

Separate Opinion of Judge Ndiaye

(Translation by the Registry)

1. I have voted in favour of the Advisory Opinion as I am in agreement with the grounds set out by the Tribunal in respect of the main questions. However, in my view, the Advisory Opinion could have adopted a much simpler approach to Question 4.

2. In accordance with article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, this separate opinion will concentrate on that point.

3. Paragraph 187 states: “The Tribunal now wishes to clarify its understanding of the expression ‘sustainable management’”. Paragraph 188 reads:

The Tribunal observes that the Convention does not define the expression “sustainable management”. Article 63 of the Convention as such does not address the issue of cooperation with respect to measures necessary to ensure the sustainable management of shared stocks. [...]

4. The international judicial function is performed by the adjudicating body charged with laying down the law, irrespective of the nature of the proceedings before it, whether contentious or simply advisory.

5. Laying down the law, that is the positive law, the law in force when the decision is rendered, or the *lex lata*. Where there is no law, the judge, acting in keeping with the principle of the “court’s duty to decide”, interprets so as to avoid a *non liquet*. In law, therefore, it is primarily where uncertainty prevails or gaps exist that a *non liquet* comes into play.

6. *Non liquet* means:

The impossibility for the judge or arbitrator to decide on the merits of the case owing to insufficient information about the facts or the lack of a sufficient basis in the law in force between the parties to make a decision, or because the judge considers that what he is called upon to do oversteps his judicial role.

(J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, 2001, p. 747)

[Translation by the Registry]

7. It must be said that none of the situations outlined above is present in the instant case and that, what is more, the basis in respect of the existing law more than suffices. The Tribunal has placed itself in a straightjacket with respect to the scope of its jurisdiction in the current case. It states

that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States. Therefore, the rights and obligations of the coastal State referred to in the fourth question are to be construed as rights and obligations of the SRFC Member States.

(para. 179)

The Tribunal has failed to devote sufficient attention to the nature and the import of the questions submitted to it. According to the Tribunal, the first question relates solely to the exclusive economic zone of the Member States of the SRFC, and the phrase “[IUU] fishing activities . . . conducted within the Exclusive Economic Zones of third party States” means such activities conducted within the exclusive economic zones of the SRFC Member States (para. 87).

8. It is a different matter for Question 4 in so far as the adjacent area and the migration area for tuna are outside the exclusive economic zones of the SRFC Member States. The Tribunal recognizes this itself, without drawing the appropriate inferences, when it addresses the subject of tuna. It states:

[...] The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the ICCAT, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

(para. 207(iii))

9. Accordingly, given the scope of the jurisdiction it determined for itself, the Tribunal should have refrained from examining Question 4 and declined jurisdiction to entertain that question. It was strikingly mistaken about the extent of the law in force with regard to straddling fish stocks and highly migratory fish stocks, i.e., in this case, shared stocks and stocks of common interest, especially stocks of small pelagic species and tuna.

10. Question 4 is governed by the United Nations Convention on the Law of the Sea and the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish

Stocks and Highly Migratory Fish Stocks. The question reads: “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?”

11. The SRFC sets out the context in which the question was raised. It states that small pelagic species and tuna are migratory species that congregate seasonally, depending on environmental conditions, in waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management. The SRFC explains that, in general, the concerned States do not consult each other when setting up measures for the management of these resources. In fact, these pelagic resources are subject to fishing authorizations pursuant to fishing agreements between the coastal State and foreign companies entered into without consultation with neighbouring coastal States through whose waters those resources pass. Some SRFC Member States continue to act in isolation, issuing licenses to fish for the shared resources.

12. It should be borne in mind that the purpose of enshrining the notion of exclusive economic zone in the United Nations Convention on the Law of the Sea was to put an end to the conflict between the interests of coastal States and those of long-range fishing operators. As shown by experience, the result has been unsatisfactory. That is why the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks gives practical effect to, and complements, the Convention through recourse to the concept of “sustainability”.

