INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2014

Public sitting

held on Friday, 5 September 2014, at 10 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

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

(Request for Advisory Opinion submitted to the Tribunal)

Verbatim Record

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
		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

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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
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Australia

Mr William McFadyen Campbell QC, General Counsel (International Law), Office of International Law, Attorney-Generals' Department
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Ms Amanda Annamalay, Second Secretary, Embassy of Australia, Berlin, Federal Republic of Germany

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Mr Eduardo Schott S., Consul-General of Chile, Hamburg, Federal Republic of Germany
Ms Katherine Bernal S., Lawyer, Sub-Secretariat for Fisheries

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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
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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

THE PRESIDENT: Good morning. We will hear today the last two oral statements in Case No. 21 concerning the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission.

The Caribbean Regional Fisheries Mechanism will first take the floor and will be followed by the International Union for the Conservation of Nature.

I now invite Mr Bekker to present the statement of the Caribbean Regional Fisheries Mechanism. Mr Bekker, you have the floor.

MR BEKKER: Mr President, honourable Members of the Tribunal, it is a very great honour to appear before this Tribunal and to do so on behalf of the Caribbean Regional Fisheries Mechanism, or CRFM, in this Case No. 21. The CRFM is pleased to note that, through Judges Lucky and Nelson, the Tribunal includes two Members from the Caribbean region.

This oral presentation supplements our written statement dated 27 November 2013, which focused on the substance of the request for advisory opinion submitted by the Sub-Regional Fisheries Commission. Today, I shall address key issues of jurisdiction and admissibility with which the Tribunal is confronted for the first time in this case concerning illegal, unreported and unregulated (IUU) fishing before making a few brief remarks on the substance of the questions posed by the SRFC. My goal is to be as responsive as possible to the various statements submitted in this case and to be of assistance to the Tribunal in its task of answering the questions posed by the SRFC. Any references are to be found in the transcript of my statement.

Mr President, Members of the Tribunal, this is a landmark case, if only because of the fact that this is the first time in its history that the full Tribunal has been requested to render an advisory opinion, and that this proceeding involves no fewer than 30 participants having submitted a total of 36 written statements.

While those facts may be of academic or historical interest, the request of the SRFC raises issues that are anything but academic. The questions posed by the SRFC confront this Tribunal with certain law of the sea issues that are of vital interest to the peoples of the region represented by the requesting body, and indeed to the international community at large. The International Union for Conservation of Nature and Natural Resources (IUCN) has helpfully reminded us that it has been estimated that as much as one third of the total global marine fish catch is taken illegally,[1] which is a staggering figure.

The Global Oceans Action Summit for Food Security and Blue Growth, which took place in The Hague in April of this year, described IUU fishing as "[o]ne of the greatest challenges of our time in terms [of] contributing significantly to the depletion of fish stocks

[1] See written statement of the IUCN, para. 31 (citing D.J. Agnew, J. Pearce, G. Pramod, T. Peatman, R. Watson, J.R. Beddington and T.J. Pitcher, "Estimating the Worldwide Extent of Illegal Fishing" (2009) 4(2) *PLos One*, available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004570>).

worldwide in a major barrier towards achieving sustainability of fish stocks and jeopardizing efforts to return over-exploited or collapsed stocks to good health".[2]

Indeed, IUU fishing is a multi-billion dollar enterprise inflicting great economic and environmental harm on States that are victims, especially developing countries with limited capacity for monitoring, control and enforcement of their fisheries laws. It is because of the magnitude of the problem underlying the request of the SRFC and its commitment to the rule of law that the Caribbean Regional Fisheries Mechanism, an intergovernmental body for regional fisheries cooperation comprising 17 developing countries and small island developing States, was pleased to accept the Tribunal's invitation to participate in this proceeding, including by submitting a comprehensive written statement supporting the Tribunal's jurisdiction and the substance of the request of the SRFC.

Mr President, at the outset, it must be stressed that the Tribunal is not called upon in this proceeding to answer the question whether a general advisory jurisdiction has been conferred on the Tribunal or whether it enjoys an inherent advisory jurisdiction. The Tribunal will not have to pronounce on such issues generally. The only question before this Tribunal in this case is whether it has the jurisdiction to issue the advisory opinion requested by the SRFC. Among the 30 participants having submitted written statements in this case, nine have remained silent on this question.

At least a dozen participants support the Tribunal's jurisdiction in this case either enthusiastically or while urging the Tribunal to adopt a more or less cautious or conservative approach. The CRFM has full confidence that the Tribunal will apply the requisite caution in performing its judicial function in this case and it invites other participants to approach this issue with the same level of confidence.

The Caribbean Regional Fisheries Mechanism notes with regret that some eight participants, all of them States, have appeared solely to oppose the Tribunal's exercise of advisory jurisdiction in this important case. They represent a clear minority.

The CRFM respectfully submits that there are at least two flaws associated with the argumentation employed by those participants having taken the position that the Tribunal is without jurisdiction in this case. First, they fail to acknowledge that it is for the Tribunal alone to decide the question of its jurisdiction based on the *Kompetenz-Kompetenz* principle recognized in article 288, paragraph 4, of the United Nations Convention on the Law of the Sea, or UNCLOS. The President of this Tribunal referred to "the well-established 'principle of the *compétence de la compétence*'" in his most recent statement to the United Nations General Assembly.[3] Remarkably, only New Zealand, the requesting body and the CRFM have referred to this principle in their written statements.[4] The Caribbean Regional Fisheries Mechanism has full

[2] *Global Oceans Action Summit for Food Security and Blue Growth*, April 22-25, 2014, The Hague, The Netherlands, Chair's Summary, p. 33, available at <www.globaloceansactionsummit.com>, accessed 22 August 2014.

[3] Statement by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea, on Agenda item 75(a) "Oceans and the Law of the Sea," at the Plenary of the Sixty-eighth Session of the United Nations General Assembly, 9 December 2013, para. 5.

