

Separate Opinion of Judge Paik

1. I agree with the findings in the Opinion that the Tribunal has an authority to give an advisory opinion and that its competence in the present proceedings is limited to matters which fall within the framework of the MCA Convention. I also agree with much of what the Tribunal has to say with respect to the merits of the four questions posed by the Sub-Regional Fisheries Commission (hereinafter “the SRFC”). However, I do have some reservations about certain aspects of the legal reasoning that leads to the conclusion as to Question 1. In particular, I believe that in addressing this question the Tribunal should have paid more attention to significant legal developments related to flag State responsibility concerning fisheries conservation and management that have taken place since the adoption of the United Nations Convention on the Law of the Sea (hereinafter “the Convention” or “UNCLOS”). As to Question 4 on the sustainable management of shared resources, I would have wished the Tribunal to elaborate more on the obligation to cooperate and how it is to be applied in relation to the sovereign rights of the coastal State to conserve and manage living resources in its exclusive economic zone (hereinafter “the EEZ”), as this issue is at the core of the legal difficulty faced by some SRFC Member States. Although I ultimately voted in favour of the conclusions on the two questions in the operative part, I find it necessary to clarify my views on those matters.

Question 1

Scope and meaning of the question

2. Question 1 is drafted in a rather confusing manner as it uses the term “third party States”, which is defined as non-Member States of the SRFC under article 2.9 of the MCA Convention, in describing the place where illegal, unreported and unregulated fishing (hereinafter “IUU fishing”) is conducted (“within the Exclusive Economic Zone of third party States”). However, it is clear from the written and oral submissions of the SRFC that it intends to request the Tribunal to address the problem of IUU fishing within the EEZs of the SRFC Member States. It becomes even clearer in light of the subject matter and the geographical scope of the MCA Convention, namely the harmonization of policies and legislations of the SRFC Member States with a view to a better exploitation of

fisheries resources within the maritime areas under their respective jurisdiction. Thus Question 1 concerns the obligations of the State in respect of IUU fishing by a vessel flying its flag within the EEZs of the SRFC Member States.

Applicable law

3. Understood this way, the question requires the examination of the applicability or otherwise of some international agreements relevant to the present case. According to the information provided to the Tribunal, all seven SRFC Member States are Parties to the Convention. Two Member States, Senegal and Guinea, are also Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks (hereinafter “the UN Fish Stocks Agreement”). This agreement addresses matters that go beyond the jurisdiction of the Tribunal in this case as it applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction. However, there are some exceptions and a few provisions concern the areas under national jurisdiction. Thus it could be relevant to the present case to that extent. In addition, while there is no detailed, comprehensive information available to the Tribunal, it is known that several Member States of the SRFC have concluded fisheries access agreements with other States, including the European Union. Those agreements are also relevant. On the other hand, no information is available on States whose vessels engage in fishing in the EEZs of the SRFC Member States and their status as to the above treaties.

4. Between the SRFC Member States and flag States which are Parties to the Convention, the Convention applies. However, between the SRFC Member States and flag States which are not Parties to the Convention, the Convention is inapplicable unless provisions relevant to the question reflect the rules of customary international law. Similar analysis can be made as to the UN Fish Stocks Agreement. If both SRFC Member States and flag States are Parties to that agreement, then the UN Fish Stocks Agreement applies between them. Otherwise, it is inapplicable unless the relevant provisions of that agreement represent the rules of customary international law. In cases where fisheries

access agreements are concluded between the SRFC Member States and flag States, those agreements should apply.

