

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2014

Public sitting

held on Tuesday, 2 September 2014, at 3 p.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

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

*(Request for Advisory Opinion submitted to the Tribunal)*

---

**Verbatim Record**

---

<i>Present:</i>	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Helmut Türk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Registrar	Philippe Gautier

---

*List of delegations:*

**Sub-Regional Fisheries Commission (SRFC)**

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

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

Mr Sebastiao Pereira, Director-General for Industrial Fisheries, Republic of Guinea-Bissau

Mr Doudou Gueye, Legal Adviser, Ministry of Fisheries and Maritime Affairs, Republic of Senegal

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

Ms Marième Diagne Talla, Acting Permanent Secretary of the SRFC

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

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

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

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

Mr Demba Yeum Kane, Regional Coordinator of the RFMO

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

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

Mr Sloans Chimatrio, African Union/NEPAD

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

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

**Mr Papa Kebe, Expert, Specialist in pelagic resources**

Mr Aboubacar Fall, Lawyer, Bar of Dakar, Senegal

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

Mr Adilson D. Djabula, Legal Counsel

**Germany**

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

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

## Argentina

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

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

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

## Australia

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

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

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

## Chile

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

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

## Spain

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

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

## Micronesia (Federated States of)

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

## New Zealand

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

Ms Elana Geddis, Barrister, High Court of New Zealand

## **United Kingdom of Great Britain and Northern Ireland**

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

## **Thailand**

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

## **European Union**

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

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

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

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

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

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

## **Caribbean Regional Fisheries Mechanism (CRFM)**

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

## **International Union for the Conservation of Nature (IUCN)**

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

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

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

1 **THE PRESIDENT** (*Interpretation from French*): At its fourteenth extraordinary  
2 session, held on 27 and 28 March 2013, the Conference of Ministers of the Sub-  
3 Regional Fisheries Commission adopted a resolution by which it decided to  
4 authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to  
5 seize the Tribunal in order to obtain its advisory opinion.  
6

7 That resolution was adopted in accordance with article 33 of the Convention of  
8 8 June 2012 on the Determination of the Minimal Conditions for Access and  
9 Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the  
10 Member States of the Sub-Regional Commission.  
11

12 The text of that resolution was transmitted by a letter from the Permanent Secretary  
13 of the Sub-Regional Fisheries Commission, dated 27 March 2013, which was  
14 received by the Registry on 28 March 2013. In accordance with article 131 of the  
15 Rules of the Tribunal, by letter of 9 April 2013 the Permanent Secretary of the Sub-  
16 Regional Fisheries Commission transmitted additional documents. Those additional  
17 documents have been posted on the Tribunal's website.  
18

19 The request for an advisory opinion was submitted on the basis of article 21 of the  
20 Statute of the Tribunal and article 138 of the Rules of the Tribunal.  
21

22 The case, which has been entered in the list of cases as Case No. 21, is named  
23 *Request for an advisory opinion submitted by the Sub-Regional Fisheries*  
24 *Commission*.  
25

26 I now call on the Registrar to summarize the procedure and to read out the questions  
27 on which the Tribunal is called to give an advisory opinion on the basis of the  
28 resolution of the Sub-Regional Fisheries Commission. Mr Registrar.  
29

30 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. The  
31 questions read as follows:  
32

33 1. What are the obligations of the flag State in cases where illegal, unreported  
34 and unregulated (IUU) fishing activities are conducted within the Exclusive  
35 Economic Zone of third party States?  
36

37 2. To what extent shall the flag State be held liable for IUU fishing activities  
38 conducted by vessels sailing under its flag?  
39

40 3. Where a fishing license is issued to a vessel within the framework of an  
41 international agreement with the flag State or with an international agency,  
42 shall the State or international agency be held liable for the violation of the  
43 fisheries legislation of the coastal State by the vessel in question?  
44

45 4. What are the rights and obligations of the coastal State in ensuring the  
46 sustainable management of shared stocks and stocks of common interest,  
47 especially the small pelagic species and tuna?  
48

49 Mr President, I would point out that the French wording of question 3, which I have  
50 just read out, corresponds to the text submitted by the Sub-Regional Commission in

1 its written statements. The wording was confirmed by the Sub-Regional Commission  
2 in its letter of 12 March 2014.

3  
4 (*Continued in English*) By an Order dated 24 May 2013, the Tribunal decided that the  
5 Sub-Regional Fisheries Commission and the intergovernmental organizations listed  
6 in the annex to that Order were likely to be able to furnish information on the  
7 questions submitted to the Tribunal for an advisory opinion. By the same Order,  
8 States Parties to the Convention, the Sub-Regional Commission and the said  
9 organizations were invited to present written statements on the questions submitted  
10 to the Tribunal for an advisory opinion. The time-limit for the submission of written  
11 statements, initially fixed on 29 November 2013, was extended to 19 December  
12 2013 by an Order of the President dated 3 December 2013.

13  
14 Within that time-limit, written statements were filed by 22 States Parties to the  
15 Convention. These are, in the order of receipt: Saudi Arabia, Germany, New  
16 Zealand, China, Somalia, Ireland, the Federated States of Micronesia, Australia,  
17 Japan, Portugal, Chile, Argentina, the United Kingdom, Thailand, the Netherlands,  
18 European Union, Cuba, France, Spain, Montenegro, Switzerland and Sri Lanka.

19  
20 Within the same time-limit, written statements were also submitted by the following  
21 seven organizations, in the order of receipt: the Forum Fisheries Agency, the  
22 International Union for Conservation of Nature and Natural Resources (IUCN), the  
23 Caribbean Regional Fisheries Mechanism, the United Nations, the Sub-Regional  
24 Fisheries Commission, the Food and Agriculture Organization of the United Nations  
25 and the Central America Fisheries and Aquaculture Organization.

26  
27 One statement was submitted by a State party to the 1995 Straddling Fish Stocks  
28 Agreement: the United States of America.

29  
30 In addition, one statement was submitted by a non-governmental international  
31 organization (the World Wide Fund for Nature), which was informed by a letter of  
32 4 December 2013 that its statement would not be considered part of the  
33 documentation in the case.

34  
35 By an Order dated 20 December 2013, the President fixed 14 March 2014 as the  
36 time-limit within which States parties to the Convention and intergovernmental  
37 organizations having presented written statements could submit written statements  
38 on the statements made. During this second round of statements, written statements  
39 were filed, in the order of receipt, by the following five States Parties to the  
40 Convention: the United Kingdom, New Zealand, European Union, the Netherlands,  
41 and Thailand. In addition, one statement was submitted by the Sub-Regional  
42 Fisheries Commission. A further statement was received from the World Wide Fund  
43 for Nature, which was not included in the case file.

44  
45 All the statements have been posted on the website of the Tribunal.

46  
47 **THE PRESIDENT:** As indicated, the Tribunal is meeting today to hear oral  
48 statements relating to the request for an advisory opinion. In this regard, the Tribunal  
49 has been informed that representatives of the following States and organizations  
50 wish to take the floor during the current oral proceedings: the Sub-Regional Fisheries

1 Commission, Germany, Argentina, Australia, Chile, Spain, the Federated States of  
2 Micronesia, New Zealand, the United Kingdom, Thailand, the European Union, the  
3 Caribbean Regional Fisheries Mechanism and the International Union for the  
4 Conservation of Nature.

5  
6 The specific arrangements for the hearing have been made known by the Registry to  
7 the participating delegations. The schedule of the hearing has also been made public  
8 by a press release.

9  
10 *(Interpretation from French)* This afternoon the Tribunal will hear the Sub-Regional  
11 Fisheries Commission, and the other delegations I have already mentioned will  
12 address the Tribunal on Wednesday, Thursday and Friday.

13  
14 I now give the floor to the representative of the Sub-Regional Fisheries Commission.  
15 Your Excellency, Mr Camara, you have the floor.

16  
17 **MR CAMARA** *(Interpretation from French)*: Mr President, distinguished Members of  
18 the International Tribunal for the Law of the Sea, as Chairman-in-Office of the  
19 Conference of Ministers of the Sub-Regional Fisheries Commission and on behalf of  
20 the delegation accompanying me, consisting of representatives of the seven member  
21 States of the SRFC (namely Cabo Verde, the Gambia, Guinea, Guinea-Bissau,  
22 Mauritania, Senegal and Sierra Leone, which are all parties to the United Nations  
23 Convention on the Law of the Sea), of the Permanent Secretariat of the SRFC, of  
24 regional intergovernmental organizations, regional NGOs and experts from the sub-  
25 region, I thank you for the honour that you have granted us of participating in the  
26 hearing on the request for an advisory opinion submitted by the Sub-Regional  
27 Fisheries Commission.

28  
29 I wish to express the hope of the Sub-Regional Fisheries Commission that the  
30 Tribunal will clarify international law so that everyone involved in the eradication of  
31 the scourge that is illegal, unreported and unregulated fishing (better known by its  
32 abbreviation IUU) can fully exercise the rights to which they are entitled and fully  
33 assume the obligations incumbent upon them.

34  
35 According to findings from surveillance operations conducted in our sub-region, the  
36 maritime areas of the Member States of the SRFC, in particular Sierra Leone, the  
37 Gambia, Guinea and Guinea-Bissau, are the favoured location for IUU fishing  
38 activities. Losses attributed to fishing without a licence are estimated annually at  
39 USD 140 million for Guinea and Sierra Leone. The amount of the loss is huge, as it  
40 is equivalent to a quarter of the average value of fisheries production officially  
41 declared in those two countries.

42  
43 For a country like Senegal, assumed to be relatively advanced in terms of  
44 surveillance, losses based solely on IUU fishing vessels actually boarded in 2011 are  
45 estimated at 350,000 tonnes, which represents a value of USD 292 million,<sup>1</sup> not to  
46 mention all the other attendant negative effects.

47  

---

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



1 The situation is equally a cause for concern in Mauritania, which has a relatively  
2 strong surveillance system. It still reports high annual boarding levels despite the  
3 strictness of the legislation in that country. In 2011 more than 400 fishing offences  
4 were recorded for industrial and artisanal fishing.

5  
6 The disastrous consequences of IUU fishing for the socio-economic fabric in all the  
7 States of the sub-region are seen *inter alia* in factory closures, with reduced  
8 productivity due to a lack of products to be processed, and unemployment in related  
9 activities such as processing, fish marketing, handling, shipping and trade in general.

10  
11 The most visible effects of IUU fishing are lower revenues for fishermen, declining  
12 landings in ports, extended fishing trips with consequent additional operating  
13 expenses, changes in catch composition, with some species disappearing, and a  
14 decrease in average size of fish caught. The stocks most affected by this over-  
15 exploitation are the pelagics targeted by certain foreign fleets.

