that:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. . . . The standard of due diligence has to be more severe for the riskier activities.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 43, para. 117)

133. The Tribunal holds that, in the present case, the Convention is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance with the "due diligence" obligation to prevent IUU fishing by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

134. The Tribunal observes that, under articles 58, paragraph 3, and 62, paragraph 4, of the Convention, the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States in accordance with the provisions of the Convention.

135. The aforementioned provisions of the Convention also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorized by the SRFC Member States.

136. Pursuant to articles 192 and 193 of the Convention, the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States.

137. Article 94, paragraphs 1 and 2, of the Convention provides that the flag State is under an obligation to exercise effectively its jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked.

138. While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.

139. In accordance with article 94, paragraph 6, of the Convention, "[a] State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State" and "upon receiving such a report, the flag State shall investigate the matter

and, if appropriate, take any action necessary to remedy the situation." In the view of the Tribunal, this obligation equally applies to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action. The action to be taken by the flag State is without prejudice to the rights of the coastal State to take measures pursuant to article 73 of the Convention.

140. The Tribunal wishes to recall that, as stated in the *MOX Plant Case*,

> the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law . . .
> (*MOX Plant* (*Ireland* v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82)

The Tribunal holds that this obligation extends also to cases of alleged IUU fishing activities.

VI Question 2

141. The second question submitted to the Tribunal is as follows:

> *To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?*

142. The Tribunal wishes to note that neither the Convention nor the MCA Convention provides guidance on the issue of liability of the flag State for IUU fishing activities conducted by vessels under its flag.

143. Pursuant to article 293 of the Convention, the Tribunal, in examining this question, will therefore be guided by relevant rules of international law on responsibility of States for internationally wrongful acts.

144. In light of international jurisprudence, including its own, the Tribunal finds that the following rules reflected in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Draft Articles on State Responsibility") are the rules of general international law relevant to the second question:

(i) Every internationally wrongful act of a State entails the international responsibility of that State
(article 1 of the ILC Draft Articles on State Responsibility);
(ii) There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State
(article 2 of the ILC Draft Articles on State Responsibility); and
(iii) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act
(article 31, paragraph 1, of the ILC Draft Articles on State Responsibility).

145. In answering the second question, the Tribunal finds it appropriate to clarify the meaning of the term "liable" referred to in this question. The Tribunal observes that, in the context of State responsibility, the English term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. While the French term "*responsabilité*" generally refers to both primary and secondary obligations, for the purposes of the second and third questions, the Tribunal wishes to clarify that the French term "*responsabilité*" is used to cover secondary obligations (see Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at pp. 30–31, paras. 64–71).

146. In the present case, the liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State. The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

147. The Tribunal is of the view that the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations referred to in the reply to the first question (see paragraphs 109 to 140; see also *M/V "SAIGA" (No. 2) Case* (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170).

148. However, the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

149. The meaning of "due diligence" obligations has been explained in paragraphs 131 and 132.

150. The Tribunal also wishes to address the issue as to whether isolated IUU fishing activities or only a repeated pattern of such activities would entail a breach of "due diligence" obligations of the flag State. As explained in paragraphs 146 to 148, the Tribunal finds that a breach of "due diligence" obligations of a flag State arises if it has not taken all necessary and appropriate measures to meet its obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States. Therefore, the frequency of IUU fishing activities by vessels in the exclusive economic zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State.

VII Question 3

151. The third question submitted to the Tribunal is as follows:

> *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 the international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?*

152. The Tribunal wishes to clarify the scope of the third question. The Tribunal notes in this regard that this question concerns the liability of a flag State or of an international agency for the violation of the fisheries legislation of a coastal State by a vessel holding a fishing license issued within the framework of an international agreement with that flag State or international agency. In the present case, the expression "international agency" is considered synonymous with "international organization".

153. The third question raises the issue of liability of the flag State on the one hand and of the international organization on the other.

154. The Tribunal considers that, in light of its conclusion that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States, the scope of this question is limited to a flag State or international organization that has concluded a fisheries access agreement with a State party to the MCA Convention.