[4] See written statement of New Zealand, para. 7; written statement of the Sub-Regional Fisheries Commission, p. 12; written statement of the Caribbean Regional Fisheries Mechanism, para. 47.

confidence in the Tribunal's application of this fundamental principle associated with the judicial function in the present case.

Second, those participants opposing the Tribunal's advisory jurisdiction, either for the purpose of this case or in general, also fail to make reference to the rule of *effet utile* in their written statements. In fact, the CRFM is the only participant having referred to this fundamental principle of international law. As the International Court of Justice has stated: "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify [an interpretation of a text] contrary to [its] letter and spirit."[5]

In this case, two treaty texts are of relevance for purposes of the rule of *effet utile*, and both must be interpreted to ensure the effectiveness of their terms. First, article 21 of the Tribunal's Statute, included in Annex VI of the UNCLOS, states, in the relevant part: "The jurisdiction of the Tribunal comprises … all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

The second provision of interest to the rule of effectiveness is article 33, entitled "Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion," which is included in the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC, or MCA Convention. That Convention is the "other agreement" meant in article 21 of the Tribunal's Statute, and it is the "international agreement related to the purposes of the Convention" to which article 138 of the Rules of the Tribunal refers.

Article 33 of the MCA Convention, to which the request of the SRFC makes reference, provides: "The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion."

Both article 33 of the MCA Convention and article 21 of the Tribunal's Statute refer to "matters". As the record shows, the present matter does not involve an underlying dispute and the issue of State consent simply does not arise in this advisory proceeding.

In sum, any conclusion that the combination of article 33 of the MCA Convention, article 21 of the Tribunal's Statute, and article 138 of the Rules of the Tribunal does not support the Tribunal's advisory jurisdiction over the matter submitted by the SRFC would contravene the rule of *effet utile*.

Mr President, Members of the Tribunal, there is no reference in any of the written statements submitted by those participating States opposing the Tribunal's jurisdiction to those States having raised any objection to the adoption of rule 138 by the Tribunal prior to this proceeding. We are confronted with 17 years of silence since the adoption of the Rules by the Tribunal on 28 October 1997.

[5] *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229.

The opposing States can point to no formal source of international law, as meant by article 38 of the ICJ Statute, providing that the full Tribunal has no advisory jurisdiction, that this jurisdiction is exclusively held by the Seabed Disputes Chamber, that the Tribunal can only consider questions that arise within the scope of the activities of the body requesting an advisory opinion, or that bodies submitting requests for advisory opinion can only pose questions that may be directly derived from the international agreement forming the basis for the request to the Tribunal.

Some opposing States have confused the role of the requesting body or organization under the UN Charter and ICJ Statute with that of the requesting body under rule 138 of this Tribunal. As Judge Jesus, speaking in his capacity as ITLOS President, has helpfully explained, "such body is only the conveyor of the request" and "[i]ts legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature and any other structure or institutional considerations."[6]

Mr President, if the drafters of the UNCLOS, including its Annex VI, had intended to limit the Tribunal's jurisdiction under article 21 of its Statute to contentious jurisdiction, they would have used the words "confers contentious jurisdiction on the Tribunal" as opposed to "confers jurisdiction on the Tribunal," the words employed by article 21.

According to China, "[i]t is necessary for the Tribunal to satisfactorily explain the basis and rationale for claiming advisory competence for its full bench."[7]

It is recalled that consecutive Presidents of this Tribunal have confirmed and explained the full Tribunal's special advisory jurisdiction through a series of official statements[8] and that the Tribunal's website and the Tribunal's own booklet *A Guide to Proceedings before the Tribunal* unequivocally confirm this jurisdiction. The CRFM cannot imagine that those statements would not be given effect in the present case. You cannot advertize a product or service and then tell an interested customer that you are unable to sell it to him.

Just as the advisory competence of the Permanent Court of International Justice, to quote China again, "was an innovation in international judicial practice at the time",[9] so is the competence conferred on the Tribunal by article 21 of its Statute, the exact language of which is not found in the constituent instrument of any other court or tribunal, "a significant innovation in the international judicial system, as Judge Wolfrum, speaking in his capacity as ITLOS President, has repeatedly put it.[10] Judge

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[6] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 10.

[7] Written statement of China, para. 5.

[8] See written statement of the Caribbean Regional Fisheries Mechanism, n. 51 and accompanying text.

[9] Written statement of China, para. 9.

[10] Statement by Judge Rüdiger Wolfrum, President of the ITLOS, before the 55th Plenary Meeting of the UNGA (A/60/PV.55), Agenda item 75, "Oceans and the Law of the Sea," 28 Nov. 2005, para. 15. The exact same words were employed by Judge Wolfrum, speaking in his capacity as ITLOS President, as part of his statement delivered at the Asia-Pacific Ambassador's Luncheon held at the Intercontinental Hotel in Berlin on 17 January 2008, at p. 18, and as part of his statement to the

Jesus, himself speaking in his capacity as ITLOS President, has explained that the full Tribunal's "[j]urisdiction to entertain requests for advisory opinions [is] based on a procedure which has no parallel in previous adjudication practice …"[11] and "represents a 'procedural novelty'."[12]

The members of the international community owe a debt of gratitude to the various Presidents of this Tribunal for taking pains to publicly explain the uniqueness and jurisdictional peculiarities of this judicial institution.

Mr President, Members of the Tribunal, with regard to the issue of admissibility, just as it is for the Tribunal to decide the question of its jurisdiction, it is for the requesting body alone to decide whether the Tribunal's answers to the questions posed by that body can or will assist it and its member States. Whatever flaws can be identified in the questions as formulated by the SRFC, such flaws do not justify the Tribunal's refusal to exercise its jurisdiction altogether. While general, broadly worded questions may pose a challenge to an international court or tribunal exercising advisory jurisdiction and might be more difficult to answer than specific questions, the SRFC's questions are not impossible to answer, as is demonstrated by the answers suggested in the various written statements submitted in this case.

