Written Statement of Japan

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

(CASE NO. 21)

WRITTEN STATEMENT OF JAPAN

29 NOVEMBER 2013

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INTRODUCTION

1. In accordance with the Order of the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") dated 24 May 2013, Japan submits this written statement on the request dated 27 March 2013 of the Sub-Regional Fisheries Commission (hereinafter "the SRFC") for an advisory opinion of the Tribunal on the following four questions :

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

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

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

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

2. Japan pays particular attention to the fact that the present case provides the first occasion on which the full Tribunal has been requested to render an advisory opinion. In this context, Japan considers that, before turning to the substance of the SRFC's request, certain clarifications on the scope of the Tribunal's advisory jurisdiction are called for. Japan's written statement is thus divided into two parts as follows:

    1 Jurisdiction of the Tribunal

    2 Substance of the questions

CHAPTER I
JURISDICTION OF THE TRIBUNAL

1 General observations as to the advisory jurisdiction of the full Tribunal

3. In considering the scope of the Tribunal's advisory jurisdiction, it is important to bear in mind that, given its innovative nature in international judicial practice, the advisory jurisdiction has been cautiously developed through the practice of the Permanent Court of International Justice (hereinafter "the PCIJ") and the International Court of

Justice (hereinafter "the ICJ"). Distinct from the contentious jurisdiction, requests for advisory opinions have nevertheless been put to careful scrutiny by the ICJ: the ICJ has satisfied itself as to whether it has jurisdiction in the case before it and whether there is any reason why the ICJ should decline to exercise its jurisdiction.[1] Japan considers that such a careful approach should be respected when the full Tribunal is seized of a request for an advisory opinion, especially in view of the following considerations.

4. Japan notes that, when it comes to the advisory jurisdiction of the full Tribunal, there is no equivalent of Article 96 of the Charter of the United Nations (hereinafter "the Charter") in the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), including its Annex VI, namely the Statute of the Tribunal, which would provide a basis for the full Tribunal to give an advisory opinion, while the Convention confers the advisory jurisdiction in express terms to the Seabed Disputes Chamber of the Tribunal in Article 191. Article 138 of the Rules of the Tribunal, adopted by the Tribunal itself in 1997 in accordance with Article 16 of the Statute of the Tribunal, stands as the sole provision explicitly setting out the advisory jurisdiction of the full Tribunal. It states in its paragraph 1:

> "*The Tribunal* may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion (emphasis added)."

5. This asymmetrical designing of the advisory jurisdiction of the ICJ and that of the Tribunal nonetheless do not necessarily lead to the conclusion that the Tribunal, in its full composition, is excluded from exercising advisory jurisdiction. Given the clear wording of Article 21 of the Statute of the Tribunal conferring on the Tribunal jurisdiction over "all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal* (emphasis added),"[2] read in conjunction with Article 138 of

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[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports 2010*, p. 412, para.17. As to the discretionary power of the Tribunal to give an advisory opinion, *see*, para. 19 below.

[2] This broad wording and structure of Article 21 seem to follow the precedents of the articles defining the jurisdiction of the PCIJ (Article 36 of the Statute of the PCIJ) and the ICJ (Article 36, paragraph 1, of the Statute of the ICJ). It should be noted that, although it had been foreseen in Article 14 of the Covenant of the League of Nations that the new Court should have advisory jurisdiction, the Statute of the PCIJ lacked explicit provisions for such effect till its amendment in 1929. The PCIJ nonetheless dealt with 15 advisory proceedings during this period.

the Rules of the Tribunal, it is untenable to argue that only the Seabed Disputes Chamber has the advisory jurisdiction.

6. Through the practice of the PCIJ and the ICJ over decades, the advisory procedure has proved to be of practical value for international society, providing assistance to the requesting organization for the proper exercise of its functions by clarifying the principles and rules of international law. The advisory jurisdiction of the full Tribunal should thus also be supported upon consideration of the position given by the Convention to the Tribunal, as well as the important role it actually plays in the rule of law for the oceans.

7. However, the advisory jurisdiction of the full Tribunal should be exercised within the fundamental confines of the advisory jurisdiction, even in light of the broad wording of Article 138 of the Rules of the Tribunal cited above. It is the considered view of Japan that the advisory jurisdiction has its own function distinguished from the contentious jurisdiction,[3] and that giving an advisory opinion should not have the effect of circumventing the principle of consent of the disputing parties on which judicial dispute settlement is based.[4]

8. In order to assist the Tribunal, Japan wishes to highlight, in particular, two areas in which the Tribunal should be cautious in exercising its advisory jurisdiction, namely: the respective scopes of (i) basis for requesting an advisory opinion; and (ii) subjects on which an advisory opinion could be requested.