13. The relevant provisions of the Convention relating to straddling fish stocks and highly migratory species are found in Part v (Exclusive Economic Zone) and Part VII (High Seas). Under article 63, paragraph 2, the coastal State and the States fishing for such stocks in the adjacent area must seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

14. Under article 64, the coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I must cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of

such species throughout the region, both within and beyond the exclusive economic zone.

15. The Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks seeks to make the conservation and management measures introduced for the high seas compatible with those adopted in areas under national jurisdiction and, in exercising the sovereign rights conferred on it, the coastal State must apply the general principles set out in article 5 of that Agreement, which provides:

Article 5
General principles

In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:

- (a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;
- (b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
- (c) apply the precautionary approach in accordance with article 6;
- (d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;
- (e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

- (f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;
- (g) protect biodiversity in the marine environment;
- (h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;
- (i) take into account the interests of artisanal and subsistence fishers;
- (j) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia , vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes;
- (k) promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and
- (l) implement and enforce conservation and management measures through effective monitoring, control and surveillance.

16. With regard to cooperation on the measures to be taken in ensuring the sustainable management of shared stocks, the Straddling Fish Stocks Agreement establishes mechanisms for international cooperation. Thus, under article 8, paragraph 1, coastal States and States fishing on the high seas must, in accordance with the Convention, pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks. In addition, paragraph 2 of article 8 provides that States must enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may

be under threat of over-exploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks.

17. The Agreement accords a central role to Regional Fisheries Management Organizations (RFMOs), which are the ideal forum for cooperation between States with a view to implementing conservation and management objectives both within areas under national jurisdiction and on the high seas.

18. The main contribution of the Straddling Fish Stocks Agreement in this regard

is to define the desirable institutional characteristics of an effective RFMO by listing, in a legally binding form, the matters upon which States are expected to agree in order to bring about the sustainable management of fisheries. These include agreement on conservation and management measures to ensure long-term sustainability, agreement on participatory rights such as allocations of allowable catch or levels of fishing effort, agreement on decision-making procedures that facilitate the adoption of conservation and management measures in a timely and effective manner, and agreement on mechanisms for obtaining scientific advice and ensuring compliance with and enforcement of conservation and management measures.

(Recommended Best Practices for RFMOs, Report of an independent panel to develop a model for improved governance by RFMOs, M. Lodge (dir.), Chatham House, April 2007, pp. 4–5)

19. Applied to the situation in the present case, “sustainable management” amounts to establishing mechanisms for cooperation among the SRFC Member States and with the SRFC to ensure that exploitation levels for shared stocks and stocks of common interest do not over time exceed the rate of replenishment of those stocks. In this case, ICCAT would be best placed to play this role given the great distances travelled by highly migratory species. It would be more suited than the SRFC or the other regional fisheries organizations to which article 63 of the Convention refers. Those organizations can, on the other hand, play an important role in policy coordination, management, fisheries development and stock assessment and perform the functions assigned to them by the Straddling Fish Stocks Agreement. Article 10 of that Agreement provides:

Article 10
Functions of subregional and regional fisheries management
organizations and arrangements

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

- (a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;
- (b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;
- (c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;
- (d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
- (e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;
- (f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;
- (g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;
- (h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;
- (i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated;
- (j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;
- (k) promote the peaceful settlement of disputes in accordance with Part VIII;
- (l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organization or arrangement; and

- (m) give due publicity to the conservation and management measures established by the organization or arrangement.

20. In fulfilling their obligation to cooperate through Regional Fisheries Management Organizations, States must strengthen those organizations in order to enable them to perform their main functions: collection and exchange of data, determination of the allowable catch, allocation of rights among member States and compliance with fisheries conservation and management measures.

21. The data collection system is established in article 119 of the Convention. States must take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors. In establishing conservation measures for the living resources in the high seas, States must take into consideration the effects on species associated with or dependent upon harvested species so as not to threaten their reproduction. Furthermore, available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks must be contributed and exchanged through the RFMOs. Experts from those organizations must endeavour to compile and analyse the information reported by States. Those data are crucial and constitute an essential prerequisite for any decision-making with a view to sustainable management of fisheries.

