INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

WRITTEN STATEMENT OF THE CARIBBEAN REGIONAL FISHERIES MECHANISM

27 NOVEMBER 2013

CONTENTS

CHAPTER 1

INTRODUCTION

I. The Caribbean Regional Fisheries Mechanism

1. In its Order 2013/2 dated 24 May 2013, the International Tribunal for the Law of the Sea (hereafter "the Tribunal" or "ITLOS") invited the States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "UNCLOS"), the Sub-Regional Fisheries Commission (hereinafter "the SRFC" or "the requesting organization") and certain intergovernmental organizations and entities listed in an annex to the Order to present written statements on four questions in Case No. 21 pertaining to illegal, unreported and unregulated ("IUU") fishing activities offshore.[1]

2. The Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM" or "the Mechanism") is an intergovernmental organization for regional fisheries cooperation founded in 2002 pursuant to the Agreement Establishing the Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM Agreement").[2] It has its headquarters in Belize. As the CRFM is listed in the Annex to the Tribunal's Order 2013/2, it wishes to avail itself of the opportunity afforded by the Order to make a written statement on the request by the SRFC for an advisory opinion of the Tribunal. This statement by the CRFM addresses the jurisdiction of the Tribunal to give an advisory opinion in response to the request by the SRFC and the questions put by the SRFC in that request.

3. The CRFM's status and mission are similar to the SRFC's, even though their regional sphere of influence differs and the CRFM's membership is more than double the SRFC's. The CRFM aims to promote the sustainable use of fisheries and aquatic resources in and among the Caribbean Community (CARICOM) Member States, by development, management and conservation of these resources in collaboration with stakeholders to benefit the people of the Caribbean region. It is beyond doubt that the fragile economies of the Member States of both organizations suffer serious damage

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1 IUU fishing is further defined in Chapter 3 of this written statement. In short, IUU fishing is "any fishing which undermines or disregards national, regional or international fisheries conservation and management arrangements and measures." Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing (hereinafter "the Castries Declaration"), first preambular paragraph, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia, on 28 July 2010 (see full text in Annex 1 to this written statement).

2 See full text in Annex 2 to this written statement. The text of the Agreement is also available from the CRFM's Web site, <www.crfm.net> (under tab "About the CRFM").

from IUU fishing activities, which also threatens border security of the countries affected by such activities.[3]

4. The combined land area of the CRFM Member States is 433,549 sq. km. and their coastal fronts extend over nearly 10,000 km. The CRFM Member States have an aggregate population of approximately 17 million, with annual per capita consumption of fisheries products estimated at 31 kg. The fisheries of CRFM Member States are an important foreign exchange earner and a primary contributor to income, employment, food security and social and economic stability, especially in coastal communities. In 2010, 62,217 persons were employed in direct production in the marine capture fisheries, with a total fleet of fishing vessels operating in the commercial capture fisheries of just under 25,000 vessels and some 40 foreign-owned and operated fishing vessels registered under open registry arrangements (Belize and St. Vincent and the Grenadines). The presence of transboundary fish stocks and fish stocks of common interest is of great benefit to the CRFM Member States, whose total marine capture fish production averaged 136,148 metric tons between 2006 and 2010. During the period 2008-2009, at ex-vessel prices the value of the marine capture fishery production for the region from domestic fleets was approximately USD 543,200,000.[4]

5. There are few large surplus stocks in the Caribbean region, with the exception of Guyana, Suriname and, to a lesser extent, Belize. The following categories of fisheries have traditionally been acknowledged by the CRFM region: small coastal pelagic fishery, small offshore pelagic fishery, large offshore pelagic fishery, shallow shelf and reef finfish fishery, shallow shelf and reef lobster fishery, shelf and deep slope fishery, shrimp fishery, conch fishery, echinoderms fishery (locally called the sea urchin or sea cucumber fishery), sea turtle fishery and fishery for sea mammals.[5]

6. The CRFM has two categories of membership, namely, Member States and Associate Members of CARICOM.[6] Most of the CRFM's 17 members are developing countries and small island developing States, or SIDS. They are listed in the table below.

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3 See, e.g., Ministry of Agriculture and Fisheries of Jamaica, "IUU Fishing and Border Security Issues in Jamaican Waters," Discussion Paper submitted at the Fourth Meeting of the Ministerial Council of the CRFM, 20 May 2011, St. John's, Antigua, text in Annex 3 to this written statement.

4 See J. Masters, *CRFM Statistics and Information Report – 2010* (2012), 65 pp., text available from the CRFM Web site, <http://www.crfm.net/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=33&Itemid=237>, accessed 7 November 2013.

5 Id., p. 15 and Tables 6-7.

6 Article 3, paragraph 1, of the CRFM Agreement provides that "[m]embership of the Mechanism shall be open to Member States and Associate Members of CARICOM." Thus, CARICOM Members and

Anguilla	Antigua and Barbuda	Bahamas
Barbados	Belize	Dominica
Grenada	Guyana	Haiti
Jamaica	Montserrat	St. Kitts and Nevis
Saint Lucia	St. Vincent and the Grenadines	Suriname
Trinidad and Tobago	Turks and Caicos Islands	

7. Similar to the SRFC, all of the Member States of the CRFM have ratified the UNCLOS (Jamaica, the Bahamas and Belize were among the first ten countries to have ratified the Convention).[7] There currently are no Associate Members. Observers of the CRFM include the following:

- CARICOM (Caribbean Community)
- CNFO (Caribbean Network of Fisherfolk Organizations)
- FAO (Food and Agriculture Organization of the United Nations)
- OECS (Organisation of Eastern Caribbean States)
- UWI (the University of the West Indies)
- Bermuda

8. The CRFM has entered into a partnering arrangement with the Dominican Republic's Ministerio de Medio Ambiente y Recursos Naturales and El Consejo Dominicano de Pesca y Acuicultura (CODOPESCA) through a memorandum of understanding.