Post-UNCLOS legal developments

5. Question 1, in my view, raises a difficult legal challenge because there is no clear provision in the Convention that specifically addresses flag State obligations concerning IUU fishing, yet there have been significant legal developments related to this issue since the adoption of the Convention. Especially in the 1990s and onwards, a steady stream of treaties and other legal instruments have been adopted in response to growing international concern over IUU fishing. They include several global and regional fisheries treaties, a number of bilateral fisheries access agreements, a series of soft law instruments mostly adopted under the auspices of Food and Agriculture Organization (hereinafter “the FAO”) and a range of fisheries-related resolutions adopted by international organizations including the General Assembly of the United Nations. Admittedly some of those instruments are voluntary in nature and not legally binding. Moreover, many provisions of those instruments are not exactly tailored to address the question before the Tribunal, as they concern flag State responsibility in respect of IUU fishing on the high seas rather than in the foreign EEZs. Nevertheless the post-UNCLOS normative developments as a whole, I believe, are relevant to the present case as they could give useful guidance as to the state and direction of international fisheries law on this question. Therefore, it would be less than judicious to turn a blind eye to them simply because they are not legally binding or they do not directly address the question at hand. On the contrary, I think that there is a compelling reason, to be explained below, for the Tribunal to examine whether and to what extent those developments should be considered in addressing Question 1. This would require scrutiny of those developments, with their legal implications, as well as a survey of related State practice. Obviously such a task is beyond the scope of this opinion and I do not intend to undertake it. However, I will clarify in more detail below why these post-UNCLOS legal developments are relevant to answering the question before the Tribunal and how and to what extent they should be reflected.

Article 94 of the Convention – general duties of the flag State

6. Let me, however, first start with the Convention. While the Convention contains no specific provision on the obligation of the State in respect of IUU fishing by vessels flying its flag, article 94 of the Convention provides for general duties of the flag State over its vessels. Then it would be necessary to examine what inference, if any, could be drawn from these general duties in addressing the issue at hand.

7. Article 94, paragraph 1, of the Convention provides that every State shall effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag. Paragraph 2 imposes upon the flag State, in particular, obligations to maintain a register of ships containing the names and particulars of ships flying its flag and to assume jurisdiction under its national law over each ship flying its flags and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. Paragraphs 3 and 4 elaborate the necessary measures that must be taken by the flag State to ensure safety at sea. Paragraph 5 requires the flag State, in taking the above measures, to conform to generally accepted international regulations, procedures and practices. Paragraph 6 further requires the flag State to investigate and, if appropriate, take necessary action in cases where a State which has clear grounds to believe that proper jurisdiction and control have not been exercised reports the facts to it. Paragraph 7 requires the flag State to cooperate in the conduct of any inquiry into a marine casualty or incident of navigation on the high seas involving ships flying its flag.

8. As a provision of general nature, article 94 of the Convention applies to all ships, including fishing vessels, at all time irrespective of their location. Moreover, while this article is particularly directed to the flag State's jurisdiction and control concerning "safety at sea", as can be seen from paragraphs 3, 4, 5 and 7, it should be noted that the duties of the flag State are not confined to matters related to safety at sea.

9. This point becomes clearer if article 5, paragraph 1, of the 1958 Convention on the High Seas (hereinafter "the Geneva Convention"), upon which article 94,

paragraph 1, of the Convention is based, is compared. Article 5, paragraph 1, of the 1958 Geneva Convention reads:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have nationality of the State whose flag they entitled to fly. There must exist a genuine link between the State and the ship; *in particular, the State must effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag.* (emphasis added)

Thus the above provision considers the duty of the flag State to exercise jurisdiction and control to be an essential condition for the grant of its nationality to ships. This condition is understood not to establish prerequisites to be satisfied before granting nationality but to mean that once its nationality is granted, the flag State is required to exercise effective jurisdiction and control over its ship (see *The M/V “Virginia G” Case (Panama/Guinea-Bissau), Judgment of 14 April 2014*, paragraphs 110–113). On the other hand, the specific duties of the flag State for safety at sea were addressed separately in article 10 of the Geneva Convention. It is clear from the above that the duties of the flag State enshrined in the closing sentence of article 5, paragraph 1, of the Geneva Convention, and now in article 94, paragraph 1, of the Convention, are general duties, not the duties confined only to safety at sea.

10. This view can further be strengthened by the fact that the Convention contains elsewhere a specific provision on the duty of the flag State with respect to the protection of the marine environment. For example, article 217 of the Convention requires the flag State to ensure compliance by vessels flying its flag with applicable international rules and standards and with its laws and regulations adopted in accordance with the Convention for prevention, reduction and control of pollution of the marine environment from vessels. Thus the duties of the flag State elaborated under article 94 should not be considered exhaustive. While article 94 of the Convention is silent on the duties of the flag State in respect of IUU fishing, that does not necessarily mean that no such duties exist under the Convention.