2 Scope of the advisory jurisdiction of the full Tribunal

(1) Basis for requesting an advisory opinion

9. First, paragraph 1 of Article 138 of the Rules of the Tribunal, governing the advisory procedure of the full Tribunal, leaves open the question of the entities which are

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[3] In its advisory opinion given in the case *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the ICJ stated as follows:

> "The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96(2) of the Charter, may obtain the Court's opinion in order to assist them in their activities (*I.C.J. Reports 2010*, p. 417, para. 33.)."

[4] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 24-25, paras. 32-33; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004(I)*, pp. 157-159, paras. 46-50.

authorized to request an advisory opinion[5] or the issue concerning the scope of the legal instruments which could afford a basis for requesting an advisory opinion. It simply provides that "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."

10. Article 96 of the Charter only empowers the General Assembly, the Security Council (para. 1) and other organs of the United Nations and specialized agencies "which may ... be so authorized by the General Assembly" (para. 2)[6] to request advisory opinions of the ICJ. The advisory jurisdiction of the Seabed Disputes Chamber, for its part, is based on Article 191 of the Convention whereby the entities authorized to request an advisory opinion are limited to two organs of the International Seabed Authority, namely, the Assembly and the Council. This express limitation is particularly noteworthy in that the Seabed Disputes Chamber can be seized of contentious disputes between States, the Authority or natural or juridical persons[7]. These observations indicate that the entities which are allowed to request an advisory opinion of an international court or tribunal have been strictly limited.

11. Paragraph 1 of Article 138 of the Rules of the Tribunal only requires that "*an international agreement* related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion (emphasis added)." Thus, a wide range of international agreements may seem to fall under purview, for as long as they are related to the purposes of the Convention. However, the advisory procedure before the Seabed Disputes Chamber is also illustrative in that requests for opinions could only be made in accordance with two provisions of the Convention (paragraph 10 of Article 159 and Article 191). The fact that the legal bases for requesting an advisory opinion of the ICJ and the Seabed Disputes Chamber of the Tribunal are only given by the Charter and the Convention respectively suggests that the scope of "an international agreement" as provided in Article 138, paragraph 1, of the Rules of the Tribunal should also require a careful interpretation.

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[5] Article 138, paragraph 2, of the Rules of the Tribunal provides that a request for an advisory opinion shall be "transmitted" to the Tribunal by "whatever body is authorized". In light of Article 104 of the Rules of the ICJ, this paragraph seems only concerning the body to *transmit* the request to the Tribunal, which is "the Secretary-General of the United Nations or, as the case may be, the chief administrative officer of the body authorized to make the request" in the case of the ICJ. It does not relate to the entity authorized to *make such requests*.

[6] A view is expressed that the right of organs of the United Nations other than the General Assembly and the Security Council and specialized agencies to request advisory opinions of the ICJ is a "derivative right" (Sh. Rosenne, *The Law and Practice of the International Court, 1920-2005*, vol. I, 2006, p. 285).

[7] *See*, Articles 187 and 188 of the Convention.

12. In the present instance, however, the request for an advisory opinion was made by the SRFC, a treaty-based international organization to which specific functions are conferred by its member States. The 2012 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 (hereinafter "the MCA Convention") stipulates in its Article 33 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." The latter is a multilateral agreement laying down a set of rights and obligations of member States of the SRFC regarding the regulation of fishing activities within their exclusive economic zones (hereinafter "EEZs") as well as on the high seas, including IUU fishing. It follows that the MCA Convention falls within the category of "an international agreement related to the purposes of the Convention." Japan considers that there is no obstacle to the exercise of the jurisdiction by the Tribunal over the present request by the SRFC; the MCA Convention is not an *ad hoc* agreement concluded solely for the purposes of resorting to the advisory procedure before the Tribunal, nor is the SRFC a mere group of States or an *ad hoc* inter-state commission established solely for requesting an advisory opinion of the Tribunal.