22. The Straddling Fish Stocks Agreement complements the Convention in this area by laying down standards for data collection and exchange. Annex I to the Agreement provides for:

- general principles;
- principles of data collection, compilation and exchange;
- basic fishery data;
- vessel data and information;
- reporting;
- data verification, and
- data exchange.

23. Lastly, article 6, paragraph 2, of the Agreement provides that

States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

24. With regard to determination of the allowable catch and allocation of rights, the Agreement provides that, in fulfilling their obligation to cooperate, States must agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort (article 10(b)).

25. Nevertheless, it is one thing to determine the allowable catch but quite another to allocate or distribute rights among the member States of the RFMO, which raises the problem of cooperation in respect of sustainable management of stocks and the stability of the conservation schemes set up by the RFMOs. Those organizations must tackle overfishing of harvested stocks and overcrowding of fisheries together with the consequences for associated or dependent species whose reproduction may become seriously threatened.

26. Participation by all States fishing for straddling fish stocks or highly migratory species in the RFMO for a given fishing area or migration area would greatly facilitate the matter of allocating rights, which raises very complex economic and political problems.

27. Article 11 of the Agreement sets out the factors to be taken into account for the fair allocation of the rights to available fish stocks:

- (a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery;
- (b) the respective interests, fishing patterns and fishing practices of new and existing members or participants;
- (c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks;
- (d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;
- (e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; and

- (f) the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks also occur.

28. In order to attain the objectives set with a view to conserving and sustainably managing stocks, the measures decided by RFMOs must be implemented by the member States and complied with by vessels flying their flag. To that end, first of all, the monitoring, control and surveillance system is crucial. It allows the flag State effectively to exercise its jurisdiction and control over ships flying its flag. That system includes vessel registration, vessel monitoring (VMS), inspection programmes and observers.

29. Second, there are the rules on transshipment, where the monitoring system proves difficult. This is an important means of combating IUU fishing but calls for greater cooperation in SRFC countries lacking naval surveillance resources.

30. Furthermore, the Straddling Fish Stocks Agreement supplements the obligations imposed on the flag State by article 94 of the Convention, which are intended to permit it effectively to exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

31. Articles 18, 19 and 20 of the Straddling Fish Stocks Agreement supplement these general provisions. They provide for the measures to be taken by the flag State, enabling it to exercise effective control over the high-seas activity of fishing vessels flying its flag and to respond where conservation and management measures have been contravened. The Agreement also provides for specific measures relating to port State jurisdiction.

32. Lastly, with regard to port State measures, it should be noted that the 2009 Agreement on Port State Measures is not yet in force. Therefore, national laws and the practice of the SRFC can play an important role in the management of shared stocks and stocks of common interest. The port State is able for example to exercise real enforcement powers against offending vessels. Given that long-range vessels operate at great distance from their home ports, they frequently have to visit ports of States close to the fishing areas for supplies or repairs.

33. To begin with, a port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures. When taking such measures a port State must not discriminate in form or in fact against the vessels of any State.

34. Second, a port State may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels that are voluntarily in its ports or at its offshore terminals.

35. In addition, States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

36. Lastly, the port State may adopt punitive measures in the event of the violation of its laws and regulations, by prohibiting use of the services of its ports, such as resupplying.

37. All in all, in accordance with the duty to cooperate with a view to the conservation and sustainable management of shared stocks and stocks of common interest, the SRFC must

- determine the allowable catch and allocate quotas among its Member States;
- draw up the register or record of licensed fishing vessels;
- reduce fishing effort or capacity;
- establish prior consultation between Member States before fishing permits for shared stocks or stocks of common interest are issued.

With regard to compliance and enforcement, the SRFC must take measures in relation to:

- boarding and inspection;
- the observer programme;
- the vessel monitoring system;
- the register and record of vessels engaged in IUU fishing;
- marking of vessels and fishing gear;
- landing and transhipment of catches;

- port State measures;
- the catch documentation scheme; and lastly,
- effective implementation of article 18 of the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks relating to the duties of the flag State.

(*signed*) T.M. Ndiaye