16  
17 Within the area of the SRFC, fish provide almost 62 per cent of available animal  
18 proteins. *Per capita* fish consumption is 21 kg whereas the global average is 18 kg,  
19 which represents double the African average of 9 kg.

20  
21 According to FAO estimates, it is likely that the global consumption of fish, which  
22 currently stands at around 91.3 million<sup>2</sup> tonnes per year, will increase considerably  
23 by 2030, even though the resource is declining drastically in all parts of the globe  
24 and especially in countries with low capacity to protect their resources.

25  
26 This decline in the resource, combined with a continuous increase in demand for fish  
27 on the global market, encourages an intensification of IUU fishing, particularly in the  
28 area of the Sub-Regional Fisheries Commission, which is reputed to be one of the  
29 richest in fish worldwide.

30  
31 Note should also be taken of the degradation of marine habitats as a result of IUU  
32 fishing vessels using destructive techniques such as bottom-trawling, blast fishing  
33 and the mass dumping at sea of fish that are deemed to be unprofitable but which  
34 could have been consumed by people in the sub-region.

35  
36 Moreover, scientific opinions provided to managers to underpin decisions concerning  
37 fisheries management are subject to major uncertainty resulting from stock  
38 evaluations based on mathematical models that are dependent on the reliability of  
39 statistical, biological and socio-economic data on fisheries. These data are often  
40 skewed by the activities of certain illegally operating vessels, which are not taken  
41 into account.

42  
43 Finally, other problems linked to IUU fishing in the sub-region have been observed,  
44 such as attempts at clandestine emigration amongst young fishermen and,  
45 sometimes, their involvement in various forms of illegal trafficking (drugs, arms etc.).  
46

---

<sup>2</sup> SOFIA Report, FAO, 2014, *The State of World Fisheries and Aquaculture – Opportunities and challenges* – ISBN 97892-5-108275-1.

1 Considering the recurring difficulties encountered by the Member States of the SRFC  
2 in their fight against IUU fishing, we, the Ministers of the Member States of the SRFC  
3 have authorized – I repeat, have authorized – the Permanent Secretary of the  
4 Commission to seize the International Tribunal for the Law of the Sea in order to  
5 obtain its advisory opinion.

6  
7 Mr President, distinguished Members of the International Tribunal for the Law of the  
8 Sea, thank you very much for your kind attention.

9  
10 Mr President, would you kindly now give the floor to the Agent of the Sub-Regional  
11 Fisheries Commission, Ms Diénaba Bèye Traoré, to expand on the arguments of the  
12 Sub-Regional Fisheries Commission?

13  
14 **THE PRESIDENT** (*Interpretation from French*): Thank you very much, Mr Camara.  
15 Before I give the floor to the next speaker I wish to inform you that some of the  
16 Judges would like to ask questions to the Sub-Regional Commission. I shall now  
17 give the floor to Judge Cot.

18  
19 **JUDGE COT** (*Interpretation from French*): Thank you, Mr President. Mr Camara, the  
20 Sub-Regional Fisheries Commission relies on the MCA Convention of 8 June 2012  
21 in submitting to the Tribunal a request for advisory opinion. It has put four questions.  
22 Could the Sub-Regional Fisheries Commission cite for us the article or articles of the  
23 MCA Convention corresponding to each of the four questions? Thank you.

24  
25 **THE PRESIDENT** (*Interpretation from French*): Thank you, Judge Cot. (*Continued in*  
26 *English*) I will now give the floor to Judge Pawlak.

27  
28 **JUDGE PAWLAK**: Thank you, Mr President. Mr President, distinguished Judges,  
29 distinguished representatives of the Sub-Regional Fisheries Commission, I am of the  
30 view that in order to understand better the request for an advisory opinion it would be  
31 advisable to have the following information: Is the term “flag State” used in the first  
32 question intended to encompass all flag States or only those whose fishing vessels  
33 are operating in the exclusive economic zones within the framework of the MCA  
34 Convention? Thank you, Mr President.

35  
36 **THE PRESIDENT**: Thank you, Judge Pawlak. I now invite Judge Gao to take the  
37 floor.

38  
39 **JUDGE GAO**: Thank you, Mr President. Your Excellency, my question is relatively  
40 straightforward. Would it be possible for the Sub-Regional Fisheries Commission to  
41 provide the Tribunal with additional information and materials upon which the four  
42 questions are formulated and put forward for an advisory opinion? This further  
43 relevant documentation may include the following categories:

- 44  
45 - international agreements concluded with the flag States and other relevant  
46 international agencies;  
47 - national reports on IUU fishing activities and damages and losses suffered  
48 from these activities;  
49 - and last but not least, existing regulatory and enforcement measures against  
50 IUU fishing.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46

Thank you, Minister.

**THE PRESIDENT:** Thank you, Judge Gao. (*Interpretation from French*) Of course, you will be sent the written text of these questions. If you so wish, you may answer the questions during the hearing or send a written answer within one week, that is to say by noon on Tuesday, 9 September. The text of your answer will be sent to the States and organizations participating in the hearing and will be posted on the Tribunal's website. Ms Bèye Traoré, you have the floor.

**MS BÈYE TRAORÉ** (*Interpretation from French*): Thank you, Mr President. Mr President, distinguished Members of the International Tribunal for the Law of the Sea, it is for me a singular honour to appear today before your esteemed institution on behalf of the Sub-Regional Fisheries Commission.

It has to be said that – despite efforts to strengthen legal frameworks at the national, sub-regional, continental and international levels to combat IUU fishing; and despite the fact that all SRFC Member States have ratified the United Nations Convention on the Law of the Sea, it being the governing framework on which the legal action of the SRFC is based as it seeks an advisory opinion from your Tribunal; and despite the fact that the Member States of the SRFC do not oppose either the binding international instruments to combat IUU fishing<sup>1</sup> or the non-binding instruments, if we refer to the preamble to the SRFC Convention on Minimal Conditions for Access; and despite the adoption of decisions by regional fisheries organizations to strengthen the good governance of fisheries by means of major reforms to national fisheries policies, improvement of the legislative and regulatory fisheries framework, development of an information system on fisheries and strengthening of fisheries research; and despite the institutional and operational support of technical and financial partners in the monitoring, oversight and surveillance of fisheries zones, particularly by developing human and material capacity and regularly organizing joint surveillance operations – the Member States of the SRFC are still facing ever more serious IUU fisheries problems without being able to rely on effective and fruitful cooperation by the flag States of offending vessels.

That is the situation the SRFC has observed, which justifies its request for an advisory opinion from your Tribunal based on the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC – generally known as the Convention on Minimal Conditions for Access or MCA Convention. We also base our request on the United Nations Convention on the Law of the Sea and the governing legal documents of this Tribunal.

We are now going to look at issues of jurisdiction, admissibility and applicable law.

Regarding the jurisdiction of the Tribunal, the basis and scope of the Tribunal's jurisdiction in respect of our request for an advisory opinion are to be found not only

---

<sup>1</sup> Sierra Leone signed the Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing on 23 November 2009.

1 in the Statute and Rules of this Tribunal but also in UNCLOS and the MCA  
2 Convention of the SRFC.

3  
4 Whilst it is true that UNCLOS and the Statute of ITLOS do not expressly state the  
5 jurisdiction of the Tribunal for the instant case, the provisions of the Statute and the  
6 Rules of the Tribunal, of UNCLOS and of the MCA Convention, taken together,  
7 incontrovertibly found this jurisdiction.

8  
9 I refer here *inter alia* to the following provisions: article 21 of the Statute; article 16 of  
10 the Statute; article 138 of the Rules; article 33 of the MCA Convention; and  
11 articles 287 and 288, paragraph 4, of UNCLOS.

12  
13 Let us look first at the jurisdiction of the Tribunal pursuant to article 21 of the Statute.  
14 The advisory function of the Tribunal is based on article 21 of the Statute, which  
15 reads in French as follows:

16  
17 Le Tribunal est compétent pour tous les différends et toutes les demandes  
18 qui lui sont soumis conformément à la Convention et toutes les fois que cela  
19 est expressément prévu dans tout autre accord conférant compétence au  
20 Tribunal.

21  
22 It should be noted that in the French version of article 21 a clear distinction is made  
23 between the word “*différend*”, which refers to a contentious situation, and the word  
24 “*demande*”, which refers to a non-contentious situation. The word “*et*”, a co-  
25 ordinating conjunction between the words “*différends*” and “*demandes*”, shows here  
26 the Tribunal’s jurisdiction in the two distinct situations.

27  
28 It must be noted that there is a difference of meaning between the French and  
29 English versions of article 21. In English, it reads as follows: “The jurisdiction of the  
30 Tribunal comprises all disputes and all applications submitted to it in accordance with  
31 this Convention and all matters specifically provided for in any other agreement  
32 which confers jurisdiction on the Tribunal.”

33  
34 Does the English term “applications” refer to an “application” within the meaning of  
35 the provisions of UNCLOS, that is to say “*demandes*”, “*requêtes*”, or is this an  
36 attribution of the Tribunal’s jurisdiction to situations other than those where there is a  
37 dispute?

38  
39 The expression “*toutes les demandes*”, mentioned in French in article 21, opens the  
40 jurisdiction of ITLOS to procedures other than those pertaining to the contentious  
41 function, which itself is reflected by the words “*tous les différends*”. The advisory  
42 jurisdiction of the Tribunal is thus expressed.

43  
44 A plain reading of article 21 of the Statute in both the English and French versions  
45 shows clearly the Tribunal’s jurisdiction to give an advisory opinion.

46  
47 Regarding the jurisdiction of the Tribunal pursuant to article 16 of its Statute,  
48 article 16 provides as follows: “The Tribunal shall frame rules for carrying out its  
49 functions. In particular it shall lay down rules of procedure.”

1 This article refers explicitly to the Rules of the Tribunal to define the procedure for  
2 exercising its functions as defined under UNCLOS and the Statute of the Tribunal.  
3 Article 16 is the basis for the adoption of article 138 of the Rules of the Tribunal  
4 mentioned in section H – Advisory Proceedings.

5  
6 Let us move on now to the jurisdiction of the Tribunal under article 138 of its Rules.  
7 According to article 138 of the Rules of the Tribunal,

8  
9 The Tribunal may give an advisory opinion on a legal question if an  
10 international agreement related to the purposes of the Convention  
11 specifically provides for the submission to the Tribunal of a request for such  
12 an opinion (para. 1). A request for an advisory opinion shall be transmitted  
13 to the Tribunal by whatever body is authorized by or in accordance with the  
14 agreement to make the request to the Tribunal (para. 2).

15  
16 Under article 138 of the Rules, three conditions are therefore left to the sole  
17 determination of the Tribunal in order for it to give an advisory opinion:

- 18  
19 - first, the existence of an international agreement related to the purpose of  
20 UNCLOS;  
21 - second, a given legal question within the meaning of article 138; and  
22 - third, the authorization to seize the Tribunal given by the governing body of the  
23 institution making the request.