Advisory proceedings often involve less specific questions, as is shown by Case No. 17 and the case law of other international courts and tribunals. As Case No. 17, also an advisory proceeding, makes clear, an assessment of issues of liability is not necessarily closely connected with factual situations, and so the CRFM respectfully disagrees with the European Union that this might form an impediment to rendering an opinion in this case.[13] The Request of the SRFC squarely involves specific legal obligations, particularly under the MCA Convention and the UNCLOS, being two treaty instruments binding on all SRFC Member States.

Mr President, the Caribbean Regional Fisheries Mechanism agrees with Judge Jesus, speaking in his capacity as ITLOS President, that "interpretation of certain provisions of the Convention [on the Law of the Sea] by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention."[14] The SRFC's request relating to IUU fishing clearly concerns such a matter.

The Tribunal itself stated in its Judgment in the *"Volga"* Case more than a decade ago that it "understands the international concerns about illegal, unregulated and

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Informal Meeting of Legal Advisers of Ministries of Foreign Affairs held in New York on 23 October 2006, at p. 7.

[11] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 4.

[12] Id., p. 6.

[13] Cf. written statement of the European Union, para. 15.

[14] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 9.

unreported fishing and appreciates the objectives behind the measures taken by States … to deal with the problem."[15]

The Request of the SRFC offers this Tribunal an important and timely opportunity to clarify core law of the sea questions arising in the context of IUU fishing and the management of fish stocks. The Caribbean Regional Fisheries Mechanism, which itself is actively engaged in the fight against IUU fishing in the Caribbean region in the western hemisphere, hopes, therefore, that the Tribunal will pronounce itself on those questions and will do so in a way that is helpful to all subjects of international law that are confronted with the legal questions raised by the request of the SRFC.

While it is beyond controversy that a number of rules and instruments addressing IUU fishing exist today, the exact meaning of the international law rights and obligations of flag States and coastal States with regard to IUU fishing is not clear, as the written statements submitted in this case underscore.

Mr President, Members of the Tribunal, I shall devote the remainder of my presentation to substantive issues. The world fisheries community owes a profound debt of gratitude to those participating States and international organizations that have contributed substantive statements regarding the four questions posed by the SRFC in the course of these proceedings. The Request of the SRFC and the statements that it has attracted before this Tribunal already have put a most welcome spotlight on the global problem of IUU fishing and will serve to advance our understanding of the legal issues arising in this context. However, those statements lack the authority that would be associated with this Tribunal's pronouncements on these issues.

As the written statements submitted in this case highlight, there are a number of legal questions arising from the SRFC's four questions relating to IUU fishing that would profit from the Tribunal's clarification by means of authoritative statements set forth in an advisory opinion. Legal questions that have emerged from among the 36 written statements submitted to the Tribunal include the following:

Exactly what activities are covered by the concept of IUU fishing in the areas covered by the Request of the SRFC?

What is the law applicable to IUU fishing activities by a vessel flagged in one State within a coastal State's areas of territorial sovereignty or sovereign rights and on the high seas?

Which of the relevant rules and instruments concerning IUU fishing reflect a codification of existing international law, or *lex lata*, rather than being more in the nature of a progressive development?

What is the meaning of the concept of "sustainable management" as mentioned in the relevant provisions of the UNCLOS within the context of IUU fishing as meant by the Request of the SRFC? To what extent does it encompass ecosystem

[15] *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002*, p. 10, para. 68.

management, requiring consideration of the whole system rather than individual components, in that context, and what are a State's duties associated with the ecosystem approach in the area of IUU fishing?

How does the principle of sustainable development affect the rights and duties of flag States and coastal States in the context of the legal regime governing IUU fishing activities in the areas covered by the request of the SRFC, and how are the rights and obligations of flag States and coastal States to be balanced in that context?

What does the duty of States to ensure effective jurisdiction and control of vessels flying their flag mean in practice?

Which concrete measures are to be taken by States in order to comply with their duty to apply the precautionary approach and to ensure sustainable management of marine living resources in the context raised by the Request of the SRFC? Is the precautionary approach implicit in Part V of the UNCLOS?

What is the meaning of the duty to cooperate under Part V of the UNCLOS in relation to IUU fishing as meant by the Request of the SRFC? What general and specific duties to cooperate exist in this context, and what does it mean, within the context of the Request of the SRFC, for States to have "due regard" to the rights and duties of other States under the relevant instruments? It is recalled that the ICJ referred in its 1974 judgment in the *Fisheries Jurisdiction* case to "a duty to have due regard to … the needs of conservation for the benefit of all."[16]

Does the flag State's responsibility to ensure that any laws and regulations enacted by a coastal State in relation to fishing in its exclusive economic zone be complied with extend to its vessels as well as its nationals owning or operating vessels, and how is the term "nationals" in article 62, paragraph 4, of the UNCLOS to be defined?

To what extent do the applicable conventional rules pertaining to IUU fishing activities taking place in areas under national jurisdiction or control of a coastal State or on the high seas reflect customary international law that is not incompatible with the UNCLOS? Concretely, does the practice of listing individual vessels engaged in IUU fishing and of identification or listing of non-cooperating States form part of contemporary international law?

What criteria are to be applied in determining whether a State has met its due diligence obligations in the context of IUU fishing as meant by the request of the SRFC? Does international law expect an increased level of due diligence from flag States whose vessels conduct fishing activities in areas where the coastal States exercise only limited control over their natural resources?

What is the meaning of general principles of international law, including the principle of good neighbourliness, in the context of the Request of the SRFC?

[16] *Fisheries Jurisdiction Case (UK v. Iceland), Judgment, I.C.J. Reports 1974*, p. 3, 32.