(2) Subject on which an advisory opinion is requested

13. Second, the scope of the subject on which an advisory opinion can be given also calls for consideration. Japan is of the view that, even in the absence of explicit limitation, an advisory opinion of the Tribunal could not be given on whatever matters that the requesting body brings to it. At least, two sorts of limitations could be envisaged: (i) one as a result of the scope of the activities of the requesting organization, and (ii) the other deriving from the scope of the international agreement providing for the submission of a request.

14. Under paragraph 2 of Article 96 of the Charter, specialized agencies are only conferred a limited competence to make requests for advisory opinions on "legal questions arising within the scope of their activities." In the *Case concerning Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ found that it could not give an advisory opinion because the question referred to a matter which was not one arising within the scope of the activities of the World Health Organization (hereinafter "the WHO"), the requesting organ[8]. In its finding in application of paragraph 2 of

[8] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996(I),*

Article 96 of the Charter, the ICJ relied upon the "principle of speciality" by which international organizations were "governed." International organizations are "invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them," according to the ICJ. After analysis of the function of the WHO, the ICJ thus concluded that "...to ascribe the WHO the competence to address the legality of the use of nuclear weapons ... would be tantamount to disregarding the principle of speciality."[9] This observation by the ICJ strongly suggests that, even in the absence of a provision equivalent to paragraph 2 of Article 96 of the Charter, in the case of the advisory jurisdiction of the full Tribunal, the same restriction could be deduced from the very "principle of speciality" which lays the foundation of international organizations.

15. The second possible limitation derives from the scope of the international agreement providing submission of the request in question. Even if the provision of a convention which afford the basis for the request for an advisory opinion defines the subject of questions for which an advisory opinion may be requested in a very broad manner, it does not follow that the requesting body may ask questions beyond the scope of the convention itself. In other words, the questions on which an advisory opinion could be requested must have a sufficiently close link with the purpose and contents of the international agreement which provides for the submission of such request.

16. In the present case, the fundamental aim and function of the SRFC are defined in Article 2 of its constituent instrument, the 1985 Convention Establishing a Sub Regional Fisheries Commission. It reads: "[t]he Commission shall aim to harmonize in the long-term, policies of member countries in terms of preservation, conservation and management of fisheries resources and strengthen their cooperation for the well-being of their populations." Turning to the MCA Convention, it defines IUU fishing (paragraph 4 of Article 2), and incorporates various measures to fight against IUU fishing. There is little doubt that the questions related to the fight against IUU fishing fall within the scope of the activities of the SRFC and those of the MCA Convention.

17. Upon the above considerations, Japan concludes that the full Tribunal has the advisory jurisdiction, and has jurisdiction to deal with the request for an advisory opinion submitted by the SRFC.

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pp. 74-79, paras. 18-25.
[9] *Ibid.*, p. 79, para. 25.

18. On the other hand, it is to be noted that, in parallel with the SRFC itself, the MCA Convention bears a regional character, since its application is limited to "the maritime area under jurisdiction of the SRFC Member States" (paragraph 2 of Article 1), while all the four questions brought before the Tribunal by the SRFC are formulated very generally. Japan therefore suggests that the Tribunal may interpret or further reformulate the questions put to it in light of the regional character of the SRFC and the MCA Convention, if it considers it necessary.

19. Finally, Japan notes that the wording of paragraph 1 of Article 138 of the Rules of the Tribunal, stating that "[t]he Tribunal *may* give an advisory opinion," suggests that the Tribunal has discretionary power to decline to exercise its advisory jurisdiction, if the circumstances of the case so require.[10] In the present instance, however, Japan sees no particular reason for the Tribunal to do so.

CHAPTER II
SUBSTANCE OF THE QUESTIONS

1 General observations

20. As developed in paragraphs 13-18 of the previous Chapter, Japan is of the view that the Tribunal may interpret or reformulate the questions posed by the SRFC so that they fit within the scope of the activities of the SRFC and the MCA Convention. Nonetheless, with a view to assisting the Tribunal, at this stage of the proceedings, Japan would like to comment on the questions as formulated by the SRFC in this Chapter. Should the scope of those questions be clarified in the course of the proceedings, Japan may make at a later stage further refinements to its comments.

21. Before turning to the questions, some preliminary observations are necessary regarding (1) the definition of IUU fishing, and (2) some underlying premises on which Japan's comments are based.