24  
25 Let us consider first the existence of an international agreement related to the  
26 purposes of UNCLOS.

27  
28 In the instant case, the jurisdiction of this Tribunal is founded on the MCA  
29 Convention.

30  
31 Let us recall that the MCA Convention is a regional legal instrument for the  
32 regulation of fishing activities which, for that purpose, refers to the relevant  
33 international legal instruments such as:

- 34  
35 – the United Nations Convention on the Law of the Sea, especially paragraph 4 of  
36 its preamble;  
37 – international provisions relating to maritime safety and the protection of the  
38 marine environment established by the International Maritime Organization;  
39 – the principles and standards set out in the Code of Conduct for Responsible  
40 Fisheries of the FAO;  
41 – the International Plan of Action to prevent, deter and eliminate IUU fishing  
42 adopted in 2001 by the FAO.

43  
44 Further instruments in this regard are article 3, paragraph 1, of the MCA Convention,  
45 which rehearses article 62, paragraph 2, of UNCLOS, and article 3, paragraph 3, of  
46 the MCA Convention, which faithfully reflects paragraph 7.5 of the Code of Conduct  
47 for Responsible Fisheries.

48  
49 Similarly, Title IV on Port State Measures and measures to fight IUU fishing  
50 reproduces the key points of the FAO Agreement of 2009 on Port State Measures  
51 and the International Plan of Action to prevent, deter and eliminate IUU fishing.

1  
2 Thus, it can be inferred from the foregoing that the MCA Convention is  
3 incontrovertibly an international agreement related to the purposes of the Convention  
4 as provided for in articles 61-64 and 116-119 with respect to the conservation and  
5 management of biological resources of the EEZ and the high seas.  
6

7 The basis for the referral to the Tribunal by the SRFC can be found in article 33 of  
8 the MCA Convention, which reads as follows: “The Conference of Ministers of the  
9 SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal  
10 matter before the International Tribunal for the Law of the Sea for advisory opinion.”  
11

12 As article 33 indicates, the Tribunal must ensure that the following conditions are  
13 met:  
14

- 15 (a) an authorization by the governing body of the applicant institution, by means of a  
16 resolution of the Conference of Ministers of the SRFC, to bring a matter before  
17 ITLOS, which has been done; and  
18 (b) a request relating to a given legal matter, which is the case here.  
19

20 The second condition in article 138 is that there must be a given legal matter.  
21

22 Article 138, paragraph 3, of the Rules refers to the application *mutatis mutandis, inter*  
23 *alia*, of article 131, paragraph 1, of the Rules: “A request for an advisory opinion on a  
24 legal question [...] shall contain a precise statement of the question. [...]”  
25

26 The International Court of Justice gives some guidance on the concept of a legal  
27 question in its advisory opinion on *Western Sahara*.  
28

29 That Court considers that “[t]he questions [...] have been framed in terms of law and  
30 raise problems of international law [...] and [...] are by their very nature susceptible of  
31 a reply based on law; [...]”.<sup>2</sup>  
32

33 This case law has been confirmed by the Seabed Disputes Chamber of this Tribunal  
34 in the advisory opinion handed down in Case No. 17. In paragraph 39 of that opinion,  
35 the Chamber recalls that the International Court of Justice underscored that  
36 “[q]uestions framed in terms of law and rais[ing] problems of international law are [...]”  
37 by their very nature susceptible of a reply based on law.”<sup>3</sup>  
38

39 In summary, the four questions posed by the SRFC concern the rights and  
40 obligations of the flag State in cases of IUU fishing, the responsibility of States or  
41 international organizations signing fisheries agreements and the rights and  
42 obligations of coastal States in sustainably managing shared fish stocks.  
43

44 These questions are precise, they are framed in terms of law, and they raise  
45 problems of international law and thus are perfectly susceptible of a reply based on  
46 law.

---

<sup>2</sup> *Western Sahara, Advisory Opinion [of 16 October 1975], I.C.J. Reports 1975.*

<sup>3</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion [of 22 July 2010], I.C.J. Reports 2010, p. 403, para. 25; Western Sahara, Advisory Opinion [of 16 October 1975], I.C.J. Reports 1975, p. 12, para. 15.*

1  
2 The answers to these questions posed by the SRFC will provide it with the  
3 necessary legal elements to assure the proper conduct of its activities, specifically  
4 the effective implementation of the MCA Convention.

5  
6 Let us move now on to the third condition flowing from article 138, namely the  
7 authorization to seise the Tribunal given by the governing body of the institution  
8 making the request.

9  
10 The Conference of Ministers of the SRFC, which is its governing body, authorized  
11 the Permanent Secretary by a resolution adopted during the 14<sup>th</sup> extraordinary  
12 session (held on 27 and 28 March 2013 in Dakar, Senegal) to request an advisory  
13 opinion of this Tribunal. That resolution was transmitted by letter dated 27 March  
14 2013, as set out in Order 2013/2 of the Tribunal. This procedure is in line with  
15 article 33 of the MCA Convention.

16  
17 There can be no doubt, then, that the decision to request an advisory opinion is  
18 indeed the result of a resolution of the supreme governing body of the SRFC, namely  
19 the Conference of Ministers.

20  
21 As a last point on the jurisdiction of the Tribunal, let us look now at jurisdiction  
22 pursuant to articles 287 and 288, paragraph 4, of UNCLOS.

23  
24 Article 287 of the Convention provides a number of choices of procedure concerning  
25 the interpretation or application of the Convention. Amongst them is included the  
26 International Tribunal for the Law of the Sea pursuant to Annex VI(a) to the  
27 Convention.

28  
29 Although article 287 refers to a situation of dispute settlement, article 288,  
30 paragraph 4, gives the Tribunal the possibility to decide, itself, as to its jurisdiction in  
31 the case of a request for an advisory opinion (*competens competens*). Indeed,  
32 article 288, paragraph 4, of the Convention reads as follows: "In the event of a  
33 dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled  
34 by decision of that court or tribunal."

35  
36 Consequently, the Tribunal is entitled to examine the extent of its jurisdiction in case  
37 of dispute<sup>4</sup> but must respect the provisions of the Convention and its own Statute  
38 and Rules, *inter alia* articles 21 and 27 of the Statute and articles 130, 131 and 138  
39 of the Rules.

40  
41 Moreover, according to doctrine on the Tribunal's jurisdiction to give an advisory  
42 opinion, it should be noted that the issue of such jurisdiction has been raised on a  
43 number of occasions during meetings of States Parties and during debates held in  
44 the United Nations General Assembly. It would appear that no firm objection was  
45 raised and a number of States were in favour of the application of article 138.<sup>5</sup>

---

<sup>4</sup> For example, the comments by the International Court of Justice on the principle of *compétence de la compétence* in *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at pp. 119-120.

<sup>5</sup> Michael B. Gerrard and Gregory E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), pp. 524-525. See also

1  
2 Furthermore, Presidents of the Tribunal have always confirmed in their statements  
3 the advisory jurisdiction of the full Tribunal.<sup>6</sup> This jurisdiction complements the  
4 judicial function<sup>7</sup> attributed to the Tribunal by the Convention and its governing legal  
5 documents.

6  
7 Moving on now to the admissibility of the SRFC request, by agreeing to examine and  
8 give an opinion on the four questions posed by the SRFC, the Tribunal will enable  
9 the Member States of the SRFC better to appreciate and apply the relevant  
10 international and regional legal instruments to combat IUU fishing.<sup>8</sup> This will  
11 contribute to strengthening the framework of good governance of the seas and  
12 oceans, notably in providing its opinion on the obligations which, under international  
13 law, fall to the flag State in the event of IUU fishing.

14  
15 With respect to the legal regime of fishing in the EEZ and on the high seas,<sup>9</sup> the  
16 opinions of the Tribunal will carry considerable legal and practical weight. These  
17 opinions could also be used when necessary by other States Parties to the  
18 Convention and regional organizations facing the problem of IUU fishing.

19  
20 It should be remembered that an advisory opinion remains advisory and refers  
21 mainly to the agreement under which it was given, in this case the Convention on  
22 Minimal Conditions for Access – the MCA Convention<sup>10</sup> – and beyond that, UNCLOS  
23 and instruments adopted pursuant to it.

24  
25 Finally, the questions posed by the SRFC are precise and thus should lead the  
26 Tribunal to find them admissible.<sup>11</sup>

27  
28 Moving to applicable law, the SRFC referenced in chapter II of its written statement  
29 (version 2) a number of binding legal instruments that the Commission believes are  
30 relevant in support of its request. Some of these legal instruments are directly linked  
31 to the MCA Convention, for example the United Nations Convention, the United  
32 Nations Fish Stocks Agreement, the FAO fisheries legal instruments, whereas others

---

Michael A. Becker, "Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion", *American Society of International Law Insights*, Vol. 17, Issue 19 (23 August 2013);

See also P. Rao and P. Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), pp. 393-394.

<sup>6</sup> See the statements by the various Presidents on the Tribunal's website.

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

<sup>8</sup> See Chapter II, Section 1 of the SRFC's Written Statement version 2 (Legal instruments to fight IUU fishing applicable in the SRFC area).

<sup>9</sup> See Resolution 56/12 of 28 November 2001, where the UN General Assembly underlined "the important role and authority of the Tribunal concerning the interpretation or application of the Convention". As the former President of the Tribunal Judge José Luis Jesus said, "interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention".

<sup>10</sup> See article 59 of the Statute of the International Court of Justice (ICJ).

<sup>11</sup> See, for example, Fitzmaurice, *The Law and Practice of the International Court of Justice* (Grotius, Cambridge, 1986), Vol. 1 at pp. 16-117.



1 focus more on the goals of the MCA Convention. Unquestionably, all these  
2 instruments are relevant where implementation of the United Nations Convention is  
3 concerned.

4  
5 There are also a number of non-binding instruments which have been voluntarily  
6 approved by States. These instruments are also relevant in the light of the advisory  
7 opinion sought from your Tribunal. This is the meaning to be given to the reference  
8 made by the Seabed Disputes Chamber to the rules of the International Seabed  
9 Authority when it speaks of “texts of a binding nature” negotiated by States and  
10 adopted under a procedure similar to that used by multilateral conferences.