155. Regarding the liability of the flag State that may result from the violation of the laws and regulations of the coastal State by vessels flying its flag fishing in the exclusive economic zones of the SRFC Member States under a license issued within the framework of a fisheries access agreement between one such State and the flag State, the Tribunal is of the view that its conclusions reached in paragraphs 146 to 150 apply in this context.

156. The Tribunal will now deal with the issue of liability of an international organization where fishing licences are issued within the framework of a fisheries access agreement between the SRFC Member States and the organization.

157. The Tribunal emphasizes that the third question is not to be understood as relating to international organizations in general, but only to international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries.

158. In accordance with its articles 305, paragraph 1(f), and 306 as well as its Annex IX, the Convention is open for participation by international organizations. An international organization may become a party to the Convention upon the deposit of an instrument of formal confirmation or of accession.

On that basis, the European Community (hereinafter "the EC") became a party to the Convention on 1 May 1998, following the deposit of its instrument of formal confirmation.

159. At present, the only such organization party to the Convention is the European Union (hereinafter "the EU"), which, on 1 December 2009, succeeded and replaced the EC (see article 1, Consolidated Version of the Treaty on European Union (TEU), Official Journal of the European Union, C 326, 26 October 2012, p. 16).

160. According to article 4, paragraphs 1, 2 and 3, of Annex IX to the Convention:

> 1. The instrument of formal confirmation or of accession of an international organization shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States which are Parties to this Convention.
> 2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in article 5 of this Annex.
> 3. Such an international organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it.

161. In depositing its instrument of formal confirmation, the EC declared "its acceptance, in respect of matters for which competence has been transferred to it by those of its member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement" relating to the implementation of Part XI. The EC also stated that "[t]he scope and the exercise of such Community competences are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with article 5(4) of Annex IX to the Convention."

162. The Tribunal notes that the declaration by the EC concerning competence under article 5, paragraph 1, of Annex IX, attached to the instrument

of formal confirmation, specifies the matters governed by the Convention in respect of which competence has been transferred to the organization by its member States, all of which are parties to the Convention.

163. In this declaration, the EC specified certain matters of exclusive competence, as well as matters of shared competence with its member States. The respective parts of the declaration are reproduced below:

> 1. Matters for which the Community has exclusive competence:
>
> The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions.
> . . .
>
> 2. Matters for which the Community shares competence with its Member States:
>
> With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.

164. The Tribunal notes that in the present case, pursuant to the declaration of the EU with regard to "the conservation and management of sea fishing resources", it is only the exclusive competence of the EU that is relevant.

165. The Tribunal observes that the Common Fisheries Policy of the EU contains a definition of "Union fishing vessel", that is a "fishing vessel flying the flag of a Member State and registered in the Union" (see article 4, para.5, Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC).

166. The Tribunal is of the view that the issue of liability in respect of vessels that are owned or operated by a national of a member State of an international organization and which are flying the flag of a State that is not a member of that international organization is beyond the scope of the third question.

167. The Tribunal takes note of the statement made by the EU in the course of the oral proceedings that "[i]n the European Union, international agreements concluded by the EU are binding on its institutions and its member States." The EU added that "[a]s 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" and that "[i]t follows from that that it is only the EU – the organization – that is potentially liable under international law for violations of the obligations under these agreements."

168. The Tribunal wishes to point out that, in the present case, the liability of an international organization for an internationally wrongful act is linked to its competence. This is clearly spelled out in article 6, paragraph 1, of Annex IX to the Convention, which provides that parties which have competence under article 5 of that Annex have responsibility for failure to comply with obligations or for any other violation of the Convention. It follows that an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of "due diligence".

169. The Tribunal further notes that the EU stated in the course of the oral proceedings that the fisheries access agreements "are an integral part of the EU legal order and . . . are implemented within the Union by the Member States'

authorities" and that "[i]f 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."

170. The Tribunal considers that the liability of an international organization for a violation of the fisheries legislation of the coastal State by a vessel flying the flag of a member State holding a fishing license issued within the framework of a fisheries access agreement depends on whether the relevant agreement contains specific provisions regarding liability for such violation. In the absence of such provisions in the agreement, the general rules of international law apply. The Tribunal notes that the EU expressed a similar view during the proceedings, stating:

> The liability of the flag State or the international agency for the violation of the fisheries legislation of the coastal State depends on the content of the international agreement applicable to it, possibly including specific provisions regarding liability of the flag State. In the absence of specific provisions, the general rules of international law on State responsibility for a breach by the State of its international obligations are applicable.