9. The CRFM is composed of three organs: (a) the Ministerial Council, (b) the Caribbean Fisheries Forum, and (c) the Technical Unit.[8] The Ministerial Council, consisting of the Ministers of Fisheries of the Member States, determines the policy of the Mechanism. The Forum consists of representatives from Member States and Associate Members as well as observers from fisher folk, through the Regional Network of Fisherfolk Organizations (CNFO), and private companies, regional bodies and

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Associate Members may become members of the CRFM. Any other State or territory of the Caribbean region (i.e., States that are not CARICOM Members or Associate Members) may become an Associate Member of the CRFM.

7 Anguilla, Montserrat and the Turks and Caicos Islands are included in the United Kingdom's ratification of the Convention as overseas territories.

8 CRFM Agreement, articles 6-13.

institutions and non-governmental organizations. It determines the technical and scientific work of the Mechanism. The Technical Unit is the permanent secretariat of the Mechanism and is headed by the Executive Director. The Unit has capability for policy and planning, research and resource assessment, fisheries management and development, and statistics and information.

10. The objectives of the CRFM as enunciated by article 4 of its constituent instrument are threefold:

    (a) the efficient management and sustainable development of marine and other aquatic resources within the jurisdiction of Member States;

    (b) the promotion and establishment of co-operative arrangements among interested States for the efficient management of shared, straddling or highly migratory marine and other aquatic resources; and

    (c) the provision of technical advisory and consultative services to fisheries divisions of Member States in the development, management and conservation of their marine and other aquatic resources.

11. Article 5 of the CRFM Agreement provides that, in pursuance of its objectives, the CRFM shall be guided by the following principles:

    (a) maintaining bio-diversity in the marine environment using the best available scientific approaches to management;

    (b) managing fishing capacity and fishing methods so as to facilitate resource sustainability;

    (c) encouraging the use of precautionary approaches to sustainable use and management of fisheries resources;

    (d) promoting awareness of responsible fisheries exploitation through education and training;

    (e) according due recognition to the contribution of small scale and industrial fisheries to employment, income and food security, nationally and regionally; and

    (f) promoting aquaculture as a means of enhancing employment opportunities and food security, nationally and regionally.

12. These provisions clearly indicate that resource management constitutes the primary objective of the CRFM, the provision of technical and consultative services being its secondary objective. Since its creation in 2002, the CRFM has concentrated on the

following areas and activities: coordinating fisheries management activities in the Member States of the Mechanism; conducting research and resource assessments of national and shared fish stocks; strengthening fisher folk organizations and improving Community Participation; assisting in the development of fishing plans; developing strategic and work plans; securing, executing and managing externally financed programs and projects; networking with regional and international organizations; and representing CARICOM or the members of the CRFM at international fora.

13. To date, the CRFM has not been involved with the management of the exploitation of regional stocks. The region is in the process of determining suitable regional cooperation agreements for managing key shared fishery resources, including considering the need for establishing a regional fisheries management organization (hereinafter "RFMO") to address active management of all shared fishery resources in the region. The CRFM is not set up as an RFMO for the Caribbean Sea.

14. By Order 2013/2, the Tribunal fixed 29 November 2013 as the time-limit within which written statements on the four questions in Case No. 21 may be presented to the Tribunal. This written statement is intended to support the SRFC's request for an advisory opinion and to assist the Tribunal in responding to the four questions addressed to it by the SRFC.

15. This written statement is arranged as follows:

Chapter 1 sets out the SRFC's request for an advisory opinion and provides a summary of the CRFM's views on the questions submitted by the SRFC.

Chapter 2 then briefly considers the Tribunal's jurisdiction to give the opinion, possible questions of admissibility and the applicable law.

Chapter 3 then addresses in turn each of the four questions put to the Tribunal in the light of the relevant legal provisions and other rules of international law.

Finally, **Chapter 4** sets out the Conclusions which the CRFM invites the Tribunal to reach.

II. The request for an advisory opinion

16. At its Fourteenth Extraordinary Session, held in Dakar, Republic of Senegal, from 25 to 29 March 2013, the seven-member Conference of Ministers of the SRFC, acting pursuant to Article 33 of 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"),[9] unanimously authorized the Permanent Secretary of the SRFC to submit a request for advisory opinion to the Tribunal. The MCA Convention deals with IUU fishing in Part IV comprising articles 25-30.

17. The English text of the decision of the Conference of Ministers authorizing the Permanent Secretary of the SRFC to request the Tribunal to render an advisory opinion reads as follows:

> ***Decides***, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:
>
> 1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
>
> 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
>
> 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
>
> 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

18. By letter dated 27 March 2013 and received in the Registry of the Tribunal the following day, the Permanent Secretary of the SRFC submitted a request asking the Tribunal to render an advisory opinion on the above questions (in French and based on the French text of the Conference of Ministers' resolution).[10]

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9 The MCA Convention repeals and replaces the Convention of 14 July 1993 on the Determination of Conditions for Access and Exploitation of Marine Resources Off the Coasts of SRFC Member States, which also regulated fishing activities within the maritime areas of SRFC Member States.

10 See ITLOS Order 2013/2 of 24 May 2013, p. 2, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

19. The CRFM will discuss in connection with Question 3 in Chapter 3 below how the discrepancy in the English and French texts of the Tribunal's Order 2013/2, which appears to have its origin in the ITLOS Registry's mistaken translation of the Permanent Secretary's letter, affects the reply to be given to Question 3.