11  
12 This confirms the position of the ICJ when that court declared in its advisory opinion  
13 on *Accordance with International Law of the Unilateral Declaration of Independence*  
14 *in Respect of Kosovo* that rules governing the interpretation of treaties enshrined in  
15 the Vienna Convention “may provide guidance” as to the interpretation of United  
16 Nations Security Council resolutions.<sup>12</sup>

17  
18 Moreover, it should be emphasized that information on the national, regional and  
19 international legal frameworks found in the written statements of the SRFC are there  
20 for information purposes, to enlighten the Tribunal as to the legal regime  
21 underpinning fisheries activities in the SRFC zone. Reference to these legal  
22 instruments will enable the Tribunal better to appreciate the difficulties encountered  
23 by the SRFC and its Member States in their interpretation and their application.

24  
25 The SRFC very respectfully urges the International Tribunal for the Law of the Sea to  
26 find that it has jurisdiction to entertain this request for an advisory opinion, to declare  
27 that the request from the SRFC is admissible, and to find that the texts referred to  
28 constitute applicable law in the instant case.

29  
30 As regards the additional arguments in support of the questions asked, as was  
31 stated in its letter of transmittal of 12 March 2014 accompanying the written  
32 statement, the SRFC informed the Tribunal that the contents of that statement were  
33 “without prejudice to other arguments and information which may be presented and  
34 relied upon during the oral phase of the proceedings”.

35  
36 Thus, in its oral statement the SRFC is providing clarification and additional  
37 information to reinforce its arguments relating to the questions asked.

38  
39 Firstly, the definition of a third-party State. A third-party State is any State which is  
40 not a member of the Sub-Regional Fisheries Commission, as is indicated in article 2,  
41 paragraph 9, of the MCA Convention.

42  
43 Second, in its submissions, the SRFC is requesting an advisory opinion on the  
44 application and interpretation of the MCA Convention and, beyond that, of the United  
45 Nations Convention on the Law of the Sea, but not on other bilateral and multilateral  
46 instruments signed or ratified by one or more of its member States, which are

---

<sup>12</sup> *Advisory Opinion [of 22 July 2010], I.C.J. Reports 2010*, p. 403, para. 94 (Interpretation of Security Council resolution 1244 (1999)), [www.icj-cij.org/docket/files/141/15987.pdf](http://www.icj-cij.org/docket/files/141/15987.pdf).

1 mentioned in the SRFC's written statements purely to familiarize the Tribunal with  
2 the SRFC.

3  
4 In the SRFC's written statements the reference to the legal status of new economic  
5 and scientific uses of the seas is justified by the emergence of new factors, such as  
6 the scale of IUU fishing, which call for new legal responses.

7  
8 It is also necessary to point out that the Sub-Regional Fisheries Commission's  
9 questions regarding the changes in the definition of IUU fishing can be explained by  
10 the fact that the fisheries sector is highly dynamic and that the fishing techniques  
11 used increasingly call for advanced and evolutionary technologies such as the fish  
12 aggregating device, transshipment at sea, driftnet fishing etc.

13  
14 Furthermore, certain major retail brands care little about the origin and legality of the  
15 products that they purchase, process and sell. This does not in any way mean that  
16 the SRFC is questioning the definition of IUU fishing set out in the International Plan  
17 of Action to prevent IUU fishing, which, incidentally, is reproduced verbatim in  
18 article 2, paragraph 4, of the MCA Convention.

19  
20 Furthermore, it should be stated that the examples of offences cited in the SRFC's  
21 written statements represent a sample of cases which have been presented to you to  
22 illustrate the scale of IUU fishing in the sub-region.

23  
24 In the light of articles 58, paragraph 2, 62, paragraph 4, and 94 of UNCLOS, it should  
25 be pointed out that the term "flag State", which appears in questions 1, 2, and 3 of  
26 the request for an advisory opinion from the SRFC, should be interpreted to mean  
27 the "State of nationality" of natural and legal persons such as the owners, charterers  
28 and crew of a fishing vessel.

29  
30 The obligations of the State of nationality of natural and legal persons in the case of  
31 IUU fishing will also have to be clarified, as the UN General Assembly stated in its  
32 resolution endorsing the outcome document of the United Nations Conference on  
33 Sustainable Development entitled "The Future We Want."<sup>13</sup> In paragraph 170 of that  
34 resolution, it is stated:

35  
36 We recommit to eliminate illegal, unreported and unregulated fishing [...] by  
37 [...] implementing, in accordance with international law, effective and  
38 coordinated measures by coastal States, flag States, port States, chartering  
39 nations and the States of nationality of the beneficial owners and others who  
40 support or engage in illegal, unreported and unregulated fishing by identifying  
41 vessels engaged in such fishing and by depriving offenders of the benefits  
42 accruing from it.

43  
44 Furthermore, in article 94, paragraph 2(b), of UNCLOS we read that every State  
45 shall "assume jurisdiction under its internal law over each ship flying its flag and its  
46 master, officers and crew in respect of administrative, technical and social matters  
47 concerning the ship".

48  

---

<sup>13</sup> See UN General Assembly Resolution A.66/288, "The Future We Want", para. 170.

1 Lastly, IUU fishing activities are internationally wrongful acts committed by the State  
2 which incur the international responsibility of the flag State of the vessel. The  
3 definition of “internationally wrongful acts”, as set out in the annex to United Nations  
4 General Assembly Resolution A/Res/56/83, which reproduces the wording used by  
5 the International Law Commission in the provisions relating to responsibility of  
6 States, is satisfied when conduct consisting of an action or omission is attributable to  
7 the State under international law, in other words the conduct of any State organ of  
8 any organ of that State, whatever functions that organ holds (article 4), and  
9 constitutes a breach of an international obligation of the State, that is to say, when  
10 an act of that State is not in conformity with what is required of it by that obligation,  
11 regardless of its origin or character (article 12).

12  
13 We shall now present the Commission’s arguments question by question.

14  
15 Question 1 reads as follows: “What are the obligations of the flag State in cases where  
16 illegal, unreported and unregulated fishing activities are conducted within the Exclusive  
17 Economic Zone of third party States?”

18  
19 For purposes of clarification, the reference here is to the obligations of the flag State  
20 when IUU fishing activities are conducted in waters under the jurisdiction of third-  
21 party States. A clarification is required with respect to the translation of the word  
22 “obligations” into English, since it can have two different but complementary  
23 meanings: “obligations” can mean responsibility or liability. In question 1 it should be  
24 translated by the word “liability”.

25  
26 The coastal State is required under international law to inform the flag State of any  
27 IUU fishing activities conducted in the waters under its national jurisdiction and of  
28 any penalties imposed in that connection.

29  
30 The flag State is required under international law to ensure that, in waters under the  
31 jurisdiction of third-party States, vessels flying its flag comply with measures  
32 pertaining to the conservation and management of fishery resources.<sup>14</sup> The flag  
33 State is therefore responsible for the effective monitoring of fishing activities  
34 conducted by a vessel flying its flag, regardless of the location of such activities. This  
35 responsibility stems from the right of the coastal State to sail its vessels throughout  
36 the world, including on the high seas. It therefore entails the obligation to take due  
37 account of the rights and obligations of the coastal State by respecting its laws and  
38 regulations adopted in accordance with the Convention.

39  
40 This general obligation incumbent on the flag State is an obligation of conduct  
41 coupled with an obligation of due diligence, which derives from article 194 of the  
42 Convention and from general principles of law relating to the prevention of  
43 transboundary damage. This obligation also derives from:

44  
45 - customary international law;

---

<sup>14</sup> See *Lauritzen v. Larsen*, 1953, 345 US 571.

See also the discussions in Colombos, *International Law of the Sea* (4<sup>th</sup> ed., Longman, London, 1961) p. 250-251.

See also International Law Commission, Commentary to the articles concerning the law of the sea, Article 29, para. 3; Article 30, para. 1, *Yearbook of the International Law Commission 1956*.

- 1 - the 1958 Convention on the High Seas;  
2 - the Convention, in particular article 58, paragraphs 2 and 3, on the rights and  
3 duties of other states in the exclusive economic zone, and article 94 on the duties  
4 of the flag State.

5

6 It also derives from:

7

- 8 - the 1995 Agreement on straddling fish stocks and highly migratory fish stocks;  
9 and  
10 - the 1993 FAO Compliance Agreement.

11

12 The obligation to take administrative and regulatory measures and to enforce them is  
13 an obligation of conduct incumbent on the flag State. It thus requires the flag State to  
14 enact laws and to adopt regulations and other administrative measures and  
15 procedures that are designed to ensure, within its own legal system, effective  
16 compliance with its obligations by persons subject to its jurisdiction, in accordance  
17 with article 153, paragraph 4, of the Convention.

18

19 The obligation of conduct is thus linked to the obligation of due diligence incumbent  
20 on the flag State with respect to private owners and crews of fishing vessels flying its  
21 flag, regardless of the maritime area in which they are conducting their activities.

22

23 This obligation of due diligence requires not only the adoption of appropriate  
24 standards and measures but also the exercise of a certain degree of vigilance in  
25 enforcing them and in providing for the administrative monitoring of public and  
26 private operators, for example by ensuring surveillance of the activities conducted by  
27 these operators with a view to preserving the rights of the other party.<sup>15</sup>

28

29 In other words, the flag State must endeavour, by appropriate means, to prevent its  
30 vessels from engaging in IUU fishing. The flag State is therefore expected to  
31 exercise a higher degree of due diligence, particularly where the coastal State has  
32 insufficient technical or operational means at its disposal to enforce its laws and  
33 regulations, which is the case in the Member States of the Sub-Regional Fisheries  
34 Commission.

35

36 The flag State is thus required to ensure effective control of its vessels and crews  
37 and to impose penalties when offences take place, irrespective of any penalties  
38 imposed by the coastal State.

39

40 Collaboration is necessary, as far as possible, with the coastal State to facilitate  
41 enforcement of the penalty imposed for an offence, in particular

42

- 43 - by proceeding expeditiously with an in-depth investigation to determine the  
44 veracity of the allegations made by the coastal State;  
45 - by sharing relevant information, including evidentiary material, with the coastal  
46 State regarding the activities of the vessel;  
47 - by instituting legal proceedings, where appropriate, against the vessel;

---

<sup>15</sup> See *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 197.