What are the implications on the coastal State's rights and obligations of States having declared 200-nautical-mile exclusive fisheries zones rather than exclusive economic zones in this context?

What is the meaning of what the Request describes as "shared stocks" and "stocks of common interest" under the applicable law, and what does that law stipulate with regard to a coastal State's rights and obligations in relation to such fish stocks?

Can isolated occurrences of IUU fishing trigger the international responsibility of a State, or must there be proof of "a general and systemic failure to fulfil the obligations as flag, coastal, port or market State", as the European Union has suggested?[17]

What circumstances will exonerate from international responsibility a State that fails to comply with its direct or due diligence obligations in relation to IUU fishing as meant by the Request of the SRFC?

In what circumstances is there room for joint responsibility of States and/or international organizations in the case of the violation of a licence issued within the framework of an access agreement to which they are parties?

What remedies are appropriate under international law for IUU fishing as meant by the Request of the SRFC? What options are available for restitution? When is compensation the appropriate remedy in a case of IUU fishing?

Finally, what subjects are entitled to claim damages for IUU fishing in the different maritime zones covered by the request for an advisory opinion? Does the "*erga omnes* character of the obligations relating to preservation of the environment of the high seas" to which the Seabed Disputes Chamber referred in Case No. 17 extend to IUU fishing as meant by the Request of the SRFC?[18] It is recalled that this Tribunal observed in the *Southern Bluefin Tuna* cases that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[19]

The Caribbean Regional Fisheries Mechanism and its 17 Member States would welcome the Tribunal's clarifying answers to these and other questions arising within the context of the Request submitted by the SRFC.

Mr President, honourable Members of the Tribunal, I have come to the end of my presentation. I thank you very much for your attention – or, as they say in my native language and that of Hugo Grotius, "dank u wel".

That concludes the presentation of the Caribbean Regional Fisheries Mechanism this morning.

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[17] Written statement of the European Union, para. 80.

[18] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 180.

[19] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70.

THE PRESIDENT: Thank you, Mr Bekker, for your statement. I now give the floor to the delegation of the International Union for the Conservation of Nature, which has requested to speak for 45 minutes. Ms Oral, you have the floor.

MS ORAL: Mr President, distinguished Members of the Tribunal, we have the great honour to appear before this Tribunal on behalf of the International Union for Conservation of Nature, which we will refer to as the IUCN, the oldest and largest global conservation organization, and we thank the Tribunal for affording us this opportunity to contribute to these proceedings, which my colleague has referred to as a landmark case on important questions of international law and conservation.

I would like to introduce Professor Cymie Payne who will address the basis for the Tribunal's advisory jurisdiction through the Convention, Statute and Tribunal Rules and the structure of the regime of the law of the sea.

I will address substantive questions 1 and 2 of the Request for an advisory opinion submitted by the SRFC, where I will identify key flag State obligations related to IUU fishing in the EEZ and high seas and questions of liability within the context laid by the distinguished counsel for the SRFC on Tuesday.

Finally, Professor Telesetsky, in question 3, will address when an international organization may be held responsible for IUU fishing conducted by a member State and, in question 4, highlight five key obligations of the coastal State in relation to shared, straddling or highly migratory stocks, and finally conclude our comments.

Mr President, I would respectfully request that you call upon my colleague Professor Payne.

THE PRESIDENT: Thank you, Professor Oral, for your statement. I now invite Professor Payne to take the floor.

MS PAYNE: Mr President, distinguished Members of the Tribunal, it is an honour for me to appear before you today on behalf of the International Union for Conservation of Nature.

We appreciate that much has been said about advisory jurisdiction, as counsel for CRFM reminds us, largely in support of the Tribunal's competence, and we do not intend to belabour points that have been made many times. However, in our view there has not been sufficient attention to the role of the Tribunal's advisory jurisdiction in the law of the sea regime and the role that jurisdiction-conferring agreements like the MCA Convention perform to define and constrain jurisdiction.

The Law of the Sea Convention sets out jurisdiction in Part XV and in Annex VI, which provides this Tribunal's Statute. Annex VI does more than simply amplify Part XV; like most of the annexes, it contains independent substantive provisions. The relevant portion of Annex VI is the second part of article 21, which states that the jurisdiction of the Tribunal includes "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." For convenience, I will refer to this "other agreement" as the "additional agreement".

Thus advisory jurisdiction of the full Tribunal rests on article 21 of the Statute plus an additional agreement. This additional agreement expressly states the Tribunal's jurisdiction to give an advisory opinion and establishes the scope of the Tribunal's competence.

Article 21 of Annex VI to the Convention is sufficient to establish the Tribunal's advisory jurisdiction when it is properly requested in accordance with such additional agreements. Without the second part of article 21, the Tribunal's competence would be circumscribed in a way that would undermine its role within the regime of the law of the sea.

To appreciate this interpretation of the text, we invite you to consider what kind of international agreement the Convention was designed to be. The Convention provides not just substantive rules but also a framework for the further development and integration of the law of the sea.

This is very different from the role of the International Court of Justice, which has been referred to so often in these proceedings. The Court and the Tribunal are different courts with different histories and different structures. Therefore we should be cautious in drawing parallels. The Tribunal has its own history, structure and objectives.

The principles that the Convention articulates are often intended to be implemented by other agreements, particularly in the area of fisheries management. Some of those are global and others are regional in scope.

Many articles of the Convention direct States to cooperate to achieve its objectives. Several call on States to cooperate through competent international organizations and to form "agreements or other arrangements." These agreements, arrangements and international organizations include 17 regional fisheries management organizations and the global Fish Stocks Agreement. The MCA Convention is an example of an international agreement, amended in 2011 to better advance the Law of the Sea Convention's objectives and to provide authority and a procedure for submitting a request for an advisory opinion to the Tribunal.