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[10] Article 191 of the Convention states that the Seabed Disputes Chamber "shall give" advisory opinions requested by the Assembly or the Council of the International Seabed Authority, while Article 65, paragraph 1, of the Statute of the ICJ provides that the ICJ "may give" an advisory opinion, the wording which is followed by Article 138, paragraph 1, of the Rules of the Tribunal. However, in the case *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the Seabed Disputes Chamber cautiously concluded that it was not necessary to pronounce on the consequences of this difference of wording with respect to the admissibility of the case *(See, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea*, paras. 46-49.).

(1) Definition of IUU fishing

22. Whilst the questions of the SRFC concern IUU fishing, there is no universally accepted legally binding instrument which defines IUU fishing in general. Japan is of the opinion that the following elements should be taken into consideration when the Tribunal finds it necessary to define the scope of "IUU fishing", in order to answer to the questions raised by the SRFC.

23. First of all, paragraph 4 of Article 62 of the Convention states as follows;

> "Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

The same article specifies the matters to which these laws and regulations of the coastal States may relate, which are, *inter alia:*

- Licensing of fishermen, fishing vessels and equipment (para.4 (a));
- Determining the species which may be caught, and fixing quotas of catch (para.4 (b));
- Regulating seasons and areas of fishing, the types, sizes and amount of gear and fishing vessels (para.4 (c)); and
- Specifying information required of fishing vessels, including catch and effort statistics and vessel position reports (para.4 (e)).

24. In addition, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter "UNFSA"),[11] provides in Article 18 entitled "Duties of the flag state" as follows:

> 1. A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.
>
> 3. Measures to be taken by a State in respect of vessels flying its flag shall include:
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> (b) (iv) to ensure that vessels flying its flag do not conduct unauthorized

[11] UNFSA shall be interpreted and applied in the context of and in a manner consistent with the Convention (Article 4).

fishing within areas under the national jurisdiction of other States.

Although only applicable on the high seas, paragraph 11 of Article 21 further provides a detailed list of what constitutes a "serious violation" of conservation and management measures of the targeted stocks[12].

25. Turning to non-binding instruments, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter "IPOA-IUU"), adopted by the FAO Council on 23 June 2001, lays down a general definition of "IUU fishing."[13] This IPOA-IUU serves as reference for States to

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[12] Under paragraph 11 of Article 21 of the UNFSA, the following activities are deemed to be "serious violations" of conservation and management measures:

- fishing without a valid license, authorization or permit issued by the flag State ((a));
- failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch ((b));
- fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement ((c));
- directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited ((d));
- using prohibited fishing gear ((e));
- falsifying or concealing the markings, identity or registration of a fishing vessel ((f));
- concealing, tampering with or disposing of evidence relating to an investigation ((g));
- multiple violations which together constitute a serious disregard of conservation and management measures ((h)); or
- such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement ((i)).

[13] IPOA-IUU II.3 defines IUU fishing as follows:

3. In this document:

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

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

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or

elaborate their national plan of action to fight against IUU fishing[14], and is recalled in the preambles of several binding measures to establish an IUU fishing vessel list adopted by major tuna Regional Fisheries Management Organizations (hereinafter "RFMOs").[15] IUU fishing is defined in these measures in a more specific manner. The following activities conducted by vessels are defined in common as IUU fishing in these RFMO measures:

- Harvesting species in the area covered by the RFMO concerned and not being registered on the list/record of vessels authorized to fish of that RFMO;
- Not recording or reporting their catches made in the area covered by the RFMO concerned, or making false reports;
- Taking or landing undersized fish in contravention of conservation and management measures of the RFMO concerned;
- Fishing during closed fishing periods or in closed areas in contravention of conservation and management measures of the RFMO concerned;
- Using prohibited fishing gear in contravention of conservation and management measures of the RFMO concerned;
- Transshipping with, or participating in joint operations such as re-supply or re-fuelling vessels included in the IUU vessels list;
- Harvesting species of the RFMO concerned in the waters under the national jurisdiction of the coastal States in the area covered by the RFMO without authorization and/or in infringement of its laws and regulations[16];
- Being without nationality and harvesting species in the area covered by the RFMO concerned; and
- Engaging in fishing activities contrary to any other conservation and management measures of the RFMO concerned.

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management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

[14] Concerning straddling fish and highly migratory fish, Articles 63 and 64 of UNCLOS state that States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks. Article 10 of the UNFSA provides that States shall agree on and comply with the conservation and management measures of these species.