- 1 - by imposing appropriate sanctions on the vessel and its operators if the offence is  
2 proved;  
3 - and by providing the coastal State with regular information regarding the  
4 measures taken and progress made.  
5

6 It is appropriate at this stage to examine the shortcomings in international law with  
7 respect to question 1.  
8

9 In light of the foregoing, it is perfectly reasonable to request the Tribunal to clarify the  
10 responsibilities of the flag State in order to facilitate their effective implementation.  
11 The competent authorities in the Member States of the Sub-Regional Fisheries  
12 Commission draw the Tribunal's attention to the fact that when a vessel is boarded  
13 because it is engaging in IUU fishing, the flag State authorities are regularly informed  
14 but fail to take any action, let alone any positive action.  
15

16 Member States of the SRFC have encountered difficulties in ensuring the  
17 enforcement of international law, in particular after boarding fishing vessels of foreign  
18 nationality. For example, in the case of IUU fishing in one of the SRFC Member  
19 States, the flag State, once informed, cooperates only if the offence is the result of  
20 fishing activity undertaken within the framework of a fisheries agreement between  
21 the Member State and the flag State of the boarded vessel. It is only in that case that  
22 the flag State cooperates in enforcing the penalty on a vessel that has committed an  
23 IUU fishing offence and has absconded.  
24

25 However, in most cases where the vessel has succeeded in evading the SRFC  
26 Member State patrol boats, the flag State, on being alerted, has failed to cooperate.  
27 In such cases, should the flag State not undertake to prosecute and sanction vessels  
28 flying its flag that commit offences in waters under the jurisdiction of the SRFC  
29 Member State? Could the joint responsibility of the flag State and the vessel's owner  
30 and captain not be engaged?  
31

32 In addition, a further difficulty encountered by Member States of the SRFC stems  
33 from the fact that international law fails to specify the timeframe for the flag State's  
34 response and the form it should take when it is notified of an IUU fishing offence.  
35

36 International law does not specify either the rights of the SRFC Member State in the  
37 event of non-cooperation by the flag State when one of its fishing vessels is seized  
38 on account of IUU fishing in a port of that member State.  
39

40 In addition, international law remains unclear regarding the nature and the penalties  
41 applicable to the flag State if a flag of convenience has been granted to a vessel in  
42 violation of articles 91, paragraph 1, and 92, paragraph 1, of the Convention.  
43

44 A vessel's nationality is based on two fundamental principles, namely the principle of  
45 the monopoly of the flag State and the principle of a genuine link between the State  
46 and the vessel.<sup>16</sup>  
47

---

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

1 The first principle states that the vessel can sail under the flag of one State only  
2 (article 92, para. 1, of the Convention). If it sails under several flags, using them  
3 according to convenience, it is considered under international law to be a vessel  
4 without nationality and it may not claim any of the nationalities in question with  
5 respect to a third-party State (article 92, para. 2, of the Convention). During a voyage  
6 or while in a port of call, a vessel can change its nationality only in the case of a real  
7 transfer of ownership or change of registry (article 92, para. 2, of the Convention). A  
8 new nationality may not be granted until the previous nationality has been  
9 annulled.<sup>17</sup>

10  
11 The difficulties faced by shipowners during the international crisis in the maritime  
12 transport sector led to the enactment of several national laws authorizing bareboat  
13 chartered vessels, even those registered in other countries, to operate under the  
14 national flag provided that the declaration of ownership and the inherent right to raise  
15 the respective flags was suspended. In such cases there is dual registration: the  
16 genuine registration of the flag State and the registration of the charterer's State.<sup>18</sup>

17  
18 The second principle, that of the genuine link, calls for the existence of a relationship  
19 between the State and the vessel (article 91, para. 1). The criteria that determine  
20 whether a genuine link exists vary from one legal system to another, and  
21 responsibility for defining them lies with individual States (article 91, para. 1, of the  
22 Convention).

23  
24 Whatever option is chosen, the criterion adopted must require the flag State:

- 25  
26 - To exercise control over the vessel and the persons and property on board in  
27 administrative, technical and social matters (articles 94 and 97 of the  
28 Convention);  
29 - To exercise its criminal jurisdiction in the event of a navigation accident (article 97  
30 of the Convention);  
31 - To require vessels to render assistance to persons and vessels in danger at sea  
32 (article 98 of the Convention);  
33 - To prohibit and punish the transport of slaves (article 99 of the Convention);  
34 - To prohibit and punish illicit traffic in narcotic drugs and psychotropic substances  
35 (article 108 of the Convention);  
36 - To prohibit and punish unauthorized radio or television broadcasting from the  
37 high seas (article 109 of the Convention);  
38 - To regulate the conditions governing fishing on the high seas by vessels flying its  
39 flag, to ensure that they are respected and to punish vessels that violate them  
40 (articles 87, para. 1(e), 116, 119 and 120 of the Convention);  
41 - To require vessels flying its flag to comply with international norms aimed at  
42 preventing, reducing and controlling pollution of the maritime environment from  
43 vessels, to ensure that they are complied with and to punish vessels that violate  
44 them (article 217 of the Convention).

45  
46 The genuine link requirement implies primarily that the flag State should be assigned  
47 the role of an agent of the international community and should be required to adopt

---

<sup>17</sup> von Böhm-Amolly, "Registo de Navios"..., *op. cit.*, p. 173.

<sup>18</sup> von Böhm-Amolly, "Registo de Navios"..., *op. cit.*, p. 173.

1 and maintain on its behalf a minimum standard of rights and duties that enable it to  
2 control its vessels' activities in maritime areas that are open to all, without prejudice  
3 to the interests of third parties and, in general, to those of the international  
4 community.<sup>19</sup>

5  
6 This responsibility is based on the idea that the principle of freedom of the high seas  
7 can be more effectively guaranteed if the flag State controls the freedom and the  
8 activities conducted by its vessels in that maritime area.<sup>20</sup> It follows that the purpose  
9 of the genuine link requirement is to ensure effective control and jurisdiction.<sup>21</sup>

10  
11 The Tribunal therefore needs to base its opinion on the combined provisions of  
12 articles 56, paragraph 1(a), 58, paragraph 3, 62, 73, paragraph 1, 91, paragraph 1,  
13 and 92, paragraph 1, of the Convention in order to conclude, in response to  
14 question 1 of the Sub-Regional Fisheries Commission, that the vessel's flag State  
15 must be held fully responsible for improper activities conducted by a vessel flying its  
16 flag. The fact is that the Convention does not explicitly state whether the flag State  
17 incurs any responsibility, nor does it specify the nature of its responsibility if such a  
18 case arises or the applicable penalties. Incidentally, the Tribunal could therefore  
19 clarify the meaning that should be attributed to the provisions of article 94 of the  
20 aforementioned Convention, pursuant to which the flag State has a positive duty to  
21 prevent and punish IUU fishing activities.

22  
23 Now let us turn to question 2 of the SRFC, which reads as follows: To what extent shall  
24 the flag State be held liable for IUU fishing activities conducted by vessels flying its  
25 flag?

26  
27 This relates, in particular, to the obligations of the flag State in cases of IUU fishing  
28 conducted in the high seas by a vessel flying its flag. In more specific terms,  
29 reference should be made to the responsibility of the flag State in cases where there  
30 has been a breach of its international obligation to exercise effective jurisdiction and  
31 control over a vessel flying its flag.

32  
33 In addition to the responsibility invoked under question 1, international law requires  
34 the flag State to ensure that vessels flying its flag and fishing in the high seas abide  
35 by measures aimed at the conservation and management of fish stocks and do not  
36 engage in any activities that could undermine their effectiveness.

37  
38 It should be borne in mind that the provisions of article 116 of the Convention, while  
39 recognizing that States Parties to the Convention have the right to engage in fishing  
40 on the high seas, requires them to take the rights, duties and interests of coastal  
41 States into account. Similarly, articles 117 and 118 remind States of their duty of  
42 cooperation with respect to fishing on the high seas.

43  
44 All these texts should serve as a basis for the Tribunal to conclude that in cases of  
45 IUU fishing on the high seas the flag State should recognize its full liability if it is  
46 proved to have breached its obligation to take reasonable measures to prevent IUU  
47 fishing by its national vessels.

---

<sup>19</sup> See, to similar effect, von Böhm-Amolly, "Registo de Navios"..., *op. cit.*, p. 175.

<sup>20</sup> von Böhm-Amolly "Registo de Navios"..., *op. cit.*, p. 174.

<sup>21</sup> Ariella D'Andrea, The "Genuine Link"..., *op. cit.*, p. 4.

1  
2 The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory  
3 Fish Stocks and the 1993 Compliance Agreement confirm the responsibility of the  
4 flag State for any IUU fishing offence committed by a vessel flying its flag on the high  
5 seas.  
6

7 In addition, according to the provisions of the 2009 Agreement on Port State  
8 Measures, which are backed up by the 2014 Voluntary Guidelines for Flag State  
9 Performance,<sup>22</sup> the flag State must:

- 10
- 11 (a) ensure that the vessel authorized to fly its flag does not engage in illegal,  
12 unreported and unregulated fishing and/or does not support such activity;
  - 13 (b) monitor the fishing activities of all vessels flying its flag, regardless of the  
14 location of such activities;
  - 15 (c) confirm, where necessary, the information contained in the notification of arrival  
16 of a vessel;
  - 17 (d) cooperate with port States and adopt all necessary punitive measures against  
18 any of its ships that are arrested on grounds of IUU fishing activities, even if the  
19 port State's legislation has already prescribed penalties for this kind of offence.  
20

21 In such a case, could a Member State of the Sub-Regional Fisheries Commission,  
22 acting in the context of its monitoring, control and surveillance activities, for instance  
23 when implementing provisions that fall under the jurisdiction of the port State, board  
24 vessels that have engaged in IUU fishing activities in the high seas and that are  
25 currently located in one of its ports?  
26

27 That brings me to shortcomings in international law with respect to question 2. The  
28 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks imposes a  
29 number of obligations on the flag State in cases involving fishing on the high seas.  
30 Under article 18 of the Agreement, States should authorize vessels flying their flags  
31 to engage in fishing on the high seas only where they can effectively exercise their  
32 responsibilities in that regard.  
33

34 Article 3, paragraph 3, of the Compliance Agreement confirms the provisions of  
35 article 18 of the Agreement on straddling stocks as follows:  
36

37 No party shall authorize any fishing vessel entitled to fly its flag to be used  
38 for fishing on the high seas unless the Party is satisfied that it is able, taking  
39 into account the links that exist between it and the fishing vessel concerned,  
40 to exercise effectively its responsibilities under this Agreement in respect of  
41 that fishing vessel.  
42

43 In addition, the Code of Conduct for Responsible Fisheries stipulates that flag States  
44 must ensure that:

45  
46 no fishing vessels entitled to fly their flag fish on the high seas or in the waters  
47 under the jurisdiction of other States unless such vessels have been issued  
48 with a Certificate of Registry and have been authorized to fish by the

---

<sup>22</sup> Voluntary Guidelines for Flag State Performance were adopted by the 31<sup>st</sup> session of the FAO Committee on Fisheries, Rome, 9-13 June 2014.



1 competent authorities. Such vessels should carry on board the Certificate of  
2 Registry and their authorization to fish.  
3 (Article 8.2 of the Code of Conduct for Responsible Fisheries on flag State  
4 duties)  
5

6 This Tribunal is requested to deliver an opinion regarding the types of sanctions that  
7 Member States of the Sub-Regional Fisheries Commission can impose if the flag  
8 State refuses to cooperate, takes no steps to control vessels flying its flag or is  
9 reluctant to cooperate in penalizing an IUU offence on the high seas.