The MCA Convention itself establishes a system of cooperative fisheries management, implementing articles 61, 62, 63, and 64 of the Convention. This is an evolving area of international law, where legal questions will inevitably arise. As with other international legal arrangements, an authoritative judicial body is needed to resolve disputes and, should the States Parties so desire, provide legal advice to guide their implementation. It has been said that advisory opinions are used "for the better assurance of the legality of proposed administrative or legislative measures." It is for the parties to these agreements to decide whether to accept the Tribunal's advisory jurisdiction by adopting a provision conferring that jurisdiction and to provide the terms on which a request for an advisory opinion may be submitted to the Tribunal. We respectfully submit that it is not for third party States to limit the rights of these States by challenging the Tribunal's competence.

It is consistent with the text, object and purpose of the Convention for the Tribunal to act as an arbiter in case of disputes and as a source of legal advice for the parties to

these agreements. In fact, it would be more surprising if the Tribunal's jurisdiction were so narrow that it excluded these agreements.

The Tribunal itself understood the importance of its advisory role and provided clarification of this component of its jurisdiction when it adopted rule 138 in 1997, pursuant to its Statute. (It is worth noting that the Tribunal did not alter rule 138 when it amended its Rules in 2001 and 2009). The terms of the jurisdiction-conferring provision in any agreement that authorizes the Tribunal to exercise jurisdiction under UNCLOS Annex VI, article 21, must comply with the Tribunal's Rules, the relevant parts of the Law of the Sea Convention and other relevant rules of international law. The Tribunal's decision whether to accept an advisory request will include this analysis of the agreement, providing the guarantees sought by some of those who object to jurisdiction.

Does this Request by the Sub-Regional Fisheries Commission under article 33 of the MCA Convention satisfy the requirements of rule 138? We submit that it does. They are: that an additional international agreement related to the purposes of UNCLOS confer jurisdiction; that the request address a legal question; and that it be transmitted in accordance with the procedures specified by the additional agreement.

Rule 138 states that the agreement conferring advisory jurisdiction must be "related to the purposes of" the Convention. The purposes of UNCLOS, stated in its preamble, include establishing

> a legal order for the seas and oceans which will ... promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

In particular, UNCLOS gives a coastal State sovereign rights over the living resources of its EEZ and spells out how those rights are to be exercised.

The MCA Convention is related to those purposes because it establishes legally appropriate conditions for access to the EEZs of its Member States. It does this by requiring that Member States adopt consistent practices for access to surplus fishery resources, licensing, equipment standards, vessel regulation, artisanal fishery regulation, port State measures and enforcement. In this way it reflects a regionally specific effort to integrate the substantive obligations of the Law of the Sea Convention into Central East African law and practice. The 2011 revisions of the MCA Agreement further clarify that the agreement is intended by its members to assist States in meeting their basic Law of the Sea Convention obligations for fisheries conservation and management.

Article 33 of the MCA Convention provides the basis for the Tribunal's advisory jurisdiction, the scope of the advice that may be sought, and the procedures to make the request by stating that "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion."

It is uncontroversial that this is a valid request: the SRFC Technical Note provides the details to verify that the Council of Ministers did authorize the Permanent Secretary of the SRFC to submit the questions according to the specified procedures, and he did so.

The scope of jurisdiction established by the Tribunal's rule 138 and article 33 of the MCA Convention is for "a given legal matter," the natural reading of which is "a given legal matter relating to the activities of the SRFC and the provisions of the MCA Convention." The four questions submitted by the SRFC raise questions that concern fisheries in the region managed by the SRFC. They ask the Tribunal to address legal rights, obligations, and consequences of breach. They do not ask the Tribunal to decide matters of fact. Therefore, the four issues submitted for the Tribunal's advisory opinion should be considered legal matters.

To conclude, while it may not invent competence where none is authorized, the Tribunal is the judge of its own competence. Article 21 of the Statute is reasonably read to include advisory jurisdiction over matters that are specifically provided for in other agreements. When they voted to adopt rule 138, the Judges of the Tribunal, many of whom contributed to the drafting of the Convention on the Law of the Sea, determined that the Tribunal did have advisory jurisdiction for the limited situation when an international agreement related to the purpose of the Convention conferred it. As we have demonstrated, the Tribunal's legal advice will contribute immeasurably to the development of the law of the sea, a role necessitated by the unique structure of the Law of the Sea Convention and its implementing global and regional agreements.

We submit, therefore, that article 21 of Annex VI of the Law of the Sea Convention, read with article 33 of the MCA Convention, confers on this Tribunal jurisdiction to give an advisory opinion on any legal matter related to the activities of the SRFC under the MCA Convention, referring as relevant to the Law of the Sea Convention and other sources of international law.

Thank you, Mr President and Members of the Tribunal for your attention. I would ask you, Mr President, to give the floor to Professor Oral.

THE PRESIDENT: Thank you, Professor Payne. I will call Professor Oral to take the floor again.

MS ORAL: Thank you. Mr President and Members of the Tribunal, it is now my privilege to make a few points regarding the substantive questions referred to the Tribunal by the SRFC. We read these questions within the context of the Minimal Conditions for Access (MCA) Convention provisions, such as article 25, which requires Member States to take all the necessary measures to prevent, deter, and eliminate IUU fishing, which would include taking actions against flag States.

I will not summarize all the arguments made in our written submission but only highlight those points we regard as having particular significance for the conservation of the environment and natural resources, the mandate of IUCN.

In question 1, SRFC seeks clarification of flag State obligations and liability in cases where IUU fishing has been conducted in the EEZ of another State. This is a vitally important issue for effective implementation of conservation measures, which is why we regard this case as so important.

The two principal flag State obligations related to fishing activities can be found in the 1982 Law of the Sea Convention. The first is the flag State duty to ensure compliance by its vessels with conservation measures, laws and regulations of the coastal State. The second obligation is the duty to exercise effective jurisdiction and control over ships flying its flag.