[15] Such measures are: IATTC Resolution C-05-07; ICCAT Recommendation 11-18 (amendment of recommendation 09-10); WCPFC Conservation and Management Measure 2010-06; and IOTC Resolution 11/03.

[16] This is a common phrase used in the measures referred to in footnote 15, except IATTC Resolution C-05-07.

(2) Some underlying premises on which Japan's comments are based

(i) Species of fish concerned

26. While the fourth question which identifies the fish species concerned as small pelagic species and tuna, none of the other questions of the SRFC specify the fish species concerned. Japan thus interprets that the first through third questions are concerned with catches of any fish species including straddling fish and highly migratory fish.

(ii) Areas of water concerned

27. The second question does not specify the water area in which IUU fishing is conducted. However, in light of the first question which only concerns IUU fishing conducted within the EEZ, and the third and fourth questions which presumably do so, Japan considers it natural to interpret the second question as only concerning IUU fishing in the EEZ.

2 Comments on the questions posed

(1) First question

28. The first question seems to concern the obligations of the flag State in the case where IUU fishing activities are conducted by vessels flying its flag within the EEZs of other States, though the meaning of the word "third party States" used in the question is not clear.

29. Under the Convention, coastal States have the primary responsibility for the conservation and management of living resources within their EEZ. Articles 61 ("Conservation of the living resources") and 62 ("Utilization of the living resources") provide the rights and obligations of coastal States to determine the allowable catch of the living resources and conservation measures (Article 61, paragraphs 1 and 2), to promote the objective of optimum utilization of the living resources (Article 62, paragraph 1), and to give to other States access to the surplus of the allowable catch. Accordingly, "*nationals* of other States" fishing in the EEZ shall comply with the conservation measures and with other terms and conditions established in the laws and regulations of the coastal State (Article 62, paragraph 4). It is noteworthy that, under Article 62, paragraph 4, it is "*nationals* of other States" fishing in the EEZ who shall have the direct obligation to comply with the laws and regulations of the coastal State.

30. However, the Convention is not clear as to the obligations of the flag State in such

context. Under Article 92 of the Convention, ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. Paragraph 1 of Article 94 further requires every State to effectively exercise, as duties of the flag State, its "jurisdiction and control in administrative, technical and social matters" over ships flying its flag. The same article provides as such exercises of jurisdiction, in particular, maintaining a register of ship (para. 2(a)) and taking measures to ensure safety at sea (para. 3). Although Article 94 seems to be primarily concerned with the assurance of safety at sea, it does not define the "jurisdiction and control in administrative, technical and social matters" that the flag State shall assume over each ship, its master, officers and crew (Article 94, para. 2(b)). Upon receiving a report of the facts from another State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised by the flag State, the latter shall investigate the matter and, if appropriate, take any action necessary to remedy the situation (para. 6). These articles under Part VII entitled "High Seas" of the Convention applies to the EEZ, in so far as they are not incompatible with Part V (Article 58, para. 2).

31. Moreover, paragraph 3 of Article 58 of the Convention concerns the obligation of *States* to comply with the laws and regulations adopted by the coastal State within the EEZ within the scope of its rights and jurisdiction given by paragraph 1 of Article 56. Paragraph 3 of Article 58 reads:

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

Such sovereign rights and jurisdiction of coastal States include those for the purpose of exploring and exploiting, conserving and managing the living resources. A question thus arises as to obligations flag States assume under these provisions on the fishing activities of their vessels within the EEZs of other States. Japan considers that, in this context, Article 58, paragraph 3, needs to be interpreted in conjunction with Articles 92 and 94 mentioned above, concerning the jurisdiction of flag States over ships flying its flag.

32. The relevant articles of the UNFSA would shed light upon this question. Article 18 entitled "Duties of the flag State" of the UNFSA provides that a State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures (para. 1). Such measures to be taken

by a State with respect to vessels flying its flag shall include, *inter alia*, the establishment of regulations "to ensure that vessels flying its flag *do not conduct unauthorized fishing within areas under the national jurisdiction of other States*" (para. 3(b)(iv)). To fulfill its obligation under this article, Japan requires, in its legislations, vessels flying its flag which wish to fish within areas under the national jurisdiction of relevant States to obtain the authorization of the States concerned.