10  
11 Given the inadequate means of surveillance available to the Member States of the  
12 Commission and the recurrence of cases in which flag States refuse to cooperate,  
13 the Tribunal will take the opportunity of this request for an advisory opinion to  
14 specify, where appropriate, the conditions, scale and modalities of the sanctions that  
15 should be imposed in such cases.  
16

17 In its Draft Articles on Responsibility of States for Internationally Wrongful Acts, the  
18 International Law Commission fully endorses the position that the flag State is  
19 responsible for the consequences of such acts, i.e. in this case IUU fishing by a  
20 vessel flying its flag. Thus, the flag State is under an obligation to cease the act and  
21 to guarantee its non-repetition (article 30), to make reparations (articles 31, 34 and  
22 39) and, where appropriate, to take countermeasures (articles 49 and 54).<sup>23</sup>  
23

24 The opinions delivered on questions 1 and 2 are of paramount importance not only  
25 for regional fisheries organizations but also for the countries of registration that are  
26 deemed to be sources of flags of convenience.  
27

28 Let us now turn to question 3.  
29

30 **THE PRESIDENT** (*Interpretation from French*): I beg your pardon, Madam. I am  
31 sorry to interrupt you but it is now almost 4.30 p.m. and the Tribunal will now  
32 withdraw for a break of 30 minutes. The sitting will resume at 5 p.m., when we will  
33 continue to listen to your statement.  
34

35 Thank you.  
36

37 (*The sitting was suspended at 4.29 p.m. and resumed at 5 p.m.*)  
38

39 **THE PRESIDENT** (*Interpretation from French*): The sitting now continues and I give  
40 the floor immediately to Ms Bèye Traoré to continue the oral statement of the  
41 Sub-Regional Fisheries Commission. Go ahead, please.  
42

43 **MS BÈYE TRAORÉ** (*Interpretation from French*): Thank you, Mr President.  
44

45 We shall now consider the arguments of the Sub-Regional Fisheries Commission  
46 regarding question 3, which reads as follows: "Where a fishing license is issued to a  
47 vessel within the framework of an international agreement with the flag State or with

---

<sup>23</sup> See UN General Assembly Resolution A/RES/56/83 (Responsibility of States for internationally wrongful acts).

1 an international agency, shall the State or international agency be held liable for the  
2 violation of the fisheries legislation of the coastal State by the vessel in question?"

3  
4 It should be explained that the wording of question 3 is as it appears in the two  
5 written statements (in French and English) that were sent to the Tribunal on  
6 16 December 2013 and 12 March 2014, respectively. This wording is authoritative,  
7 as noted by the Commission in its letter of 12 March 2014, accompanying version 2  
8 of the written statement. Consequently, the wording of question 3 as it appears in the  
9 French version of the SRFC resolution is an error which we respectfully request the  
10 Tribunal to overlook.

11  
12 The question of the responsibility and the definition of the flag State, in the case of  
13 an offender sailing under the flag of a member State of an international organization  
14 that has signed a fisheries agreement with a coastal State, is raised. A review of  
15 fisheries agreements with Member States of the Commission shows a variety of  
16 responsibilities in cases where a vessel is arrested for IUU fishing in waters under  
17 the national jurisdiction of an SRFC Member State. Three cases have been  
18 identified:

19  
20 In the first case, the fisheries agreement refers to the international organization  
21 signing the agreement as the single point of contact when acts of IUU fishing are  
22 committed in waters under the national jurisdiction of an SRFC Member State. It is  
23 stated that the SRFC Member State shall notify the international organization of all  
24 boardings and penalties imposed in implementation of the agreement.

25  
26 In this first case, under international law, is there not some confusion as to the  
27 respective responsibilities of the international organization signatory to the  
28 agreement and those of the flag State?

29  
30 In the second case, the fisheries agreement refers to both the responsibility of the  
31 flag State and the responsibility of the international organization that signed the  
32 agreement for any boarding of a vessel or penalties imposed in implementation of  
33 the agreement.

34  
35 In this second case, is it possible to hold the international organization, on the one  
36 hand, and the flag State of the offending vessel, on the other, jointly and severally  
37 liable?

38  
39 In the third case, the fisheries agreement refers to the responsibility of the  
40 international organization that signed the agreement for any boarding of a vessel or  
41 penalties imposed in implementation of the agreement. In addition, it provides for the  
42 possible participation of a representative of the concerned flag State in the  
43 exchanges between the SRFC Member State and the international organization that  
44 signed the agreement.

45  
46 In this third case, could the flag State, which is simply participating in the exchanges  
47 between the international organization that signed the fisheries agreement and the  
48 SRFC Member State in whose waters an IUU fishing activity occurred, be held liable  
49 under international law?

1 This brings me to the shortcomings of international law in relation to question 3.

2  
3 International law provides that only a State can be considered a flag State. In that  
4 case, as stated in the arguments put forward by the SRFC regarding questions 1 and  
5 2, the flag State has an obligation of “due diligence” under the law of treaties and  
6 customary law and must, in good faith, take all necessary measures to ensure that a  
7 vessel sailing under its flag complies with the regulations governing the conservation  
8 and management of the fisheries resources of the coastal State; it must also ensure  
9 that the measures taken are not contrary to the interests of the coastal State. This is  
10 in line with the jurisprudence of the International Court of Justice in the *Corfu*  
11 *Channel* case,<sup>24</sup> as well as with the adage *sic utere tuo in alienum non laedas* (“Use  
12 your own property in such a way that you do not injure other people's”).

13  
14 Can an international organization made up of sovereign States therefore be subject  
15 to the same legal regime as the flag State in respect of IUU fishing by a vessel  
16 sailing under the flag of one of its member States and fishing under its cover?

17  
18 Where the flag State is not bound to the coastal State by a fisheries agreement, can  
19 it be held responsible in the event of IUU fishing simply because it is a member of  
20 the international organization that signed the agreement?

21  
22 If so, which of them should be considered as the flag State under international law:  
23 the international organization that signed the fisheries agreement, the State of  
24 registration or the State of nationality of the offending vessel? Is it possible to hold  
25 them jointly responsible for a fisheries offence committed in waters under the coastal  
26 State’s jurisdiction? International law on this matter requires updating. The Sub-  
27 Regional Fisheries Commission eagerly awaits the detailed opinion of the Tribunal  
28 on these questions.

29  
30 According to the Tribunal’s Judgment in Case No. 2, *M/V “SAIGA” (No. 2)*,<sup>25</sup>  
31 confirmed by its Judgment in Case No. 19, *M/V “VIRGINIA G”*, issued on 14 April  
32 2014, an international organization cannot confer nationality on a vessel. The flag  
33 State has the exclusive right to grant its nationality to vessels. Indeed, the Judgment  
34 in the *M/V “SAIGA”* Case states that: “Article 91 leaves to each State exclusive  
35 jurisdiction over the granting of its nationality to ships. In this respect, article 91  
36 codifies a well-established rule of general international law.”

37  
38 The Tribunal’s jurisprudence in this case supports the Sub-Regional Fisheries  
39 Commission in its view that the flag State must be a State, not an organization that  
40 consists of several States and is therefore not competent to

- 41  
42 - grant its nationality to a vessel; and  
43 - assume sole liability for an act of IUU fishing by a vessel sailing under the flag of  
44 one of its member States and operating within the framework of a fisheries  
45 agreement.

24 See *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p.4, at p. 22.

25 See (*Saint Vincent and the Grenadines v. Guinea*), *Judgment, ITLOS Reports 1999*, p. 32, para. 51.

1 Furthermore, other terms used by regional fisheries management organizations to  
2 refer to a flag State,<sup>26</sup> such as “contracting party” (or “parties”), should be clarified  
3 with reference to the Convention, particularly article 91 (“Nationality of ships”),  
4 article 94 (“Duties of the flag State”), article 61 (“Conservation of the living  
5 resources”) and part 5 (“Exclusive economic zone”).  
6

7 All of these articles combine in pursuit of the objectives of article 193 and other  
8 provisions of the Convention.  
9

10 I shall now turn to question 4, which reads: “What are the rights and obligations of  
11 the coastal State in ensuring the sustainable management of shared stocks and  
12 stocks of common interest, especially the small pelagic species and tuna?”  
13

14 The pelagic species are fish which live near the surface and are characteristically  
15 migratory. Their habitat generally covers the tropical and subtropical zones  
16 straddling the maritime areas of several States. IUU fishing activities in the area of  
17 the Sub-Regional Fisheries Commission often target these pelagic species.  
18

19 In the central eastern Atlantic, a number of migratory pelagic species move between  
20 the exclusive economic zones of several States (“transboundary stocks” or “stocks of  
21 common interest”) and/or between the exclusive economic zones and the waters  
22 beyond (“straddling stocks”). Thus, these are stocks which are shared between two  
23 neighbouring coastal States, two non-neighbouring coastal States located on either  
24 side of a gulf or an ocean, or a coastal State and the flag State of the vessel fishing  
25 the stock.  
26

27 The term “shared stocks” requires clarification in light of the provisions of the  
28 Convention and the request for an advisory opinion submitted by the Sub-Regional  
29 Fisheries Commission.  
30

31 In that connection, two types of pelagic fisheries are generally identified in the SRFC  
32 area: small coastal pelagic fisheries and high-seas fisheries.  
33

34 Mr President, I now invite you to call to the bar Mr Papa Kebe, an expert in pelagic  
35 resources and Co-Agent, who will describe the biology, ecology and status of the  
36 pelagic species in the SRFC area.  
37

38 **THE PRESIDENT** (*Interpretation from French*): Thank you, Ms Bèye Traoré. I now  
39 invite the next speaker, Mr Kebe, to take the floor.  
40

41 **MR KEBE** (*Interpretation from French*): Thank you. President, ladies and gentlemen  
42 of the Tribunal for the Law of the Sea, it is a great honour for me to be able to  
43 address with you some of the scientific aspects of the pelagic species that live in

---

<sup>26</sup> See the Compendium of management recommendations and resolutions adopted by ICCAT for the conservation of Atlantic tunas and tuna-like species: <http://www.iccat.int/en/recsregs.asp>. For example, the Recommendation by ICCAT Regarding Belize, Cambodia, Honduras, and St. Vincent and the Grenadines pursuant to the 1998 Resolution Concerning the Unreported and Unregulated Catches of Tuna by Large-Scale Longline Vessels in the Convention Area. See also the Recommendation by ICCAT Concerning the Importation of Bigeye Tuna and Bigeye Tuna Products from St. Vincent and the Grenadines, which entered into force on 21 September 2002.