I will focus principally on the first obligation.

Article 62, paragraph 4, of the Law of the Sea Convention expressly requires that foreign nationals comply with the conservation measures and other conditions and terms established under its laws and regulations when fishing in the EEZ of a coastal State.

While no express reference has been made to the flag State in this provision, we submit that a requirement can be read into the Convention that a flag State is under an obligation to ensure that vessels having its nationality comply with the coastal State's fisheries laws and regulations when fishing in a foreign EEZ.

This reading flows from the Convention itself. I refer to article 91, which expressly states that the flag State fixes the conditions of granting nationality of ships, including registration and the right to fly its flag. A ship is thus a "national" of the flag State. The drafting history of articles 116-118 of the Convention further supports this interpretation. We would also draw attention to the fact that private individuals cannot be the subject of the Law of the Sea Convention. Consequently, an interpretation of article 62, paragraph 4, that excluded fishing vessels would undermine its purpose and object, which is to garner compliance with coastal State laws.

Therefore, while the coastal State has sovereignty rights and the competence to regulate fishing activities in its EEZ, parallel to this is the flag State obligation to take the necessary measures to ensure that fishing vessels flying its flag, in other words, its nationals, comply with the conservation measures as provided under article 62, paragraph 4. This obligation to ensure compliance with the coastal State laws is, we argue, an obligation of conduct and due diligence. Drawing on the jurisprudence of the International Court of Justice in the *Pulp Mills* case and this Tribunal's Seabed Dispute Chamber Advisory Opinion it can be concluded that a State's obligation "to ensure" is an obligation of conduct, that is, "to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result." The State is not required to achieve the specific result.

In the context of the present matter, this means that the flag State is not obliged to guarantee full compliance by each of its vessels with the foreign coastal State laws but rather must adopt those measures that demonstrate "best possible efforts" to achieve compliance.

Further, as underlined by the International Court of Justice in the *Pulp Mills* case,

"a certain level of vigilance in their enforcement and the exercise of administrative control …." is required. In other words, *pro forma* adoption of rules and measures alone would not suffice to meet "due diligence" obligations.

In summary, the obligation to ensure compliance requires both a legislative component and a robust administrative and enforcement component. Words alone will not suffice; action is also required.

In our written submission, paragraphs 27-30, we have sought to demonstrate that the flag State's obligation to ensure compliance with coastal State fisheries laws and regulations has become customary international law through widespread State practice, embodied in various soft law instruments and compliance clauses in numerous sub-regional fisheries treaties, access agreements, and coastal States' domestic legislation, which we have listed in the annex to our written submission.

We submit further that, drawing on this range of instruments, the actual content of these flag State obligations at minimum can be distilled to the following six obligations: to prohibit unauthorized fishing; not to authorize fishing in the EEZ of another State unless it can exercise effective jurisdiction and control over its vessels; to adopt legislation requiring that its fishing vessels comply with the coastal State conservation laws in its EEZ; to implement effective mechanisms to detect possible breaches of the coastal State's fisheries laws and regulations; to take administrative and/or criminal proceedings against vessels that are reasonably suspected of having violated the laws and regulations of the coastal State when fishing in the EEZ; and finally, to impose sanctions with adequate deterrence against future violations of the coastal State laws.

We submit that these six measures, while not derived from binding instruments, have developed normative force and provide the substance of what measures need to be taken by the flag State to meet its due diligence obligations as outlined by the Seabed Disputes Chamber and the International Court of Justice for the fulfilment of the flag State obligation, which in the present case is to ensure compliance with the coastal State's laws and regulations.

As to the second obligation of the flag State to exercise effective control and jurisdiction over its vessels, which has been addressed in detail in several submissions, we submit that it is an obligation that follows the flag regardless of jurisdiction. This Tribunal recently stated in the *M/V "Virginia G"* case that

> once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operated in accordance with generally accepted international regulation, procedures and practices.

The duty begins from the moment of registration and for purposes of this advisory opinion, we believe that such duty would apply to fishing vessels.

I will now examine the application of flag State liability within the context of the present question taking into account specific cases provided by the SRFC.

For example, if the flag State fails to take action following notification by the coastal State of IUU fishing activities in its EEZ, we are of the view that the flag State would be in violation of an international obligation as stated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

We are also of the view that a single incident could entail State liability. A single incident of IUU fishing can result in significant economic harm through revenue loss to the coastal State as well as damage to the ecosystem itself. For example, a single serious incident of IUU fishing of an over-exploited stock could cause significant, if not irreparable, damage to the integrity of the ecosystem.

An example of valuation can be found in the *"Hoshinmaru"* prompt release case, decided by this Tribunal, where Russia had valued from a single incident of IUU fishing, US$350,000- 400,000 (7,927,500 roubles) as damage to the marine environment.

To predicate liability only on systematic failures, as some have argued – that is, multiple incidents of IUU fishing – we submit, would have negative consequences for the efforts to promote sustainable fisheries and would undermine the purpose and objective of many treaties concluded in this vein.

I will leave the question of appropriate reparation by referring to our written submission and also to the statements made by our distinguished colleagues representing Micronesia and New Zealand.

In conclusion, the flag State is required to exercise effective control and jurisdiction over its vessels and to adopt the necessary measures to ensure compliance of its fishing vessels with the laws of the coastal State, which includes the six due diligence measures we have outlined.

I now turn to question 2. As indicated in our written statement, we interpreted question 2 to include IUU fishing in the high seas. The second written statement submitted by the SRFC confirmed this, and it is the high seas regime which is of particular interest in this context to the IUCN.

Having identified the flag State obligations applicable to fishing in the EEZ of another State in question 1, we would now go on to ascertain those obligations under international law specific to fishing vessels operating in the high seas.