20. As the March 2013 Technical Note from the Permanent Secretariat of the SRFC explains, the Member States of the SRFC are seeking to find out from the Tribunal exactly what their rights and obligations are in connection with IUU fishing with a view to "supporting the SRFC Member States to enable them, thanks to sensible and perceptive advice, to derive the greatest benefit from the effective implementation of the relevant international legal instruments and [to] ensuring that the challenges that they are facing from IUU fishing are better met."[11] Indeed, all similarly placed intergovernmental organizations for fisheries cooperation, including the CRFM, as well as all flag and coastal States stand to gain from the Tribunal's authoritative statements in response to the questions submitted by the SRFC.

21. The scale of the problem underlying the request of the SRFC is highlighted in a recent report of a ministerially-led task force on IUU fishing:

> Illegal, unreported and unregulated (IUU) fishing is a serious global problem. It is increasingly seen as one of the main obstacles to the achievement of sustainable world fisheries. Recent studies put the worldwide value of IUU catches at between USD 4 billion and USD 9 billion a year. While USD 1.25 billion of this comes from the high seas, the remainder is taken from the exclusive economic zones (EEZs) of coastal states.[12]

22. The Tribunal has been confronted with the problem of IUU fishing within the exclusive economic zone (hereinafter "the EEZ") or exclusive fishing zone of third party States in prior cases involving applications for prompt release. The aforementioned report singles out the case of the *Camouco*,[13] which was the subject of a 2000 decision of the Tribunal[14] before being re-named, re-flagged and re-arrested for IUU fishing, as "a

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11 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

12 *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, p.3, text available at <http://www.oecd.org/sd-roundtable/aboutus/stoppingillegalfishingonthehighseas.htm>, accessed 7 November 2013.

13 Id., p. 33.

14 *The "Camouco" Case (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 10.

graphic illustration of what can happen" when vessels engaged in IUU fishing activities game the prevailing system and take advantage of the inability or unwillingness of the responsible States to prevent, deter and eliminate IUU fishing.

III. Summary of argument

23. The Caribbean Regional Fisheries Mechanism appreciates the opportunity to submit this written statement, and to present its position in respect of the four questions to be considered by the Tribunal. Before addressing those questions, the CRFM wishes to make the following general observations.

A. The ecosystem-based approach

24. In responding to the four questions submitted to it by the SRFC, the CRFM invites the Tribunal to affirm the link between all States' "sovereign right to exploit their natural resources" with "their duty to protect and preserve the marine environment,"[15] to acknowledge the economic, social and environmental impacts of IUU fishing, and to apply the ecosystem-based approach to fisheries for a sustainable management of living marine resources and their ecosystems, as recognized in the Preamble to the MCA Convention[16] and other relevant regional and international instruments and documents. At its Seventh Meeting held in May 2013, the Ministerial Council of the CRFM "**[r]eaffirmed and declared** the ecosystem approach to fisheries and aquaculture as a key guiding principle for the CRFM, … , to ensure the long-term conservation and sustainable use of aquaculture and marine living resources."[17] The key features of this

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15 UNCLOS, article 193. See also R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 820; Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the International Law Commission, Geneva, 31 July 2008, p. 10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013 ("Article 192 places upon all States a duty to protect and preserve the marine environment and article 193 provides for a sovereign right to exploit natural resources only in accordance with such duty.").

16 The preamble to the MCA Convention reads, in relevant part: "taking into account the ecosystem-based approach to fisheries for a sustainable management of resources, and the fight against illegal, unreported and unregulated fishing, in accordance with international law." It has been pointed out that "[t]he living resources (i.e., fish, shellfish, sea turtles, and marine mammals) provisions of the LOS Convention recognize international interdependence on these resources" and "attention to ocean ecosystems would reflect the highly complex web of biological relationships where food chain and commensal associations create intricate interdependencies." See Eugene H. Buck, "U.N. Convention on the Law of the Sea: Living Resources Provisions," pp. 2, 4, CRS Report for Congress, Order Code RL32185 (Feb. 2008).

17 See text in Annex 4 to this written statement.

approach are maintaining ecosystem integrity[18] while improving human well-being and equity and promoting an enabling governance.

25. The MCA Convention defines the term "Ecosystem Approach" as follows:

> The ecosystem-based approach to fisheries is a means of ensuring the sustainable development of the fisheries sector. It is based on current fisheries management practices and explicitly acknowledges the interdependence between human well-being and that of the ecosystem. This approach places particular emphasis on the need to maintain the ecosystem in a good state and improve its productivity so that the level of fisheries production is maintained or improved for the benefit of current and future generations.[19]

26. This definition affirms the link between the ecosystem-based approach and the principle of sustainable development (see paras 32 to 35 below). Similarly, in adopting resolution 65/155 of 25 February 2011 entitled "Towards the sustainable development of the Caribbean Sea for present and future generations," the United Nations General Assembly reaffirmed "that the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach."[20] In this context, IUU fishing issues should be addressed in a holistic manner and against the background of the principle of sustainable development.

27. The same resolution noted "the heavy reliance of most of the Caribbean economies on their coastal areas, as well as on the marine environment in general, to achieve their

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18 See also ILC Draft Articles on the Law of Transboundary Aquifers and Commentaries, UNGA Official Records, *Report of the ILC,* 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p. 55 ("An external impact affecting one component of an ecosystem may cause reactions among other components and may disturb the equilibrium of the entire ecosystem, resulting in impairing or destroying the ability of an ecosystem to function as a life-support system.").