171. The activities of fishing vessels of the EU operating in the exclusive economic zone of an SRFC Member State under a fisheries access agreement with the EU are, according to these agreements, subject to the fisheries laws and regulations of that State. In this regard, the Tribunal takes note of the statement made by the EU in the course of the oral proceedings that "[f]ishing 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", that "[t]hese agreements commit the Union '[t]o take appropriate steps required to ensure that its vessels comply with the Agreement and the legislation governing fisheries'", and that "[o]n 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".

172. The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

173. Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its "due diligence" obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

174. The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

VIII Question 4

175. The fourth question submitted to the Tribunal is as follows:

> *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?*

176. In its written submission, the SRFC gives the following details as to the background of this question posed to the Tribunal:

> Small pelagic species and tuna are migratory species that concentrate seasonally, depending on the environmental conditions, in the waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management.
>
> It has to be highlighted that, in general, the concerned States do not consult each other when setting up management measures on those resources. In fact, these pelagic resources are subject to fishing authorization through fishing agreement signed between the coastal State and foreign companies without consultation with neighbouring coastal States that are along the migration routes of those resources.

177. The SRFC adds that "some Member States continue to act in isolation, issuing fishing licenses on the shared resources, thereby undermining the interests of neighbouring States and the initiatives of the SRFC." The SRFC concludes that "[t]oday, the practice shows the lack of cooperation among SRFC Member States in managing sustainably the stocks of common interest or shared stocks."

178. Before addressing the rights and obligations of the coastal State, certain preliminary issues need to be clarified, namely: which States are covered by the reference to the coastal State; what is the scope of the rights and obligations; what do the expressions "shared stocks", "stocks of common interest" and "sustainable management" as used in this question mean?

179. The Tribunal recalls that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States. Therefore, the rights and obligations of the coastal State referred to in the fourth question are to be construed as rights and obligations of the SRFC Member States.

180. The Tribunal observes that the Convention contains several provisions, namely articles 61, 62, 73, 192 and 193, concerning general rights and obligations of the coastal State in ensuring the conservation and management of living resources in its exclusive economic zone.

181. The Tribunal notes, however, that the fourth question addresses specifically the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna.

182. The focus of the fourth question is therefore on the rights and obligations of the SRFC Member States in ensuring the sustainable management of the fish stocks in their exclusive economic zones when such fish stocks are shared with other SRFC Member States or between them and non-Member States fishing for such stocks in an area beyond and adjacent to those zones.

183. The Tribunal wishes to clarify the meaning of the expressions "shared stocks" and "stocks of common interest".

184. The Tribunal observes that these expressions are not found in the Convention. However, the expression "shared stocks" is defined in article 2, paragraph 12, of the MCA Convention as "stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it."

185. The Tribunal observes that there is no established definition of "stocks of common interest". However, the Tribunal notes that, in its statement made during the oral proceedings, the SRFC provided the following explanation with respect to the meaning of the expression "stocks of common interest":

> In the central eastern Atlantic, a number of migratory pelagic species move between the exclusive economic zones of several States ("transboundary stocks" or "stocks of common interest") and/or between the exclusive economic zones and the waters beyond ("straddling stocks"). Thus, these are stocks which are shared between two neighbouring coastal States, two non-neighbouring coastal States located on either side of a gulf or an ocean, or a coastal State and the flag State of the vessel fishing the stock.

186. As the definition of "shared stocks" contained in article 2, paragraph 12, of the MCA Convention applies to both situations described in paragraphs 1 and 2 of article 63 of the Convention, the Tribunal considers that this expression as well as the expression "stocks of common interest" cover all stocks addressed in that article of the Convention.