1 SRFC waters. In the course of this presentation I shall be displaying graphs and  
2 charts on the screen. Some of you may be familiar with them since most of them are  
3 official FAO, International Commission for the Conservation of Atlantic Tunas  
4 (ICCAT) or SRFC documents.

5  
6 The pelagic species are fish that live between the ocean surface and the ocean  
7 bottom but at a distance from the coastline and from the demersal area. Pelagic fish,  
8 also known as blue fish, include several hundred species with common  
9 characteristics, including a dark blue back and a silver belly that make it harder for  
10 predators to see them.

11  
12 The eastern Atlantic, which includes the SRFC zone, has some of the most  
13 abundant fish resources in the world owing to the oceanographic phenomenon of  
14 upwelling. This phenomenon results from very strong ocean winds which push the  
15 surface layer of the oceans along, creating a gap into which the nutrient-rich cold  
16 waters on which the pelagic species feed rise.

17  
18 I will consider first the small and then the large pelagic species.

19  
20 The coastal pelagic resources known as “small pelagic species” include all the small  
21 fish that make up 77 per cent of all landings for the subregion. These resources  
22 essentially comprise six subspecies: round sardinella, flat sardinella, bonga, horse  
23 mackerel, Pacific horse mackerel and mackerel.

24  
25 The straddling and migratory nature of these species is such that they are spread  
26 among a number of countries in north-western Africa and have a very broad range.

27  
28 Round and flat sardinella, which are particularly important for the States of the  
29 subregion, range from south of Senegal to south of Morocco. Bonga, another widely  
30 fished species in the subregion, is found in the southern-most areas between  
31 Senegal and Sierra Leone. These small pelagic species spend virtually all of their  
32 adult life at or near the surface.

33  
34 In 2012, the Food and Agriculture Organization (FAO) Fishery Committee for the  
35 Eastern Central Atlantic (CECAF) estimated the catch statistics for 2011 at  
36 approximately 2.6 million tonnes for the area comprising Senegal, the Gambia,  
37 Mauritania and Morocco.

38  
39 In 2011, the average catch was approximately 115,000 tonnes for bonga, 535,000  
40 tonnes for round sardinella, 132,000 tonnes for flat sardinella, 318,000 tonnes for  
41 mackerel and 367,000 tonnes for horse mackerel.

42  
43 The peak reproductive season for round sardinella begins in May in the area south of  
44 Dakar and continues through June all along the coast of Senegal and north as far as  
45 Cap Timiris, ending off the coast of Mauritania between July and August.

46  
47 Flat sardinella spawn throughout the year, but there is always at least one peak,  
48 generally at the beginning of the warm season in July and August off Senegal. The  
49 spawning period for bonga lasts all year off the coasts of Senegal and the Gambia.

1 The season runs from May to December in Sierra Leone and from February to  
2 October in Guinea-Bissau.

3  
4 The reproductive period for horse mackerel is long, peaking from November to  
5 December and continuing until January or February at 15 degrees north.

6  
7 After this brief summary of the reproductive areas and catch statistics for the small  
8 pelagic species that are most important to the Commission, let us now turn to their  
9 habitats and migratory patterns.

10  
11 Early in the year, most of the round sardinella stock is concentrated between  
12 Senegal and the Gambia. The species may be found south of the Gambia, but this  
13 theory is unproven and further scientific studies are required. Beginning in April,  
14 round sardinella move towards the waters off Mauritania and in September and  
15 October, the stock moves northward towards Morocco. In late October, it returns  
16 southward to its spawning grounds along the coast of Senegal.

17  
18 Flat sardinella are less migratory in nature and sometimes establish local  
19 populations that remain in the same area throughout the year. This species is found  
20 all along the tropical seaboard of the eastern Atlantic from Morocco to Angola.

21  
22 The horse mackerel migration follows the normal seasonal changes in the upwelling  
23 patterns. In spring and summer, horse mackerel move towards the Azores and in  
24 autumn and winter, a period of increased upwelling along the continental shelf, they  
25 move towards the coast.

26  
27 The CECAF Working Group, which met in 2012, conducted an assessment of small  
28 pelagic fish stocks in north-western Africa. The scientists concluded that most of  
29 these stocks were fully exploited or over-exploited. They recommended that current  
30 catch levels should be reduced in order to avoid collapse of the stock.

31  
32 For flat and round sardinella, the total catch was 707,000 and the stock was over-  
33 exploited; it seems advisable to reduce the total catch to 257,000 tonnes in order to  
34 maintain the stock.

35  
36 The stock of mackerel, with a catch of 259,000 tonnes per year, was also over-  
37 exploited. It was recommended that the total catch be maintained at 257,000 tonnes  
38 in order not to deplete the stock.

39  
40 The horse mackerel catch was 343,000 tonnes. The stock was fully exploited or  
41 over-exploited. The scientists recommended that the fishing effort be reduced and  
42 catches maintained at the 2011 level. The annual bonga catch was estimated at  
43 67,000 tonnes and the stock was also over-exploited. The scientists recommended a  
44 reduction in the fishing effort.

45  
46 Mr President, ladies and gentlemen of the Tribunal, these small pelagic species  
47 which are harvested in the Commission's area are a pillar of the economies of our  
48 countries. Fishing is one of our main economic activities and provides most of the  
49 edible animal protein consumed by our populations.

50

1 Additionally, 1.4 million people are employed directly or indirectly in fishing-related  
2 activities in our member States. In Senegal, the artisanal subsector offers direct  
3 employment to approximately 60,000 fishermen, of whom 20 per cent – 12,000  
4 people – are involved in fishing the small pelagic species.

5  
6 In 2006, 3,000 fishermen – roughly 50 per cent of the small fishermen in the Gambia  
7 – focused primarily on the small pelagic species, particularly bonga.

8  
9 The contribution of fisheries to the national economy varies from one State to  
10 another. In Mauritania, it accounts for roughly 5 per cent of gross domestic product  
11 (GDP) and 20 to 25 per cent of the national budget; in Senegal, its contribution to  
12 actual GDP and export income is estimated at 1.3 per cent and 12.3 per cent,  
13 respectively; and in the Gambia, fishing accounts for 3 per cent of GDP.

14  
15 It should also be noted that fishmeal and fish oil exports are an increasingly  
16 important source of foreign currency for Mauritania, particularly at a time when the  
17 price of these commodities has been soaring on the world markets.

18  
19 After this rapid summary of some of the socioeconomic and biological aspects of the  
20 small pelagic species, let me now move to the second part of my statement, which  
21 will concern the large pelagic species.

22  
23 These are highly migratory species, essentially the tuna family, similar species and  
24 other species that are harvested in the Atlantic tuna fisheries.

25  
26 The large pelagic species are managed internationally by an intergovernmental  
27 organization which includes most of the Atlantic coastal states, including the SRFC  
28 member States with the exception of the Gambia and Guinea-Bissau; it also includes  
29 all of the African, Asian, American and European fishing States.

30  
31 All of the large pelagic species which are harvested in the SRFC zone are listed in  
32 Annex I to the Convention (“Highly migratory species”). I will now consider the three  
33 species – yellowfin, skipjack and bigeye – which are commercially the most  
34 important and therefore account for 80 per cent of the catch.

35  
36 As with the small species, I will now provide an overview of the status of the large  
37 pelagic fish stocks.

38  
39 I will be using a graph technique known as the Kobe diagram, which was adopted by  
40 the world’s tuna fishing management organizations in Kobe in 2007, in order to show  
41 you the results of the tuna stock assessments. It comprises four quadrants and uses  
42 three colours to better present the data on the status of the stocks.

43  
44 Green indicates that the stock has not been overfished or overexploited, which is  
45 obviously the goal of all the institutions responsible for managing tuna fisheries.

46  
47 Red indicates that the resource is overfished or overexploited and that there is a high  
48 risk of collapse of the stock.

49  
50 Yellow is a warning sign indicating overfishing or overexploitation of the stock.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48

The first species on which I shall focus is the yellowfin.

This species is found in the open waters of the tropical and subtropical areas. It spends over 90 per cent of its time in waters that have a uniform temperature of approximately 22 degrees centigrade. The maximum size reported is 2.39 metres for a weight of 200 kilos. The maximum age recorded for this species is estimated at eight years.

The equatorial area is the main spawning area for yellowfin and the season runs from October to March.

In the northern equatorial area – Senegal and Guinea – the reproductive season runs from April to June. Yellowfin also spawn around Cabo Verde during the hot season from June to October, although there is some variation from year to year.

I shall now turn to the movements of marked individuals in the Atlantic.

The recovery sites are shown on this chart.

Some individuals leave the African area and head towards the American coast, while other species migrate from the Gulf of Guinea to the Canaries. Perhaps more than ever before, monitoring the extensive migratory patterns of these stocks requires international cooperation.

The juveniles remain in the coastal areas around the Equator while the pre-adults and adults move to higher latitudes and more open waters.

Individuals up to 50 centimetres in length remain in the coastal areas and have moderate migratory patterns. Some juveniles migrate westward with seasonal feeding movements along the eastern and western Atlantic coasts.

It is generally believed that most of these individuals return to their spawning grounds once they have reached sexual maturity. In particular, during the first three months of each year, they migrate across the ocean north-west and south-east along the tropical coasts. The adults also migrate towards the higher latitudes during summer for feeding reasons and across the ocean for breeding reasons at an average speed of 1.74 miles per day.

According to the latest evaluation, the catches were 101,000 tonnes. This is below maximum sustainable yield, which is estimated at 114,000 to 155,000 tonnes.

The scientific advice resulting from the most recent stock evaluations is based on two types of model and the figures are relatively pessimistic. There is considerable uncertainty as to the status of the stock; with a probability of 26 per cent, its status seems to be in line with the management objectives, so apparently it has not been overfished.



1 The fishing effort has not reached the threshold either; the total allowable catch  
2 (TAC) limits adopted on the recommendation of ICCAT are apparently being  
3 respected.

4  
5 The next species is the skipjack, which is an open-sea fish. It tends to be  
6 concentrated in the convergence areas near the demarcation lines between  
7 temperate and cold-water bodies. Skipjack are generally found in waters with a  
8 surface temperature of 20 to 30 degrees centigrade. They can be up to one meter  
9 long and have a maximum weight of 18 kilos and a maximum lifespan of five years.

10  
11 Skipjack spawn opportunistically all year around across broad areas of the Atlantic.  
12 In the eastern Atlantic, they spawn on either side of the Equator from the Gulf of  
13 Guinea up to 20 or 30 degrees west. Spawning peaks between November and  
14 March.

15  
16 This chart shows the movements of skipjack across the Atlantic and their recovery  
17 sites. Some of these species migrate from the Gulf of Guinea and slightly north  
18 towards the Canaries, crossing the maritime areas of SRFC Member States.

