Declaration of Judge Cot

(*Translation by the Registry*)

1. I welcome the broad participation in these first advisory proceedings before the International Tribunal for the Law of the Sea sitting en banc. The number of participants and the quality of the written and oral submissions from the representatives of the Sub-Regional Fisheries Commission, the States Parties, the European Union and international and non-governmental organizations have been remarkable. The advisory proceedings have been a success in this respect.

2. I concur in most of the answers given by the Tribunal to the questions posed by the SRFC. I do, however, have serious reservations in respect of the Tribunal's convoluted reasoning in establishing the basis for its jurisdiction and of its refusal to exercise the discretionary power which it does nonetheless recognize that it holds.

3. The Tribunal considers its advisory jurisdiction to be founded on the combined provisions of an international agreement, the MCA Convention, and article 21 of its Statute. In my view this interpretation is misguided, as it is contrary to the rules codified in the 1969 Vienna Convention on the Law of Treaties. It presupposes that there is a plain meaning which can be ascribed to the article and that the term "matters" is more precise than it actually is. Quite a number of States participating in the proceedings skilfully advocated an opposite and equally plausible interpretation. The ambiguity of the provision is blindingly obvious. Reference should have been made to the *travaux préparatoires* for the Convention, which in no way confirm the interpretation adopted by the Tribunal. I would add that that interpretation does not allow the different language versions to be reconciled. The French version does not refer to "matters" and does not translate that term by "*matières*", which would have been the case had the Convention drafters intended to confer upon the term the special meaning encompassing a reference to advisory jurisdiction.

4. The Tribunal would have been well advised to find, more modestly, that nothing in the Convention prohibits the Tribunal from exercising advisory jurisdiction. I add that for two decades there has been no reaction at all from the States Parties to the language of article 138 of the Rules, dating from 1997. It is for this reason that I can accept the principle of the Tribunal's advisory jurisdiction.

5. My main reservation concerns the refusal by the Tribunal to exercise its discretionary power to answer or not to answer questions referred to it in advisory proceedings. To justify that refusal, the Tribunal takes refuge behind the jurisprudence of the International Court of Justice and states that it is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (para. 71).

6. The Tribunal could have taken inspiration here from the observation it itself makes in citing the *MOX Plant Case* regarding the danger of transposing rules from one situation to a different one in connection with interpreting the term "matters" in the Statute of the International Court of Justice (para. 57).

7. The Tribunal's position in advisory proceedings is very different from that of the Court. The advisory procedure in the International Court of Justice is governed by a tight framework. An opinion may be requested only by the General Assembly or the Security Council or with their authorization. The request is the subject of a preliminary discussion within a body in which all interested parties are represented. Each State concerned is thus involved in drafting the questions asked.

8. The situation in the present case is entirely different. The request was written by the States of the SRFC, representing the interests, clearly legitimate interests, of coastal States. On the other hand, flag States did not take part in drafting the questions.

9. The dangers of abuse and manipulation, if the Tribunal does not provide a procedural framework by exercising its discretionary power, are evident. States could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position.

10. Some States which supported the existence of jurisdiction on the part of the Tribunal nevertheless urged caution in its exercise, in two regards in particular: respect for third parties' rights and limitation of the Tribunal's jurisdiction to the content of the basic agreement allowing for the referral, in this case the MCA Convention. The Tribunal ignored these caveats, and wrongly so in my view.

11. With regard to respect for third parties' rights, the Tribunal states that "consent . . . is not relevant" since the opinion has no binding force (para. 76). This confuses the question of binding force with the question of legal effect.

The opinion does not have binding force – that is obvious – not even on its addressee, the SRFC. However, if it is without legal effect, it is meaningless. More precisely, the Tribunal finds itself in the position of legal counsel requested to advise a client and this is hardly compatible with its judicial function. This odd notion that advisory opinions have no legal effect warrants further consideration.

12. As regards limitation to the content of the basic agreement, the Tribunal, again taking up the jurisprudence of the Court, considers it sufficient that there be a "connection" with the MCA Convention (para. 68). The analogy with the International Court of Justice does not hold here either. Granted, the Tribunal does limit the scope of the opinion to the exclusive economic zone of the SRFC Member States in conformity with article 1, paragraph 2, of the MCA Convention, but, by interpreting "connection" broadly, the Tribunal ends up opining on matters not mentioned in the MCA Convention. This is true in particular of international responsibility, which lies at the heart of questions 2 and 3 asked by the SRFC.

13. In short, my feeling is that an opportunity has been missed. The Tribunal has taken a remarkable action by affirming its advisory jurisdiction on the basis of unpersuasive reasoning. Yet it could have demonstrated imagination and established a coherent system guaranteeing the rights of members of the international community in judicial proceedings. Instead, it sheltered behind the jurisprudence of the International Court of Justice, relying on analogies that have no reason to be. I would like to hope that in future the Tribunal will succeed in ridding itself of this unhappy conception by assuming in full the discretionary power to which it pays lip service.

(*signed*) J.-P. Cot