187. The Tribunal now wishes to clarify its understanding of the expression "sustainable management".

188. The Tribunal observes that the Convention does not define the expression "sustainable management". Article 63 of the Convention as such does not address the issue of cooperation with respect to measures necessary to ensure the sustainable management of shared stocks. This article rather deals with cooperation regarding measures necessary to coordinate and ensure the "conservation and development of such stocks" when they occur within the exclusive economic zones of two or more States, and cooperation regarding measures necessary for the "conservation of these stocks in the adjacent area" when they "occur both within the exclusive economic zone and in an area beyond and adjacent to the zone".

189. The Tribunal, however, considers that article 61 of the Convention, which sets out the basic framework concerning the conservation and management of the living resources in the exclusive economic zone, provides guidance as to the meaning of "sustainable management". In this connection paragraphs 2, 3 and 4 of this article are of particular relevance; they read as follows:

Article 61
Conservation of the living resources

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested

> species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

190. The Tribunal observes that the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource.

191. The Tribunal will therefore construe the expression "sustainable management" as used in the fourth question as meaning "conservation and development", as referred to in article 63, paragraph 1, of the Convention.

192. The Tribunal will now identify the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks occurring within their exclusive economic zones and shared stocks occurring both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, especially small pelagic species. The Tribunal will first examine the applicable provisions of the Convention.

193. In the view of the Tribunal, these provisions are: article 63, paragraph 1, of the Convention, on the same stocks or stocks of associated species occurring within the exclusive economic zones of two or more coastal States; paragraph 2 of the same article on the same stock or stocks of associated species occurring within the exclusive economic zone and in an area beyond and adjacent to the zone; and article 64, paragraph 1, of the Convention, on the highly migratory species listed in Annex I to the Convention.

194. Article 63 of the Convention, which relates to stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it, covers shared stocks as defined by article 2, paragraph 12, of the MCA Convention.

195. Article 63, paragraph 1, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States

> shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

196. Article 63, paragraph 2, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

197. The Tribunal notes that article 63, paragraph 1, of the Convention establishes that the coastal States concerned "shall seek . . . to agree" on the necessary measures to coordinate and ensure "conservation and development" of shared stocks. While article 61 of the Convention provides guidance regarding "conservation", the term "development" needs to be clarified.

198. The Tribunal is of the view that the term "development of such stocks" used in article 63, paragraph 1, of the Convention suggests that these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime. This may include the exploitation of non-exploited stocks or an increase in the exploitation of under-exploited stocks through the development of responsible fisheries, as well as more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks. This may also include stock restoration, guided by the requirement under article 61 of the Convention that a given stock is not endangered by over-exploitation, thus preserving it as a long-term viable resource.

199. Article 63, paragraph 2, of the Convention establishes a cooperation regime between the coastal State and the States fishing for the same stocks and stocks of associated species with a view to agreeing on measures necessary for the conservation of these stocks in the adjacent area.

200. Since the Tribunal has jurisdiction to entertain the Request only in so far as it relates to the exclusive economic zones of the SRFC Member States, article 63, paragraph 2, of the Convention, as far as it relates to "States fishing for such stocks in the adjacent area", is not applicable to the exclusive economic zones of the SRFC Member States.

201. While article 63, paragraph 2, of the Convention does not apply to the exclusive economic zones of the SRFC Member States, the part of the straddling stocks that occurs within these zones is not left unprotected. These straddling stocks are subject to the cooperation regime of article 63, paragraph 1, of the Convention, as they occur within the exclusive economic zones of the SRFC Member States.

202. The reference to tuna in the fourth question necessarily invokes the provision contained in article 64, paragraph 1, of the Convention, which reads:

> The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organizations exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

203. This provision establishes the cooperation regime on conservation of the highly migratory species listed in Annex I to the Convention. As tuna stocks are highly migratory species listed in this Annex, this provision therefore becomes relevant in the examination of this question.

204. The reference to tuna in this question will cover only tuna stocks that occur within the exclusive economic zones of the SRFC Member States, as the jurisdiction of the Tribunal in this case does not extend to the exclusive economic zones of other States or to the high seas.

205. Turning now to the rights and obligations of the coastal State, the Tribunal is of the view that, although the Convention approaches the issue of conservation and management of living resources from the perspective of obligations of the coastal State, these obligations entail corresponding rights. Therefore, the obligations of the SRFC Member States as identified below entail corresponding rights.