19 MCA Convention, article 2.1. See also article 2 of the Convention on Biological Diversity (1760 UNTS 79), which defines "ecosystem" as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unti." See also <http://www.cbd.int/ecosystem/default.shtml>, accessed 7 November 2013,

20 UN Doc. A/RES/65/155 (25 February 2011). The UN General Assembly's recognition of the importance of the Caribbean region is underscored by a series of resolutions promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development. See, e.g., UN Doc. A/RES/59/230 (22 December 2004); UN Doc. A/RES/61/197 (20 December 2006); UN Doc. A/RES/63/214 (19 December 2008); UN Doc. A/RES/65/155 (20 December 2010); and UN Doc. A/RES/67/205 (21 December 2012).

sustainable development needs and goals."[21] IUU fishing activities constitute a direct threat to those needs and goals both within and without the Caribbean region.

28. In the preamble to the Draft Agreement establishing the Caribbean Community Common Fisheries Policy, which has been approved by the competent ministers of CARICOM and is accepted as a policy statement pending final signature and ratification, the Participating Parties express their commitment to "fostering cooperation and collaboration among Participating Parties in the conservation, management and sustainable utilization of fisheries resources and related ecosystems for the welfare and well-being of the peoples of the Caribbean."[22] This regional instrument defines the "ecosystem approach to fisheries management" as follows in article 1(g):

> the balancing of diverse societal objectives, by taking account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.[23]

29. Similarly, the preamble to the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, while recognizing "the interdependence of living resources, between them and with other natural resources, within ecosystems of which they are part," states that "the inter-relationship between conservation and socioeconomic development implies both that conservation is necessary to ensure sustainability of development, and that socioeconomic development is necessary for the achievement of conservation on a lasting basis."[24]

30. Several provisions of the UNCLOS reflect the ecosystem-based approach. For example, article 194, paragraph 5, of the Convention provides that the measures taken in accordance with Part XII of the Convention must include those "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or

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21 Id.

22 See text in Annex 5 to this written statement.

23 According to article 1(f), "ecosystem" means "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit."

24 Agreement on the Conservation of Nature and Natural Resources, adopted by the Foreign Ministers at the 18th ASEAN Ministerial Meeting in Kuala Lumpur, Malaysia, on 9 July 1985, text available at <http://cil.nus.edu.sg/rp/pdf/1985%20Agreement%20on%20the%20Conservation%20of%20Nature%20and%20Natural%20Resources-pdf.pdf>, accessed 7 November 2013.

endangered species or other forms of marine life." Article 234 of the Convention, dealing with vessel-based marine pollution in ice-covered areas, refers to "irreversible disturbance of the ecological balance."

31. Finally, as Judge Dolliver Nelson has pointed out in respect of the maritime zones featured in the instant case:

> there exists a biological unity among most species to be found in both the EEZ and in the high seas. As a result the fisheries management regime for the EEZ and that for the high seas should necessarily be concordant.[25]

B. The principle of sustainable development

32. The principle of sustainable development was referenced in the preceding paragraphs. The status and content of this concept has been considered extensively by three committees of the International Law Association (hereinafter "the ILA"):

- the Committee on the Legal Aspects of Sustainable Development (1992 - 2002);[26]
- the Committee on International Law on Sustainable Development (2003 - 2012);[27] and
- the Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present).[28]

33. Of the various committees' work, the CRFM refers particularly to the Committee on the Legal Aspects of Sustainable Development's New Delhi Declaration[29] in addition to

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25 Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012) p. 1035, 1046.

26 For the Web site of the ILA's Committee on the Legal Aspects of Sustainable Development (1992 - 2002), see <http://www.ila-hq.org/en/committees/index.cfm/cid/25>, accessed 7 November 2013.

27 For the Web site of the ILA's Committee on International Law on Sustainable Development (2003 - 2012), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>, accessed 7 November 2013.

28 For the Web site of the ILA's Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1044>, accessed 7 November 2013.

29 ILA, *Committee on the Legal Aspects of Sustainable Development: New Delhi Declaration* (2002) Resolution No. 3/2002, available at <http://www.ila-hq.org/download.cfm/docid/65DD8DEF-E74D-4ED5-925EBC6D73F19C97>, accessed 7 November 2013.

the latest resolution[30] of the Committee on International Law on Sustainable Development, which was adopted at the 75th Conference of the ILA in 2012, and the report of that Conference.[31]

34. The CRFM agrees with the New Delhi Declaration's preambular statement that:

> the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.[32]

35. The CRFM regards the principle of sustainable development so formulated, in addition to the precautionary approach[33] and the ecosystem-based approach,[34] as guiding the exercise of the rights and compliance with the obligations of both flag States and coastal States in ensuring the sustainable management of shared resources,[35] including straddling fish stocks and highly migratory fish stocks.

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30 ILA, *Committee on International Law on Sustainable Development: Sofia Guiding Statement* (2012) Resolution No. 7/2012, available at <http://www.ila-hq.org/download.cfm/docid/BE9EAAD7-1C34-431E-BE5C21DE11021910>, accessed 7 November 2013.

31 ILA, *Committee on International Law on Sustainable Development: Final Report of the Sofia Conference* (2012), available at <http://www.ila-hq.org/download.cfm/docid/7C2F958B-C576-4C55-94F79F50A87AE74D>, accessed 7 November 2013.

32 See *supra* note 29.

33 See section V.A.1 under Question 1 below.

34 See section A. above.

35 The CRFM adopts the definition of "shared resources" in article 19, paragraph 3(b), of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (see *supra* note 24). According to that provision, species may constitute shared resources "by virtue of their migratory character" or "because they inhabit shared habitats." Accordingly, this term covers both straddling fish stocks and highly migratory fish stocks. This Agreement, which has not yet entered into force but is nevertheless of relevance for definitional purposes.