33. Japan considers that the obligations of the flag State to establish such regulations in the case where its vessels fish straddling species and highly migratory species in the EEZs of other States under the UNFSA fall within the jurisdiction and control of the flag State in administrative, technical and social matters over ships flying its flag under Article 94 of the Convention, since the UNFSA shall be interpreted in a manner consistent with the Convention. Japan further considers that, concerning all fish species in addition to these two specific species, obligations of the same nature are deemed to be imposed on flag States, taking into consideration the ordinary meaning of the term "jurisdiction and control of administrative, technical and social matters" and the object of paragraph 3 of Article 58 of the Convention.

34. Japan thus considers that, with regard to the fishing activities of its vessels within the EEZ of other State, the obligation of the flag State under paragraph 3 of Article 58 to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations adopted by the coastal State would also be met when a flag State fulfils the above-mentioned obligations under Article 94 with regard to its vessels fishing in the EEZs of the other States.

(2) Second question

35. The second question of the SRFC is focused upon the extent to which the flag State shall be held liable for IUU fishing activities conducted by vessels flying its flag. As already indicated above, Japan limits its comments to cases where such vessels conduct IUU fishing within the EEZs of other States.

36. In this regard, it should be underscored that, as noted above, it is "nationals of other States" who have the obligation to comply with the conservation measures and the other terms and conditions established in the laws and regulations of the coastal State concerning the conservation and management of living resources within the EEZ, according to Article 62, paragraph 4, of the Convention. Therefore, it is those nationals who shall be liable for the violation of such measures, laws and regulations of the coastal State.

37. On the other hand, as examined above, Article 94 of the Convention provides that the flag State shall exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. This article does not provide in detail what the flag State shall do other than maintaining a register of ships and taking such measures as are necessary to ensure safety at sea. Nonetheless, as examined above in its comments on the first question, taking into account Article 18, paragraph 3(b)(iv), of the UNFSA, Japan is of the view that, under Article 94, the flag State shall have the responsibility of exercising its jurisdiction and control necessary to ensure that a vessel flying its flag does not conduct unauthorized fishing within areas under the national jurisdiction of other States. Japan considers that it fulfils this obligation by requiring, in its legislations, vessels flying its flag which wish to fish within areas under the national jurisdiction of relevant States to obtain the authorization of the State concerned. Japan further considers that Article 94 of the Convention provides such obligation of flag States regarding any species of fish, including, *inter alia*, straddling and highly migratory species.

38. As a corollary, the flag State would not be held responsible for the acts conducted by vessels flying its flag within the EEZs of other States, but responsible only to the extent that it fails to meet its own obligation under Article 94 to exercise its jurisdiction and control. As reflected in Article 18, paragraph (b)(iv), of the UNFSA, such exercise of jurisdiction is to establish regulations to ensure that its vessels do not conduct unauthorized fishing within the EEZs of other States. In light of Article 62, paragraph 4, of the Convention under which "nationals of the other States" have a direct obligation to comply with the laws and regulations of the coastal State, while the flag State shall have the abovementioned duties to effectively exercise jurisdiction and control, it is not directly responsible for the act committed by those "nationals."

(3) Third question

39. Japan finds it difficult to comment upon the third question in a general manner, without being given a specific "framework of an international agreement" or a specific "international agency." Japan simply recalls its conclusion reached in its own comment on the second question that the flag State would not be held responsible for the violation by its nationals of laws and regulations of the coastal State within its EEZ under the Convention, as well as the UNFSA, so long as it meets its own obligation as clarified in its comments on the first question. Japan thus considers that, in general, the flag State would not be held responsible either beyond that limit, even when a fishing license is issued to a vessel within the framework of an international

agreement, should such agreement not provide otherwise.

(4) Fourth question

40. The fourth question submitted to the Tribunal asks what the rights and obligations of the coastal State are in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna. Japan believes that following provisions of the Convention and the UNFSA are relevant.

(i) The Convention

41. As has been seen above, Articles 61 and 62 of the Convention give to the coastal State a broad range of rights and obligations concerning the conservation and utilization of living resources within the EEZ. Concretely, Article 61 entitled "Conservation of Living Resources" prescribes that, *inter alia*, the coastal State shall determine the allowable catch of the living resources (para. 1), take conservation and management measures (para. 2), and realize the maximum sustainable yield taking into account relevant environmental and economic factors and other factors such as the interdependence of stocks (para. 3).

42. Article 62 entitled "Utilization of the living resources," for its part, states that the coastal States shall promote the objective of optimum utilization of the living resources of its EEZ (para.1), determine its capacity to harvest the living resources (para. 2), and give other States access to the surplus of the allowable catch taking into account all relevant factors including the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests (para. 3). The same article further provides a non-exhaustive list of matters that the laws and regulations of coastal States may relate to (para. 4(a) to (k)).