11. It should be recalled that historically the notion of flag State jurisdiction and control had been developed in domestic maritime laws and practices, in particular in British law, and later transformed into international law (for historical development of flag State responsibility, see John N. K. Mansell, *Flag*

State Responsibility: Historical Development and Contemporary Issues, Springer, 2009). Such jurisdiction and control were exercised first with respect to the registration of ships, and then expanded to ensuring the safety of ships, and more recently further to protecting the marine environment. Considering the disastrous consequences of maritime accidents for human life and the marine environment, it is not difficult to understand that flag State jurisdiction and control have developed over a long time and mostly in the context of ensuring safety at sea. Nor is it surprising that the duties of the flag State under article 94 of the Convention are formulated with its focus on that matter. Over time, however, flag State jurisdiction and control have evolved to cope with new issues, reflecting the changing needs of society and the new demands of the time. In interpreting article 94 of the Convention, it is important to take into account this evolving, open-ended context of the duties of the flag State.

12. Article 94 of the Convention, based and expanded on similar provisions laid down in the Geneva Convention, is the product of the long process of imposing duties on States to regulate vessels flying their flags. As such, I believe, it reflects the rules of customary international law on this matter.

Article 58, paragraph 3, of the Convention

13. The general duty of the flag State to exercise jurisdiction and control takes a more specific form when it applies to the EEZ. In this regard, of particular relevance is article 58, paragraph 3, of the Convention, which reads that “[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and *shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention*” (emphasis added).

14. Although “States” are direct addressees of the obligation to comply with the laws and regulations of the coastal State, private actors, be they natural or juridical persons, are the ultimate regulatory targets under this provision, as they are the main actors engaging in various activities in the foreign EEZ. Thus in order to perform its duties under article 58, paragraph 3, of the Convention,

the State must ensure that those subject to its jurisdiction comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention. Through article 94, paragraph 1, of the Convention, those subject to jurisdiction of the State should include a ship flying its flag. Thus when it comes to fishing activities within the EEZ, it follows that a State is under the obligation to ensure that fishing vessels flying its flag comply with the laws and regulations of the coastal State governing fishing activities.

15. On the other hand, article 62, paragraph 4, of the Convention should be understood to provide for the extent of the prescriptive jurisdiction of the coastal State to regulate foreign fishing in its EEZ. Likewise article 73 of the Convention provides for the extent of its enforcement jurisdiction on this matter.

16. Taking article 94 and article 58, paragraph 3, of the Convention together, it can be stated that the flag State has an obligation to ensure that fishing vessels flying its flag comply with the laws and regulations adopted by the coastal State when fishing in its EEZ. As IUU fishing is defined broadly under article 2.4 of the MCA Convention to include fishing activities conducted under the jurisdiction of a State in contravention of the laws and regulations of the coastal State (illegal activities) or fishing activities not reported or misreported to the relevant national authority in contravention of national laws and regulations (unreported fishing), it follows that the flag State has an obligation to ensure that its fishing vessels do not engage in IUU fishing to that extent.

Bilateral fisheries access agreements

17. The above finding is strengthened by a number of bilateral fisheries access agreements concluded between the flag State and the coastal State, including those between the flag States and the SRFC Member States. Many access agreements contain a clause to the effect that the flag State undertakes to ensure that vessels flying its flag must comply with the terms of the agreement and the laws and regulations of the coastal State. The same may be said of the access agreements concluded by the SRFC Member States. For example, the Agreement on a Sustainable Fisheries Partnership between the European Union and the Republic of Senegal provides in article 5.4 that “[t]he Union undertakes to take all the appropriate steps required to ensure that its vessels

comply with the provisions of this Agreement and of the relevant Senegalese legislation”. Similarly, the Fisheries Partnership Agreement between the Republic of Guinea and the European Community provides in article 5.4 that

[t]he Community undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Guinea has jurisdiction, in accordance with the United Nations Convention on the Law of the Sea.