C. Applicable rules

36. As a matter of general principle, it is the CRFM's view that there should be no lacunae in the obligations and responsibility of States for IUU fishing activities conducted by entities within their jurisdiction or control. Under international law, the responsibility of States can be engaged in situations where there is no damage. If damage is caused by IUU fishing activities, particularly to the living resources of the marine environment, there should always be an entity which bears responsibility and liability for that damage.

37. The obligations of flag States and coastal States are complementary. In the EEZ, the primary jurisdiction and responsibility to prevent, deter and eliminate IUU fishing rest with the coastal State. When fishing takes place on the high seas, the primary, and in many respects exclusive, jurisdiction and responsibility lie with the flag State based on its responsibility to exercise effective jurisdiction and control over vessels entitled to fly its flag in accordance with international law, with certain general obligations applying to all States and subject to the possibility of concurrent jurisdiction existing in certain circumstances.[36]

38. The rights enjoyed by flag States and coastal States under the Convention and other law of the sea sources are coupled with obligations. The Convention reflects a balancing of rights and obligations of States and the same applies to the legal regime governing IUU fishing activities.

39. The principal sources of international obligations and rules of international law are treaties, customary international law and general principles of law. In the context of IUU fishing, the rules emanating from those sources include:

40. ***(I)* The obligation to protect and preserve the marine environment**, which is expressed as a general responsibility of all States under article 192 of the Convention. The Tribunal has recognized that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[37] This general obligation is accompanied by a number of more specific obligations in relation to the EEZ and high seas.

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[36] The primacy of the flag State is recognized in a number of provisions in the Convention, notably articles 91-92, 94, 209, paragraph 2, 211, paragraphs 2 and 3, 212, 216, 218, 222, 223, 228, 231, and 292. See also M. Nordquist, S. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982* (Brill, 2011), Vols. I-VII, , Part XII, p. 255, para. 217.8(a) (hereinafter the "Virginia Commentary").

[37] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70. See also Virginia Commentary, Part XII, p. 43, para. 192.11(a).

41. **(2) The principle of *prevention***, which is a customary rule having its origins in the due diligence that is required of a State in its territory and imposes on States the duty to adopt preventative measures in its sphere of exclusive control when international law is breached by private actors. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[38] Thus, States are under a general obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control."[39] The International Court of Justice (hereinafter "the ICJ") has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[40] Accordingly, flag States are bound to make the best possible effort to secure compliance by vessels flying their flag. This requires the implementation and enforcement[41] of appropriate measures within the flag State's legal system for the prevention, reduction and control of IUU fishing so as to ensure the sustainable development of the shared living resources of the oceans and the coastal State's exclusive sovereign right over the living resources in areas within its jurisdiction.

42. **(3) The duty of *cooperation***, which is especially required where the nationals of multiple States fish from the same shared stocks, being stocks comprising highly migratory species of fish and stocks that straddle EEZs or the divide between an EEZ and the high seas (UNCLOS, articles 63 and 64). The duty to cooperate also applies in

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38 *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

39 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29. See also article 3 of the 1992 Convention on Biological Diversity, 1760 UNTS 142, pursuant to which States have "the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;" and Principle 2 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992), pursuant to which "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction."

40 Id.

41 It has been held that the obligation to prevent pollution of the marine environment, which is analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans, "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators:" *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, p. 14, para. 197. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 140 ("The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."). The CRFM considers that the same requirement of vigilance in enforcement is required in respect of measures adopted to prevent and combat IUU fishing activities.

respect of all fishing on the high seas so as to properly conserve and manage the living resources available (UNCLOS, article 118).[42] The duty to cooperate in good faith requires more than mere membership of relevant regional fisheries organizations; actual, good-faith cooperation within such mechanisms is required.[43]

43. ***(4)* The obligation to apply a *precautionary approach***, as reflected in Principle 15 of the 1992 Rio Declaration on Environment and Development and expressed in a number of treaty and other instruments. Principle 15 reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[44]

44. ***(5)* The coastal State's duty to *manage fishing in the EEZ***. Under article 56 of the Convention, coastal States have sovereign rights for the exploitation of fish stocks within their EEZ and jurisdiction over the protection and preservation of the marine environment. The Convention obliges coastal States to ensure that fish stocks within the EEZ are preserved while enabling the fishing of the "maximum sustainable yield." The coastal State's duty to manage fish stocks extends to shared stocks (i.e., those that straddle EEZs or the EEZ and the high seas, and highly migratory fish stocks), which requires actual good-faith cooperation between the States whose nationals and vessels fish from such stocks.

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42 See also the second preambular paragraph of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas: "Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned." Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958, entered into force on 20 March 1966, 559 UNTS 285.

43 See the discussion of the *Southern Bluefin Tuna* cases in section V.A.2 of Question 1 below. Further, the CRFM notes the Tribunal's statement that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law," which the CRFM regards as analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans: see *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 92.

44 Rio Declaration on Environment and Development, 31 ILM 874 (1992), Principle 15. See also Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012), p. 400.

45. **(6) The coastal State's *rights to prevent IUU fishing of its resources***, which are extensive and exist concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. In particular, coastal States may:

(a) legislate and enforce such laws as required to ensure the sustainable development of fish stocks within their EEZ, in accordance with Part V of the Convention.

(b) take all necessary steps to prevent IUU fishing activities (including at-sea transhipment and transporting of IUU fish hauls) within their territorial seas;

(c) make effective use of port State jurisdiction over vessels voluntarily within their ports which have engaged in IUU fishing activities affecting them. The CRFM notes that article 23, paragraph 1, of the 1995 UN Fish Stocks Agreement confirms that port States have the right "and the duty" to take such measures where international rules for the conservation and management of fish stocks have been breached.