First, while all States enjoy the freedom to fish on the high seas, as codified in article 87 of the Convention, this right is subject to a number of qualifications. Under article 192 all States are obligated to protect and preserve the marine environment, which includes the living resources of the high seas. Further, in addition to treaty-created obligations, exercise of the right to fish on the high seas, as stated in article 116, is subject to the rights, duties and interests of the coastal State as provided in the Convention as well as other instruments. States, under article 117, are also required individually or in cooperation with other States to adopt the necessary measures for their nationals – that is, fishing vessels – for conservation of

the living resources of the high seas. Article 118 also mandates cooperation in the management and conservation of living resources in the high seas.

We would also add that protection of the marine living resources of the high seas is recognized as an obligation *erga omnes* that concerns the interest of the international community, which would include the Member States of the SRFC. It is clear that the flag State has primary responsibility to fulfil these obligations. The next question is: through which measures?

In our written statement, we suggest key provisions of the 1995 United Nations Fish Stock Agreement, the Compliance Agreement and other FAO instruments, which have been adopted by various RFMOs and endorsed frequently by the United Nations General Assembly and the FAO, provide for six main flag State obligations for fishing in the high seas. However, in the interest of time I will refer the Tribunal to paragraph 47 of our written statement where we outline the six obligations.

The matter is important for RFMOs dealing with IUU fishing by flag States in high seas adjacent to their EEZ. We would further conclude that infringement of these obligations by flag States could entail liability, as we have detailed in our written statement in paragraphs 59-62.

Mr President, distinguished Members of this Tribunal, I thank you again for your attention and for this privilege. I now ask you to give the floor to Professor Telesetsky.

THE PRESIDENT: Thank you, Professor Oral. I give the floor to Professor Telesetsky.

MS TELESETSKY: Mr President, distinguished Members of the Tribunal, thank you for this opportunity to address you today on the IUCN responses to questions 3 and 4.

In question 3 the SRFC asks the Tribunal this week for advice on whether an international organization that has concluded a fishing access agreement with a non-member coastal State can be held responsible when a member State fishing vessel violates the fishing laws of the non-member coastal State. If the international organization is not exclusively responsible, should the responsibility either be shared with the member State or instead assigned exclusively to the member State? We might ask this question in a more specific way.

Can an international organization, such as the European Union, that enters into fishing access agreements with SRFC countries such as Mauritania be held liable if a vessel flagged to a European Union Member violates the domestic fishing laws of Mauritania; or does the European Union jointly share international responsibility for the violation of Mauritanian law with its Member State; or is the Member State alone held responsible under the principles of flag State responsibility that we discussed in question 1?

This is an important question for the Tribunal to consider in its deliberations because many coastal States, including many of those who are Members of the Sub-Regional

Fisheries Commission, have limited resources to effectively prosecute IUU fishing vessels in their jurisdictional waters or on the high seas. It is important for these States to know which entities can be held responsible for violations of domestic coastal law.

The IUCN agrees with the EU that the short answer to question 3 is that international organizations can be held responsible for breaches of their obligations under an access agreement with a non-member coastal State as well as for breaches of any other relevant general obligations of international law. It is not uncommon for international organizations to detail in treaties specific obligations for their organizations. For example, in the Fisheries Partnership Agreement between the European Union and Mauritania, the European Union has agreed that:

> The Community undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Mauritania has jurisdiction, in accordance with the United Nations Convention on the Law of the Sea.

Here, the EU has committed itself to providing oversight to ensure that European Union vessels comply not only with various measures of the agreement but also with domestic Mauritanian fishing law.

Applying articles 3, 4, 6 and 31 of the International Law Commission's Draft Articles on the Responsibility of International Organizations to an International Fishing Access Agreement, it is clear that a breach of a legal obligation contained in a treaty with an international organization may give rise to the responsibility of the international organization.

Assuming, based on our analysis, that international organizations can breach an international agreement and be held responsible for a breach, for what kinds of acts and omissions might an international organization be held exclusively responsible? We return to the European Commission's language in a sample fisheries partnership agreement – in this case the Mauritanian agreement – to help provide answers. In this agreement, the Community has agreed to undertake "to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries" in the waters of a non-EU coastal State. Based on the choice of language in this treaty and the interpretation of the plain meaning of the term "undertake" by the International Court of Justice in its 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro***,** it appears that the EU in its treaties has agreed, as an international organization, to take affirmative steps to ensure compliance with both the fishing access agreement and Mauritanian domestic legislation.

The partnership agreement requires, for example, that all community vessels must be in possession of a fishing licence issued under the agreement. On the basis of this substantive requirement, the European Union may have either (1) an obligation of conduct to ascertain directly whether "its vessels" operating in the non-EU member State's coastal waters have legitimate fishing licences; or (2) an obligation of conduct to collect information from individual EU States regarding fishing licences that can be relayed to the non-EU coastal State. The EU must also be prepared to

share with a treaty party any information that it may have regarding vessels that do not have a fishing licence operating within the jurisdiction of a treaty partner. A failure by the European Union to have a policy and a practice to ensure that its vessels have licences or to ensure compliance with provisions under domestic fishing legislation may be considered a breach under an international fishing agreement and be subject to liability.

Regarding responsibility, if the international organization has clear competence over a subject in an international agreement with a third party coastal State, the international organization will be responsible. If a member State has clear competence over a given subject matter and there is a breach of international law, the member State will be held responsible. The more challenging question regarding responsibility is who should be held responsible in the case of a breach of domestic coastal law when the division of competence between an international organization and a member State is not clear to third parties. If the international organization and a member State fail to clearly define competences at the request of a State party under UNCLOS Annex IX, article 6, paragraph 2, then the Convention identifies responsibility for both the international organization and the member State and assigns joint and several liability.

On question 4 the SRFC asks the Tribunal today to provide guidance regarding the rights and obligations of a coastal State managing shared stocks and stocks of common interest.