206. In the case of stocks referred to in article 63, paragraph 1, of the Convention, the SRFC Member States have the right to seek to agree, either directly or through appropriate subregional or regional organizations, with other SRFC Member States in whose exclusive economic zones these stocks occur upon the measures necessary to coordinate and ensure the conservation and development of such stocks.

207. Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:

(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation (see article 61, paragraph 2, of the Convention);
(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to "seek . . . to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks" (article 63, paragraph 1, of the Convention);
(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention). The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the

ICCAT, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

208. To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that:

(i) the maintenance of shared stocks, through conservation and management measures, is not endangered by over-exploitation;
(ii) conservation and management measures are based on the best scientific evidence available to the SRFC Member States and, when such evidence is insufficient, they must apply the precautionary approach, pursuant to article 2, paragraph 2, of the MCA Convention;
(iii) conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

209. Such measures shall:

(i) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened;
(ii) provide for exchange on a regular basis, through competent international organizations, of available scientific information, catch and fishing efforts statistics, and other data relevant to the conservation of shared stocks.

210. The Tribunal observes that the obligation to "seek to agree . . ." under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the

Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

211. The Tribunal is of the view that the conservation and development of shared stocks in the exclusive economic zone of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

212. In light of the foregoing, SRFC Member States fishing in their exclusive economic zones for shared stocks which also occur in the exclusive economic zones of other Member States must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks. Such management measures are also required in respect of fishing for those stocks by vessels flying the flag of non-Member States.

213. The Tribunal is of the view that cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources, is a well-established principle in the Convention. This principle is reflected in several articles of the Convention, namely articles 61, 63 and 64.

214. While limiting its examination of the rights and obligations of the coastal State to the exclusive economic zones of the SRFC Member States, the Tribunal is aware that fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes. The Tribunal is equally aware that the fish stocks, in particular the stocks of small pelagic species and tuna, shared by the SRFC Member States in their exclusive economic zones are also shared by several other States bordering the Atlantic Ocean. The Tribunal, however, has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case.

215. The Tribunal wishes to emphasize that in order to secure the effectiveness of the conservation and development measures concerning shared stocks that the SRFC Member States may take and apply in their own exclusive economic zones, these States may, directly or through relevant subregional or regional organizations, seek the cooperation of non-Member States sharing the same stocks along their migrating routes with a view to ensuring conservation and sustainable management of these stocks in the whole of their geographical distribution or migrating area. While being aware of the scope of its jurisdiction in this case, the Tribunal is of the view that, when it comes to conservation and management of shared resources, the Convention imposes the obligation to cooperate on each and every State Party concerned.

216. The Tribunal notes in this regard that, while the SRFC Member States and other States Parties to the Convention have sovereign rights to explore, exploit, conserve and manage the living resources in their exclusive economic zones, in exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, they must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. The Tribunal recalls in this connection that living resources and marine life are part of the marine environment and that, as the Tribunal stated in the *Southern Bluefin Tuna Cases,* "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan*), *Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 70).

217. Accordingly, the Tribunal observes that, although in the present case its jurisdiction is limited to the area of application of the MCA Convention, in the case of fish stocks that occur both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, these States and the States fishing for such stocks in the adjacent area are required, under article 63, paragraph 2, of the Convention, to seek to agree upon the measures necessary for the conservation of those stocks in the adjacent area.

218. The Tribunal further observes that with respect to tuna species the SRFC Member States have the right, under article 64, paragraph 1, of the Convention, to require cooperation from non-Member States whose nationals fish for tuna in the region, "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species".

IX Operative Clause

219. For these reasons,

THE TRIBUNAL,

1. Unanimously

***Decides* that:**

It has jurisdiction to give the advisory opinion requested by the SRFC; and

Its jurisdiction is limited to the exclusive economic zones of the SRFC Member States.

2. By 19 votes to 1

***Decides* to respond to the Request for an advisory opinion submitted by the SRFC.**

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK ;

AGAINST: *Judge* COT.

3. Unanimously

***Replies* to the first question as follows:**

The flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources.