(d) enter into regional and bilateral agreements with flag States to permit the exercise of coastal State jurisdiction on the high seas in respect of vessels flying the flags of other States.

CHAPTER 2

JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

46. As this is the first occasion on which the Tribunal has been requested to render an advisory opinion under article 138 of its Rules,[45] the Tribunal is called upon to examine questions of jurisdiction and admissibility that may arise in the exercise of this important function. The present chapter deals first with the jurisdiction of the Tribunal to give the advisory opinion requested (section I), second with possible issues of admissibility (section II), and third with the applicable law (section III).

I. Jurisdiction

47. The Tribunal should first determine whether it has jurisdiction to give the advisory opinion requested by the SRFC. Based on the *Kompetenz-Kompetenz* principle recognized in article 288, paragraph 4, of the Convention, it is for the Tribunal alone to decide the question of its jurisdiction.

48. In contrast to the Sea-Bed Disputes Chamber, the jurisdiction of the Tribunal to give advisory opinions is not explicitly addressed in Annex VI of the Convention ("Statute of the International Tribunal for the Law of the Sea"), except that article 21 of the Statute states that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.*"[46] (Emphasis added). The CRFM notes the generic reference to "jurisdiction" in article 21, which can be said to include both contentious and advisory jurisdiction. Moreover, article 20 of the Statute, which has to be read with article 21,[47] confirms that

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45 The Sea-Bed Disputes Chamber of the Tribunal issued an advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area* (Case No. 17) on 1 February 2011 based on article 191 of the Convention. *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 (hereinafter "the Deep Seabed Mining Advisory Opinion").

46 All references to the Convention are taken from the United Nations, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference, U.N. Pub. Sales No. E.83.V.5 (1983). See also the Virginia Commentary.

47 See Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 15; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 24 October 2005, p. 10. Texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

"[t]he Tribunal shall be open to entities other than States Parties … in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

49. The jurisdiction of the Tribunal to give advisory opinions is mentioned in the Rules of the Tribunal, the legal foundation for which is set forth in article 16 of the Statute of the Tribunal.[48] Article 138, paragraph 1, placed in Section H ("Advisory proceedings") of the Rules, reads: "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." The latter words are clearly linked to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" in article 21 of the Statute.[49] Article 138 of the Rules of the Tribunal clearly frames "rules for carrying out its functions," namely, the Tribunal's advisory function. Paragraph 2 of article 138 stipulates that "[a] request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal." Finally, paragraph 3 provides that the Tribunal "shall apply *mutatis mutandis* articles 130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber.

50. The ITLOS Web site confirms the advisory function and jurisdiction of the Tribunal, where it is stated under the tab "The Tribunal:"

> The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21). The Tribunal is open to States Parties to the Convention (i.e. States and international organisations which are parties to the Convention). It is also open to entities other than States Parties, i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement

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48 Article 16 of the Statute reads: "The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."

49 See also Speech by Judge Hugo Caminos, Representative of the International Tribunal for the Law of the Sea, at the First Meeting of International and Regional Courts of the World on the One-Hundredth Anniversary of the Central American Court of Justice, Managua, Nicaragua, 4-5 October 2007, p. 6 ("On the basis of that provision [i.e., article 21 of the Statute], article 138 of the Tribunal's Rules authorizes it to give an advisory opinion concerning the purposes of the Convention, if that is stipulated in an international agreement."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

> conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" (Statute, article 20).
>
> (...)
>
> The Seabed Disputes Chamber is competent to give advisory opinions on legal questions arising within the scope of the activities of the International Seabed Authority. The Tribunal may also give advisory opinions in certain cases under international agreements related to the purposes of the Convention.

51. The above statement confirms that intergovernmental organizations which are not parties to the Convention may have access to the Tribunal pursuant to article 20, paragraph 2, of the Statute.

52. Under the tab "Jurisdiction" on the ITLOS Web site, the following is stated under the heading "Advisory jurisdiction:" "The Tribunal may also give an advisory opinion on a legal question if this is provided for by 'an international agreement related to the purposes of the Convention' (Rules of the Tribunal, article 138)." This language is in line with the words "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" employed in article 21 of the Statute.

53. It has been pointed out in the literature that:

> The jurisdiction of ITLOS to issue advisory opinions has been raised on several occasions at meetings of LOSC States Parties and during debates in the UN General Assembly. However, no strong objection appears to have been raised, and a number of States have expressed support for Rule 138. Authoritative commentators, including several judges on the Tribunal, have also affirmed the existence of a sound legal basis for Rule 138 in the LOSC.[50]

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[50] Michael B. Gerrard and Gregory E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), pp. 524-525 (footnotes within cite deliberately omitted). See also Michael A. Becker, "Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion," *American Society of International Law Insights*, Vol. 17, Issue 19 (23 August 2013); P. Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), pp. 393-394.

54. Indeed, consecutive Presidents of the Tribunal have confirmed the full Tribunal's advisory jurisdiction through a series of official statements.[51]

55. In sum, in the view of the CRFM there can be no doubt that the Tribunal is vested with advisory jurisdiction on the basis of its constituent instruments, in addition to contentious jurisdiction. Such a jurisdiction also accords with the judicial function entrusted to the Tribunal as an independent judicial body under the Convention.[52] In order to exercise its judicial functions properly in accordance with the Convention and implementing instruments, including the Rules of the Tribunal, the Tribunal must be vested with advisory jurisdiction. These instruments must be interpreted to ensure the effectiveness of their terms. To conclude otherwise would contravene the rule of *effet utile*. As the ICJ has stated, "[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot

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51 See, e.g., Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 24 October 2005, p. 11; Statement of Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, on the occasion of the ceremony to commemorate the Tenth Anniversary of the Tribunal, 29 September 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, p. 9; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, pp. 18-19 (describing the Tribunal's advisory function as "a significant innovation in the international judicial system"); 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, pp. 4, 6-10 (pointing out that the full Tribunal's advisory jurisdiction is "based on a procedure which has no parallel in previous adjudication practice" and represents a "procedural novelty"); Statement by Judge S. Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 76(a) "Oceans and the Law of the Sea", at the Sixty-sixth Session of the United Nations General Assembly, 6 December 2011, p. 4, para. 9; Statement by Shunji Yanai, President of ITLOS, given at the International Conference at Yeosu, Republic of Korea, 12 August 2012, p. 7; and Statement made by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 75(a) "Oceans and the Law of the Sea", at the Plenary of the Sixty-seventh Session of the United Nations General Assembly, 11 December 2012, p.3, para. 7 (all texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=49&L=1%2527%2560%2528>, accessed 7 November 2013).

52 See, e.g., Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea," 9(3) *Chinese Journal of International Law* 565-587 (2010); Doo-young Kim, "Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea," *Issues in Legal Scholarship 2010*; Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited," 39 *Ocean Dev. & Int'l L.* 360 (2008).

justify [an interpretation of a treaty] contrary to [its] letter and spirit."[53] Thus, the CRFM invites the Tribunal to conclude that it has advisory jurisdiction.

56. The CRFM will briefly consider four issues arising from article 138 of the Rules of the Tribunal and the SRFC's request, namely:

(a) Whether there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion;

(b) Whether there was a valid request of the requesting organization;

(c) Whether the questions asked are "legal questions;" and

(d) Whether the request was transmitted to the Tribunal by a body "authorized by or in accordance with the agreement to make the request to the Tribunal."

57. In the view of the CRFM, these are the only conditions to be met for the Tribunal to have jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

58. As regards the first issue, the conditions to be met under article 138 of the Rules are: (a) that there is an international agreement; (b) that the agreement is related to the purposes of the Convention; and (c) that it provides specifically for the submission of a request for an advisory opinion to the ITLOS. Under article 33 ("Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion") of the MCA Convention, "[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." In other words, the MCA Convention provides specifically for the submission to the Tribunal of a request for advisory opinion and confers on the Conference of Ministers, acting through the Permanent Secretary, the power to make such requests. The MCA Convention, a multilateral treaty which regulates 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, is evidently an international agreement related to the

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53 *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), p. 428; R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 1280 ("The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless … . [A]n interpretation is not admissible which would make a provision meaningless, or ineffective") (referring to international decisions and literature in footnote 26); Deep Seabed Mining Advisory Opinion, para. 57.

purposes of the Convention, which also addresses the conservation and management of living resources within the EEZ and on the high seas.[54] The MCA Convention deals with IUU fishing in Part IV. It is submitted therefore that the Tribunal should conclude that there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion.

59. As to the second issue, the information provided by the requesting organization shows that the decision of the competent body of that organization—namely, the Conference of Ministers comprising representatives of each of the Member States of the SRFC[55]—was taken unanimously and is otherwise in accordance with the constituent instrument and internal rules of procedure of the organization. Article 8 of the SRFC Agreement provides that "[d]ecisions taken at the Conference of Ministers shall be unanimously agreed upon by representatives of Member Countries which shall undertake to ensure their application;" this is therefore the key stipulation applicable to the validity of decisions made by the Conference of Ministers. The "Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory Opinion," adopted on 28 March 2013 during the Fourteenth Extraordinary Session of the Conference of Ministers of the SRFC held in Dakar from 25 to 29 March, received a unanimous vote and appears otherwise to have been validly adopted on the basis of article 8 of the constituent instrument of the SRFC and article 33 of the MCA Convention. It is submitted therefore that the Tribunal should conclude that there is in this case a valid request by the requesting organization.

60. With respect to the third issue, the Tribunal must satisfy itself that the advisory opinion requested by the SRFC concerns "legal questions" within the meaning of article 138 of the Rules of the Tribunal. According to article 131, paragraph 1, of the Rules, which applies *mutatis mutandis* to advisory opinions under article 138 by operation of article 138, paragraph 3, of the Rules, "[a] request for an advisory opinion on a legal question … shall contain a precise statement of the question." In examining this requirement, the CRFM invites the Tribunal to observe that the four questions put to the Tribunal

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54 The MCA Convention is a "treaty" as defined in article 2, paragraph 1(a), of the 1969 Vienna Convention on the Law of Treaties ("'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

55 Article 4 of the Convention of 29 March 1985 on the establishment of a Sub Regional Fisheries Commission as amended in 1993 (hereinafter "the SRFC Agreement"), lists "the Conference of Ministers" as one of three organs of the SRFC. Article 5 further describes the Conference of Ministers as "the supreme organ of the Commission" with a mandate "to decide on any matter relating to the preservation, conservation and management of fishery resources in the sub-region."

relate, *inter alia*, to "the obligations" of the flag State; the extent to which the flag State shall "be held liable;" and "the rights and obligations of the coastal State." The questions put to the Tribunal in this case concern the interpretation of provisions of the Convention and raise issues of general international law. As the ICJ has stated, "questions 'framed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law'(*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, para. 15)."[56] It is submitted therefore that the Tribunal should conclude that the questions raised by the SRFC are of a legal nature.