The question posed makes clear that the Tribunal is being called upon to provide its expert advice on coastal States' rights and obligations, under several key provisions including but not limited to article 62, paragraph 5, article 63, paragraph 1, article 64, and article 192 of the Convention on the Law of the Sea. An evaluation of these laws and general principle of international environmental law suggest that States and in particular coastal States have at least one right and five duties associated with managing shared, straddling, and migratory stocks.

A number of law of the sea provisions, including articles 63, paragraph 1, and 64 of the Convention clarify that coastal States have a right to engage other States in creating cooperative conservation and management measures for shared stocks, straddling stocks, and migratory species either directly through bilateral negotiations or through a sub-regional organization such as the SRFC. In principle, this means that a coastal State which in good faith approaches another coastal State to negotiate conservation measures for a shared stock or a stock of common interest must be given a fair opportunity to express its interests and to negotiate for an agreement of mutual interest.

At least five duties accompany this right. First, there is a duty by coastal States which host shared stocks or stocks of common interest to seek to coordinate various national conservation and sustainable development measures with conservation and sustainable development measures from other States that have an interest in the resource. This obligation of coordination arises because of a duty to prevent harm to transboundary resources and is most likely to manifest where either only one party has promulgated measures for a shared resource or where the measures set by the two or more parties are radically divergent in terms of protection of the resource.

Second, States have a duty to negotiate in good faith. It is not enough to physically attend a negotiation with no intent or authority to coordinate measures that will ensure the conservation and sustainable development of shared stocks, straddling stocks, or migratory stocks. While we know that the obligation to negotiate in good faith underlies all international relations, the content of this duty remains undefined. From the perspective of the IUCN, we believe that part of good faith negotiation should be an obligation to protect the long-term sustainability of a marine natural resource.

Third, States have an obligation under existing international environmental law principles, as implemented under articles 5, 6, and 7 of the UN Fish Stocks Agreement, to take into consideration the precautionary principle, the ecosystem approach, and biodiversity protection when developing conservation and management measures related to shared stocks and stocks of common interest. The logic of restricting fishing and applying the precautionary principle to straddling and migratory species also applies to shared stocks that either regularly cross a border or that have separate life stages in two or more countries. What this means in practice is that States should not provide fishing licences for shared, straddling or highly migratory stocks to either their own national vessels or foreign vessels until there has been a good faith effort to create conservation and sustainable development measures for a particular stock that protect not just the stock itself but also the ecosystem as a whole. It is also our position that long-term viability for any marine stock depends on coastal States not only implementing species-appropriate conservation and management measures but also habitat protection measures and pollution reduction measures.

Fourth, under article 62, paragraph 5, of the Convention, coastal States must give advance notice of their conservation management laws and procedures to ensure that other States are aware of their obligations under the coastal State's law. This obligation is true for all stocks including shared, straddling, and migratory stocks.

Finally, coastal States have a duty to monitor their fisheries and to enforce their laws regarding conservation and management of shared, straddling and migratory stocks. This includes a duty to enforce against ships that are flagged to the coastal State whether they are operating within coastal State waters or in distant fishing waters. This coastal State enforcement duty also extends to third-party State vessels operating within coastal State waters that are in violation of conservation and management measures.

Mr President, distinguished Members of the Tribunal, thank you for granting the IUCN the opportunity to share these legal points.

In summary, we ask you to find competence to deliver an advisory opinion under Annex VI, article 21, of UNCLOS and article 33 of the MCA Agreement.

On question 1 we suggest that the Tribunal should recognize two primary obligations of the flag State operating in the exclusive economic zone. First, each flag State has a duty to ensure compliance by its vessels with the conservation measures of any coastal State where vessels from the flag State are operating. We have distilled this

duty into six distinct due diligence obligations. Second, a flag State has a duty to exercise effective jurisdiction and control over ships flying its flag. A breach of any primary flag State obligation triggers State responsibility leading to liability.

On question 2, we suggest the Tribunal should find that flag States operating on the high seas have the six distinct obligations that we have included in our written statement.

On question 3, we ask that you will advise the SRFC that an international organization may be held responsible for a breach of an obligation that arises under an international fishing access agreement if the international organization has clear competence.

On question 4, we ask you to recognize that the duties of coastal States in relation to shared, straddling, and migratory stocks include at least five duties, including devising conservation measures that take into consideration the precautionary principle.

Mr President, distinguished Members of the Tribunal, we thank you for your attention to these matters of great importance to the conservation of living marine resources. With this, IUCN concludes its oral submission.

THE PRESIDENT: Thank you, Professor Telesetsky, for your statement.

This concludes the oral presentations of today and also brings us to the end of the oral proceedings in Case 21.

I wish to seize this opportunity to thank all delegations who have addressed the Tribunal for the high quality of their statements made in the course of these four days. In addition, the Tribunal would like to convey its appreciation to all delegations for the great professionalism and courtesy shown during the hearing. I also thank the States and organizations participating in the written proceedings.

The Registrar will now address questions in relation to transcripts.

THE REGISTRAR (*Interpretation from French*)**:** Mr President, pursuant to article 86, paragraph 4, of the Rules of the Tribunal, representatives who have participated in the hearing may, under the supervision of the Tribunal, make corrections to the transcripts of their oral statements, but in no case may such corrections affect the meaning and scope thereof. The corrections relate solely to the statements in the original language used during the hearing. The corrections should be submitted to the Registry as soon as possible and, in any event, by Wednesday, 10 September 2014 at 6.00 p.m. Hamburg time at the latest.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Gautier.

The Tribunal will now withdraw to deliberate on the case. The advisory opinion will be read on a date to be notified to all participants. The Tribunal currently plans to deliver its advisory opinion in spring 2015.

In accordance with the usual practice, I request the participants to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery its advisory opinion. I thank you in advance.

The hearing is now closed.

(*The sitting was closed at 11.23 a.m.*)