The flag State is under an obligation, in light of the provisions of article 58, paragraph 3, article 62, paragraph 4, and article 192 of the Convention, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention within the exclusive economic zones of the SRFC Member States.

The flag State, in fulfilment of its obligation to effectively exercise jurisdiction and control in administrative matters under article 94 of the Convention, has the obligation to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State's responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment.

The foregoing obligations are obligations of "due diligence".

The flag State and the SRFC Member States are under an obligation to cooperate in cases related to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned.

The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the exclusive economic zone of that SRFC Member State, has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.

4. By 18 votes to 2

***Replies* to the second question as follows:**

The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State.

The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

The SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations, referred to in the reply to the first question.

The flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK;

AGAINST: *Judges* COT, LUCKY.

5. Unanimously

***Replies* to the third question as follows:**

The question only relates to those international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries. At present, the only such international organization is the European Union to which the member States, which are parties

to the Convention, have transferred competence with regard to "the conservation and management of sea fishing resources".

In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.

Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its "due diligence" obligations, the SFRC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

6. By 19 votes to 1

***Replies* to the fourth question as follows:**

In the case of stocks referred to in article 63, paragraph 1, of the Convention, the SRFC Member States have the right to seek to agree, either directly or

through appropriate subregional or regional organizations, with other SRFC Member States in whose exclusive economic zones these stocks occur upon the measures necessary to coordinate and ensure the conservation and development of such stocks.

Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:

(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation (see article 61, paragraph 2, of the Convention);
(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to "seek . . . to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks" (article 63, paragraph 1, of the Convention);
(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention). The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the International Commission for the Conservation of Atlantic Tunas, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that:

(i) the maintenance of shared stocks, through conservation and management measures, is not endangered by over-exploitation;
(ii) conservation and management measures are based on the best scientific evidence available to the SRFC Member States and, when such evidence

is insufficient, they must apply the precautionary approach, pursuant to article 2, paragraph 2, of the MCA Convention;

(iii) conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

Such measures shall:

(i) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened;

(ii) provide for exchange on a regular basis through competent international organizations, of available scientific information, catch and fishing efforts statistics, and other data relevant to the conservation of shared stocks.

The obligation to "seek to agree . . ." under articles 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are "due diligence" obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

The conservation and development of shared stocks in the exclusive economic zone of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

In light of the foregoing, the SRFC Member States fishing in their exclusive economic zones for shared stocks which also occur in the exclusive economic zones of other Member States must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks. Such management measures are

also required in respect of fishing for those stocks by vessels flying the flag of non-Member States.

Cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources, is a well-established principle in the Convention. This principle is reflected in several articles of the Convention, namely articles 61, 63 and 64.

Fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes. Fish stocks, in particular the stocks of small pelagic species and tuna, shared by the SRFC Member States in their exclusive economic zones are also shared by several other States bordering the Atlantic Ocean. The Tribunal, however, has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case.

In exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, the SRFC Member States and other States Parties to the Convention must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. Living resources and marine life are part of the marine environment and, as stated in the *Southern Bluefin Tuna Cases,* "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".

Although, in the present case, the jurisdiction of the Tribunal is limited to the area of application of the MCA Convention, in the case of fish stocks that occur both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, these States and the States fishing for such stocks in the adjacent area are required, under article 63, paragraph 2, of the Convention, to seek to agree upon the measures necessary for the conservation of those stocks in the adjacent area.

With respect to tuna species, the SRFC Member States have the right, under article 64, paragraph 1, of the Convention, to require cooperation from non-member States whose nationals fish for tuna in the region, "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species".

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK ;

AGAINST: *Judge* NDIAYE.

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this second day of April, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Permanent Secretary of the Sub-Regional Fisheries Commission and to the Secretary-General of the United Nations.

(*signed*) Shunji YANAI,
President

(*signed*) Philippe GAUTIER,
Registrar

Judge WOLFRUM, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(*initialled*) R.W.

Judge COT, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Advisory Opinion of the Tribunal.

(*initialled*) J.-P.C.

Judge NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) T.M.N.

Judge LUCKY, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) A.A.L.

Judge PAIK, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Advisory Opinion of the Tribunal.

(*initialled*) J.-H.P.