## DECLARATION BY JUDGE KULYK

I have voted in favour of the Advisory Opinion and support its conclusions. However, I would like to clarify my views on several issues relevant to the case.

**I**. Although some States requested a second round of written statements, the Tribunal concluded that it was not required, and "that no further time limit would be fixed pursuant to … the Rules within which States Parties and the intergovernmental organizations … could present written statements on the statements made" (Advisory Opinion para. 31).

The Tribunal could have benefited from a second round of written statements. It would have facilitated the clarification and consolidation of arguments previously presented by the participants. Allowing the submission of additional written pleadings and counterarguments would have provided opportunities for further analysis and examination of the different views and for their more comprehensive assessment. Granting the option for a second round of written statements would have contributed to strengthening the inclusivity of the proceedings and would have been consistent with the Tribunal's previous practice in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission ("SRFC Advisory Opinion").*[1]

**II**. I fully support existence of the Tribunal's advisory jurisdiction, as it explained in the *SRFC Advisory Opinion.* However, I wish the Tribunal had taken this opportunity to further elaborate on related issues, given that the circumstances of this case were not identical to those of the *SRFC Advisory Opinion*, in particular with regard to the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (the COSIS Agreement) and the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission ("the MCA Convention").

[1] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4.

The objective of the MCA Convention, dealt with in the *SRFC Advisory Opinion*, is to implement the 1982 UN Convention on the Law of the Sea ("the Convention"), and in particular, its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector, and to ensure that the policies and legislation of the SRFC Member States are more effectively harmonized with a view to better exploitation of fisheries resources in the maritime zones under their respective jurisdictions. To respond to the questions posed in the *SRFC Advisory Opinion*, the Tribunal had stated that it "w[ould] be called upon to interpret the relevant provisions of the Convention and of the MCA Convention".[2]

The content of the COSIS Agreement is important, *inter alia,* for the assessment by the Tribunal "whether the questions posed by the Commission constitute matters which fall within the framework of the COSIS Agreement" (Advisory Opinion para. 105). Referring to its jurisprudence in the *SRFC Advisory Opinion*, the Tribunal considers it "enough if the questions have a "sufficient connection" with the purpose of the COSIS Agreement." (Advisory Opinion para. 106). In the *SRFC Advisory Opinion*, the Tribunal used that 'connection' to limit the jurisdiction only to the exclusive economic zones of the SRFC Member States.[3] Yet, in the present case, by interpreting 'connection' broadly, the Tribunal in fact extends to matters that are mostly not subject of the COSIS Agreement.

**III.** I wish the Tribunal had elaborated more nuanced reasoning on the balance under article 193 of the Convention between the sovereign right of States to exploit their natural resources pursuant to their environmental policies and their duty to protect and preserve the marine environment and how it is to be applied in relation to pollution from anthropogenic GHG emissions.

Article 193 calls for a careful balancing act between the sovereign right of States to exploit their natural resources and their duty to ensure that such

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[2] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, para. 65.
[3] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, para. 69.

exploitation does not harm the marine environment. Thus, it must be interpreted in a way that does not upset that balance.

The phrase “pursuant to their environmental policies” acknowledges the unique situations or interests of individual States, allowing them a considerable degree of latitude in determining how best to exploit their natural resources in alignment with their national priorities and environmental considerations. This provision also offers States flexibility in determining how to balance resource exploitation with environmental protection.

Thus, article 193 defines how States may exercise sovereign right to exploit their natural resources and ensures that it is in accordance with the duty to protect and preserve the marine environment. It may be read as elucidating the parameters within which States can exercise sovereign right to exploit their natural resources, while serving to resolve the possible conflict between the interests of resource exploitation and the protection of the marine environment, including in relation to pollution from anthropogenic GHG emissions.

**IV.1.** I share the Tribunal’s view that there are various factors that determine what measures are necessary to prevent, reduce and control marine pollution from anthropogenic GHG emissions, science being particularly relevant in this regard, as well as international rules and standards relating to climate change. Other factors that need to be considered include consistency of the measures with the Convention and, the requirement, in accordance with article 194, paragraph 4, to “refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.” This requirement apparently applies to the “activities carried out by other States” rather than to the rights themselves[4].

However, in my view, the provisions of article 194, paragraph 1, that “States shall take … all measures … that are necessary … using for this purpose the practicable means at their disposal and in accordance with their capabilities” set up

[4] See also *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, para. 540.

additional conditions for implementation of these measures, rather than in relation to their scope and content.

The Advisory Opinion recognizes that “the reference to ‘the best practicable means at their disposal’ and ‘in accordance with their capabilities’ injects a certain degree of flexibility *in implementing the obligation* under article 194, paragraph 1, of the Convention.” (Advisory Opinion para. 226) (*Emphasis added*). The Tribunal also concludes that “the obligation under article 194, paragraph 1, of the Convention to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions is one of due diligence. The standard of due diligence is stringent …. However, the *implementation of the obligation* of due diligence may vary according to States’ capabilities and available resources.” (*Emphasis added*)

A distinction must be made between the obligation to take all necessary measures and how it is actually implemented. While the obligation is the same for all States Parties to the Convention, the implementation may differ in accordance with States’ capabilities.

The insertion into article 194, paragraph 1, of the clause ‘in accordance with their capabilities’ takes account of the concerns of States, particularly developing States, that the obligation to “take … all measures … that are necessary” could overburden them. The lack of capabilities does not mean that measures are not necessary. Rather, it may require prioritization of necessary measures, efforts to improve capabilities, etc. Equality in the treatment of the obligation to take all necessary measures strives to secure the uniform application of the highest standards of protection and preservation of the marine environment.

**IV.2.** The provision in article 194, paragraph 1, on using ‘the best practicable means at the disposal’ of States is another element in understanding how necessary measures to prevent, reduce and control pollution of the marine environment must be implemented.

‘Practicable’ and ‘at the disposal’ are key terms here. The former means that benefits from the measures are more significant than the expenses, and the latter

recognizes that the implementation of these obligations must be realistic and take into account each State's circumstances and resources. These measures must also be results-oriented, meaning that they must be not only technically feasible but also economically viable and socially acceptable. The evaluation of what constitutes 'practicable means' may depend on the State's access and ability to adopt relevant technologies, on available financial resources, or on its administrative and institutional capacity to implement the necessary measures.

Using 'the best practicable means at the disposal of States', according to article 194, paragraph 1, necessitates a balancing act where the effectiveness and benefits of measures to prevent, reduce and control pollution, including from anthropogenic GHG emissions, are weighed against the practical limitations of the costs and burdens of their implementation. This allows States to avoid taking overly burdensome measures that might be excessively costly relative to the intended outcomes.

The requirement to use 'the best practicable means at the disposal' of States also underscores the importance of the adaptability of the measures to prevent, reduce and control pollution, particularly in the context of pollution from anthropogenic GHG emissions. States are expected to adapt their measures to evolving technological, environmental and socio-economic developments.

*(signed)*

Markiyan Kulyk