19  
20 Their movements depend on ambient conditions and on their propensity to cluster  
21 around floating objects, forming mixed shoals of juveniles and adults of this and  
22 other tuna species. Their average observed speed is 2.8 miles per day.

23  
24 There have also been reports of movements from the Gulf of Guinea to the south-  
25 east in summer and the north-west in October, which suggests that this species  
26 ranges widely in mixed shoals outwards from the Gulf of Guinea.

27  
28 I will now turn to the status of skipjack. Even taking an extremely conservative  
29 approach, it seems unlikely that this stock is over-exploited.

30  
31 Historically, the indicators for this stock in terms of mortality and biomass appear to  
32 predict sustainability. The average catch over the past five years was approximately  
33 161,000 tonnes, while the estimated window for maximum sustainable yield ranges  
34 from 143,000 to 170,000 tonnes.

35  
36 The last tuna species that I will discuss is bigeye, which lives at temperatures of  
37 approximately 29 degrees centigrade. However, it is a deep-diving fish and will  
38 sometimes venture as deep as 500 metres, where the ambient temperature is  
39 roughly 5 degrees centigrade.

40  
41 The maximum size reported for the bigeye is 2.5 metres, its estimated maximum  
42 weight is 210 kilos and its maximum lifespan is 15 years.

43  
44 Spawning is mostly nocturnal. It is generally believed that the species spawns from  
45 about 6 p.m. until midnight on a regular and almost daily basis. This tendency to  
46 spawn during the night is a way of averting the threat posed by both predators and  
47 ultraviolet radiation.

48  
49 Spawning occurs throughout the year in a broad zone extending around the Equator  
50 from the Brazilian coast to the Gulf of Guinea. It peaks between January and June in

1 the southern area; however, in the northern Atlantic, the spawning season is reduced  
2 to July through September and in the southern part (off Congo and Angola), to  
3 November and December.

4  
5 This chart shows the movements and recovery sites for bigeye and explains the high  
6 mobility of this species. Like most tuna species, it covers enormous distances in the  
7 Atlantic.

8  
9 The species is highly migratory. The tagging data show that it moves at a speed  
10 greater than that of yellowfin and comparable to that of skipjack; there are also  
11 seasonal movements determined by age group and the nature of the migration,  
12 which may be either feeding- or breeding-related.

13  
14 Skipjack remain in their spawning area from birth to the following spring, when they  
15 start to move towards the tropics. In so doing, they swim along the African coast  
16 from Cape Lopez to Senegal and Mauritania. Some of them will then continue to the  
17 Azores, the Canaries and Madeira at an average speed of 10 miles per day.

18  
19 Pre-adults may move northward to Senegal or southward to Angola. Between  
20 October and November, the bigeye that moved to the islands return southwards to  
21 their spawning grounds.

22  
23 Tagging studies have shown the existence of transatlantic migrations from the Gulf  
24 of Guinea to the Brazilian coast and from the Gulf of Guinea along the African coast  
25 to the islands of Madeira and the Azores.

26  
27 As with yellowfin and skipjack, transatlantic migrations from the American coast  
28 towards the Gulf of Guinea have been recorded. In the eastern Atlantic, movements  
29 from the Gulf of Guinea to the fishing areas located northward in the Azores and  
30 southward off Angola, as well as return journeys, have been observed.

31  
32 I will now turn to the status of bigeye stocks.

33  
34 The estimates seems to indicate that this stock is not overfished and that last year's  
35 catch was around 70,536 tonnes, below the maximum sustainable yield of 78,000 to  
36 101,600 tonnes.

37  
38 The indicators suggest that this stock is not overfished and that the catch is below  
39 the maximum sustainable yield.

40  
41 Apart from the few areas of uncertainty that I have mentioned, this fish resource  
42 appears to be sustainable if the parties continue to respect the TAC level of  
43 85,000 tonnes as suggested by the ICCAT Scientific Committee.

44  
45 The main conclusion to be drawn from the stock assessments for these three  
46 species, which are found in the SRFC tropical area, is that there are serious  
47 shortcomings in the data concerning IUU fleets, which have forced scientists to  
48 develop a number of theories regarding catch by size. These scientific opinions  
49 contain an enormous amount of uncertainty, which makes life difficult for the officials  
50 responsible for developing fishery management plans.

1  
2 Mr. President, this brings my scientific assessment of these fisheries to a close.  
3 I would like to thank you and to request that you call to the bar Ms Diénaba Bèye  
4 Traoré, who will complete her legal argument concerning question 4.

5  
6 **THE PRESIDENT** (*Interpretation from French*): Thank you, Mr Kebe. I now give the  
7 floor to Ms Bèye Traoré to conclude.

8  
9 **MS BÈYE TRAORÉ** (*Interpretation from French*): Thank you, Mr President,  
10 distinguished Members of the International Tribunal for the Law of the Sea. The  
11 SRFC will conclude its submissions by addressing the shortcomings in international  
12 law with respect to question 4.

13  
14 In the light of the shared nature of certain stocks, the provisions of articles 61,  
15 paragraph 2, 63, paragraph 1, and 64 of the Convention underscore the need for  
16 consultation either directly or through appropriate sub-regional or regional fisheries  
17 organizations to coordinate and ensure their conservation and development.

18  
19 However, whereas article 63, paragraph 1, explains the content of the word  
20 “conservation” of shared stocks, there is clearly a need to clarify the interpretation of  
21 the word “development” in the same paragraph.

22  
23 According to the interpretation of Satya Nandan et al.,<sup>1</sup> this word “development” in  
24 article 63, paragraph 1, should be applied on the basis of the requirements laid down  
25 in article 61, under which it must be ensured through proper conservation and  
26 management measures that the maintenance of the living resources is not  
27 endangered by over-exploitation, envisaging a long-term strategy of maintaining the  
28 stock as a viable resource.

29  
30 In addition, article 61, paragraph 3, of the Convention requires coastal States to take  
31 into account international standards generally accepted by the international  
32 community when they define conservation and management measures for their  
33 shared fisheries resources. It is vital for the Tribunal to give its opinion on the legal  
34 instruments in which the Sub-Regional Fisheries Commission can find such  
35 measures.

36  
37 These measures will have to include those referred to in articles 5 and 6 of the Fish  
38 Stocks Agreement. The general principles contained in article 5 and the provisions of  
39 article 6 of the Agreement on the precautionary approach, on the determination of  
40 reference points for each stock, and the measures to be taken if they are exceeded,  
41 and the ecosystem-based approach to fisheries that are also included in voluntary  
42 instruments such as the Code of Conduct for Responsible Fisheries should now be  
43 considered as accepted minimum international standards and, as such, should be  
44 applicable to all stocks, including pelagic fish stocks.

45  
46 As a State in the area in which the fishing activity is taking place, international law  
47 gives the coastal State the right to secure the fisheries resources in the waters under

---

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

1 its national jurisdiction by defining conditions of access for both domestic and foreign  
2 vessels. That right brings with it duties, in particular as regards management of  
3 shared stocks.

4  
5 Furthermore, under article 63 of the Convention, States are invited to cooperate  
6 either directly or through appropriate sub-regional or regional organizations “where  
7 the same stock or stocks of associated species occur within the exclusive economic  
8 zones of two or more coastal States” (para. 1). Similarly, where “the same stock or  
9 stocks of associated species occur both within the exclusive economic zone and in  
10 an area beyond and adjacent to the zone” (para. 2).

11  
12 Article 63 of the Convention calls on the coastal States involved in the management  
13 of shared stocks to seek “to agree upon the measures necessary to coordinate and  
14 ensure the conservation and development of such stocks” but nothing else is  
15 indicated, for instance, as regards the definition of a shared stock or the objectives of  
16 the management or allocation of catches between the States involved, on which the  
17 States do need to agree with a view to the sustainable management of those  
18 resources.

19  
20 Although article 63, paragraph 1, and case law<sup>2</sup> call on States to agree in good faith  
21 upon the conservation and management measures to be taken to ensure the  
22 sustainability of shared stocks, there is no obligation on those States to reach  
23 agreement. If there is no agreement, each coastal State will simply manage the  
24 shared stock when it crosses the waters under its national jurisdiction. The result is a  
25 poorly managed stock and an unequal allocation of the profits arising from its  
26 exploitation if one coastal State takes strict conservation measures so as to increase  
27 the maximum long-term yield by substantially reducing its short-term catches, while  
28 the other States concerned heavily exploit the stock in order to achieve a quick  
29 short-term gain.

30  
31 Many coastal States that share the same stocks sign fisheries agreements without  
32 any prior consultation on conservation or sustainable management measures for  
33 those resources.

34  
35 In addition, the legal status of pelagic fish stocks that are not managed by a regional  
36 fisheries management organization should also be addressed and solutions found.

37  
38 The Tribunal could, within the framework of its opinion, provide clarification on the  
39 rights and obligations of the coastal State in terms of sustainable management of  
40 shared stocks or stocks of common interest. Those rights and obligations need to be  
41 clarified by international law.

42  
43 Mr President, distinguished Members of the Tribunal, those are the arguments of the  
44 Sub-Regional Fisheries Commission.

45  

---

<sup>2</sup> See *North Sea Continental Shelf*, I.C.J. Reports 1969,1 p. 47; *Fisheries Jurisdiction*, I.C.J. Reports 1974, p. 3, p. 32.

1 I trust that these statements, the content of our oral statement and the previous  
2 written statements, will help to clarify the legal issues upon which your informed  
3 opinions are requested.

4  
5 As was stated earlier by the Chairman-in-Office of the Conference of Ministers of the  
6 Sub-Regional Fisheries Commission, the SRFC looks forward to any clarification that  
7 the Tribunal may provide of the key provisions of the Convention and other  
8 international legal instruments with regard to the rights and obligations of the flag  
9 State in cases of IUU fishing in the EEZ of the flag State or in a third-party State or in  
10 the high seas, as well as clarification of the rights and obligations of the coastal State  
11 with a view to the sustainable management of shared stocks and stocks of common  
12 interest.

13  
14 A clear interpretation and correct implementation of the provisions of the Convention,  
15 and of the rights and obligations of the flag State, the port State and the coastal  
16 State in cases of IUU fishing, are in the interests of all the States parties to the  
17 United Nations Convention on the Law of the Sea.

18  
19 Mr President, distinguished Members of the Tribunal, that brings our statement to a  
20 close. Thank you for your kind attention.

21  
22 **THE PRESIDENT** (*Interpretation from French*): Thank you very much, Ms Bèye  
23 Traoré.

24  
25 That brings us to the end of today's sitting. The Tribunal will sit again tomorrow  
26 morning at 10 a.m., when it will hear the representatives of Argentina, Australia,  
27 Germany, Chile and Spain, who will present their oral statements.

28  
29 (*The sitting was closed at 5.55 p.m.*)