61. Finally, as regards the fourth issue, Judge José Luis Jesus, speaking in his capacity as President of the Tribunal, has stated that "any organ, entity, institution, organization or State that is indicated in … an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a body within the meaning of article 138, paragraph 2, of the Rules."[57] Pursuant to the aforementioned Resolution of the Conference of Ministers of the SRFC, the Permanent Secretary of the SRFC, who heads the Permanent Secretariat of the SRFC and is charged with "implementing decisions of the Conference of Ministers,"[58] transmitted the request for an advisory opinion by letter dated 27 March 2013 addressed to the President of the Tribunal, and received by the Registry on 28 March 2013.[59] According to the text of that Resolution, the Conference of the Ministers "**[d]ecides**, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion" on the four questions submitted to the Tribunal (emphasis in original).[60] The resolution was signed by the representatives of all seven Member States of the SRFC. The Nineteenth Session of the Conference of Ministers of the SRFC had instructed the Permanent Secretary of the

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56 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, 415, para. 25 (22 July 2010). See also Deep Seabed Mining Advisory Opinion, para. 39.

57 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, pp. 9-10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

58 SRFC Agreement, article 12.

59 See ITLOS Order 2013/2 of 24 May 2013, p. 2.

60 Id.

SRFC to refer the four questions to the Tribunal for an advisory opinion. It is submitted therefore that the Tribunal should answer the fourth issue in the affirmative.

62. For the aforementioned reasons, the CRFM invites the Tribunal to find that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

II. Admissibility

63. In the view of the CRFM, there are no grounds on which the Tribunal should decline to provide the advisory opinion requested by the SRFC. Being an independent and impartial judicial body, the Tribunal's answers to the questions submitted to it by the SRFC will assist all subjects of international law to which the Convention is addressed in the performance of their rights and obligations under the Convention as well as general international law.

64. The Tribunal has a high responsibility to ensure that the provisions of the Convention are interpreted and implemented properly and the regime for fisheries in the EEZ and on the high seas is properly interpreted and applied.[62] Through its authoritative statements in reply to the SRFC's questions, the Tribunal will contribute to the implementation of the Convention's pertinent provisions and, indeed, sound governance of the seas and oceans and the Rule of Law in general.[63] By answering the questions submitted by the SRFC the Tribunal will assist the SRFC, as well as all similarly placed entities, in the performance of their activities. The SRFC and its Member States as well as States Parties to the Convention may take guidance from the interpretation in the Tribunal's advisory opinion of the pertinent rules on the obligations and liability of States in the Convention and under general international

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62 In resolution 56/12 of 28 November 2001, the UN General Assembly underlined what it referred to as the Tribunal's "important role and authority concerning the interpretation or application of the Convention." UN Doc. A/RES/56/12. As a former President of the Tribunal has stated, "interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention." 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, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013. See also Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, pp. 9-10 ("Advisory proceedings could also be advantageous for those seeking an indication as to how a specific sea-related matter could be interpreted under the Convention or which would be the applicable law when there is no specific provision governing the matter."); Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 19, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

63 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252&L=0>, accessed 7 November 2013.

law.[64] Accordingly, the CRFM invites the Tribunal to conclude that it is appropriate to render the advisory opinion requested by the SRFC and to proceed accordingly.

III. Applicable Law

65. The Tribunal should also indicate the applicable law. Article 23 of the Statute of the Tribunal reads: "The Tribunal shall decide all disputes and applications in accordance with article 293." In the view of the CRFM, there is no reason not to apply article 23 of the Statute to matters specifically provided for in any agreement which confers jurisdiction on the Tribunal.

66. Article 293, paragraph 1, of the Convention, reads: "A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention." In the view of the CRFM, "other rules of international law" must be interpreted to refer to the sources of international law listed in article 38 of the Statute of the International Court of Justice.[65] Article 38, paragraph 1, reads:

> The Court, …. , shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> (b) international custom, as evidence of a general practice accepted as law;
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> (c) the general principles of law recognized by civilized nations;

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64 See also Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, pp. 7-8 ("Through an advisory opinion, the requesting body may obtain legal guidance from the Tribunal on a specific question … ."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

65 The preamble to the Charter of the United Nations refers to the need to respect "the obligations arising from treaties and other sources of international law." As a former President of the Tribunal has stated, the "reference [in article 293] to 'other rules of international law' should be understood to include rules of customary international law, general principles that are common to the major legal systems of the world transposed into the international legal system, and rules of a conventional nature." Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, pp. 7-8, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

67. As Judge Rüdiger Wolfrum has repeatedly stated in his capacity as President of the Tribunal:

> I should underline that the law of the sea should not be seen as an autonomous regime but as part of general international law. In effect, numerous provisions in the Convention are today considered part of general international law, and the obligations of States Parties under the Convention entail international legal obligations.[66]

68. The "other rules of international law" referred to in article 293, paragraph 1, of the Convention also include those concerning the interpretation of treaties contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[67] Articles 31 and 32 reflect customary international law[68] and should be applied by the Tribunal in its interpretation of the relevant provisions of the Convention and other conventional law sources.[69]

69. The procedural rules applicable during advisory proceedings before the Tribunal are set out in section H ("Advisory proceedings") of the Rules of the Tribunal, article 138, paragraph 3 of which provides that the Tribunal "shall apply *mutatis mutandis* articles

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66 Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, p. 7; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 18 (texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013). See also Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, p. 7 ("By applying the Convention in a specific case, the Tribunal applies not only the new treaty provisions that it contains, but also the general international law that it codifies."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

67 155 UNTS 331.

68 See *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), I.C.J. Reports 2007*, p. 60, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. U.S.A.), I.C.J. Reports 2004*, p. 48, para. 43; *Japan – Taxes on Alcoholic Beverage*, Report of the Appellate Body, WT/DS8/AB/R, 1996, p. 10.

69 The CRFM invites the Tribunal to apply the approach to treaty interpretation laid out in paragraphs 57-63 of the Deep Seabed Mining Advisory Opinion.

130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber. Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.