43. The Convention thus provides a broad range of rights and obligations of coastal States, and as for the conservation and management of straddling fish and highly migratory fish, Articles 63 and 64 state that coastal States and other fishing States shall co-operate directly or through appropriate international organizations.

44. As a corollary to the extensive rights and obligations of the coastal State for the conservation and utilization of living resources within its EEZ, Article 73 of the Convention entitles the coastal State the right to enforce its laws and regulations. It states that the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its EEZ, take such measures, including boarding inspection, arrest and judicial proceedings (para. 1), under certain

constraints (paras. 2-4), such as the obligation to promptly release arrested vessels and their crews upon the posting of reasonable bond or other security.

(ii) The UNFSA

45. The UNFSA provides further details about factors to be taken into consideration in applying conservation and management measures of coastal States and States fishing on the high seas, for the purpose of ensuring the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks. While the provisions of the UNFSA apply in principle to the conservation and management of targeted fish stocks on the high seas, in accordance with Article 3, paragraphs 1 and 2, Article 6 entitled "Precautionary approach", Article 7 entitled "Compatibility of conservation and management measures" and, *mutatis mutandis*, Article 5 entitled "General principles" are also applicable to such measures within the areas under the national jurisdiction concerned.

46. Article 5 of the UNFSA provides factors to be taken into consideration when applying the conservation and management measures of coastal States and States fishing on the high seas, in a similar manner to Article 61 of the Convention. It differs, however, from Article 61 of the Convention on the point that it prescribes the duty of applying the precautionary approach, in accordance with Article 6 of the UNFSA. The precautionary approach as defined in Article 6, paragraph 2, means that "States shall be more cautious when information is uncertain, unreliable or inadequate, and the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures." Coastal States have a further duty to cooperate for the purpose of achieving compatible conservation and management measures (Article 7, para. 2). It provides a list of elements to be taken into account in determining such measures, (para. 2(a) to (f)), such as the measures adopted and applied in accordance with the Convention by coastal States (subparagraph (a)) and previously agreed measures by relevant coastal States and States fishing on the high seas (subparagraph (b)).

CONCLUSIONS

47. In view of the above considerations, Japan summarizes its views as follows:

(Regarding the jurisdiction of the Tribunal)

(i) The full Tribunal has the advisory jurisdiction, and has jurisdiction to deal with the

request for an advisory opinion submitted by the SRFC;

(ii) The Tribunal may interpret or even reformulate the questions posed so that they fall within the limits imposed by the nature of the SRFC and the scope of the MCA Convention.

(Regarding the substance of the questions posed)

(iii) Concerning the first question, whilst, in accordance with Article 62, paragraph 4, of the Convention, it is "nationals of other States" fishing in the EEZ who shall have the direct obligation to comply with the laws and regulations of the coastal State, under Article 94 of the Convention read in conjunction with Article 58, paragraph 3, and in light of Article 18, paragraph 3(b)(iv) of the UNFSA, the flag State assumes the obligation of establishing regulations to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States. Japan considers that it fulfils this obligation by requiring, by its legislations, vessels flying its flag which wish to fish within areas under the national jurisdiction of other relevant States to obtain the authorization of the State concerned;

(iv) In consequence, concerning the second question, the flag State would be held responsible with regard to IUU fishing conducted within the EEZ of other States by a vessel flying its flag only to the extent that it fails to fulfil its own obligation explained in the previous sub-paragraph.

(v) Concerning the third question, it is difficult to comment upon it in a general manner, without a specific "framework of an international agreement" or a specific "international agency". It should nonetheless be considered that, in the case where a fishing license is issued to a vessel within the framework of an international agreement, with regard to the conduct of such vessel, the flag State would only be held responsible in general for its failure to meet its own obligation examined in sub-paragraph (iv) above, should the abovementioned agreement not provide otherwise.

(vi) Concerning the fourth question, Article 61, paragraphs 1 to 5, Article 62, paragraphs 1 to 4, Article 63, and Article 73, paragraph 1 to 4 of the Convention and Article 4, Article 6, paragraph 2, and Article 7, paragraph 2(a) to (f), of the UNFSA should be taken into consideration in order to state the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna within its EEZ.

石井正文

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