A more or less identical clause is also found in the access agreement between the EEC and the Republic of Cape Verde. It should be noted that this treaty practice has been widespread and consistent.

UN Fish Stocks Agreement

18. Article 18 of the UN Fish Stocks Agreement provides in detail for the duties of the flag State in respect of fishing vessels flying its flag “on the high seas”. However, paragraph 3(b)(iv) of this article provides that measures to be taken by a State in respect of vessels flying its flag shall include the establishment of regulations to ensure that they do not conduct unauthorized fishing within areas under the national jurisdiction of other States. This obligation is, in substance, similar to the obligation of the flag State to ensure compliance by its fishing vessels with the laws and regulations of the coastal State in its EEZ, as unauthorized fishing amounts to fishing in contravention of the laws and regulations of the coastal State.

Obligation of the flag State to ensure compliance

19. In summing up, although it contains no provision that directly addresses the obligation of the flag State in respect of IUU fishing in the EEZ of the coastal State, the Convention, especially articles 94 and 58, paragraph 3, taken together, provides a sufficient basis for imposing upon the flag State an obligation to ensure that its vessels comply with the laws and regulations of the EEZ and thus do not engage in IUU fishing. In addition, such an obligation is widely assumed by flag States when concluding fisheries access agreements with coastal States. A similar obligation is imposed upon the flag State under the UN Fish Stocks Agreement. I would further say that the obligation of the

flag State to ensure compliance by its fishing vessels with the laws and regulations of the coastal State is established as a rule of customary international law. Therefore, flag States whose vessels engage in fishing in the EEZs of the SRFC Member States, whether they are Parties to the Convention or not, are subject to the above obligation.

Guidance to the content of obligation

20. As the Tribunal observed in paragraph 129, the obligation to ensure compliance is an obligation of conduct in that the flag State must deploy adequate means, exercise best possible efforts, and do the utmost to obtain the result. This obligation is also an obligation of due diligence in that the flag State must exercise due diligence to achieve the result. In addition, it is an obligation of general nature, the content of which needs to be further elaborated. Then the next question is what are the necessary measures to be taken by the flag State to fulfil this general obligation.

21. Here I cannot concur with the findings of the Tribunal in paragraph 133 that “the Convention is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance with the ‘due diligence’ obligation to prevent IUU fishing by vessels flying its flag in the exclusive economic zones of the SRFC Member States”. In the following paragraphs 134–139, the Tribunal refers back to those provisions (articles 58, paragraph 3, 62, paragraph 4, 192, 193, and 94, paragraphs 1, 2 and 6, of the Convention), which it relied upon to draw a conclusion that “[t]he flag State is under the ‘due diligence obligation’ to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag” (paragraph 129 of the Opinion). Then the Opinion simply repeats the obligation of the flag State to take necessary measures to ensure compliance (paragraphs 134 and 136 of the Opinion) rather than elaborating the content of those measures. Furthermore, nowhere in the provisions of the Convention referred to above can be found the measures that are spelled out in paragraphs 135, 137 and 138 of the Opinion, such as prohibition of vessels of the flag State from fishing in the exclusive economic zone unless so authorized

by the coastal State, proper marking of fishing vessels, and the imposition of adequate sanctions.

22. I do not think that guidance on this question can be found in the Convention for the obvious reason that this question is not directly addressed in the Convention. Useful guidance should be found somewhere else. In this regard, I regret that the Tribunal pays scant attention to the legal developments related to flag State responsibility in respect of IUU fishing since the adoption of the Convention. In fact, strengthening of flag State responsibility in respect of IUU fishing represents one of the most significant developments of international fisheries law during the past two decades or so. In my view, those developments should have received fuller and more balanced treatment in determining the content of the obligations of the flag State in this regard. There is no doubt that the Tribunal should not allow itself to apply soft law or *lex ferenda*. Nor do I claim that the detailed obligations of the flag State elaborated in various international legal instruments have become the rules of customary international law applicable to all States. However, it does not follow from the above that the Tribunal is barred from examining those legal developments in order to find guidance to identify necessary measures to be taken by the flag State in fulfilling its general obligation to ensure compliance. To the contrary, I believe that the Tribunal should undertake this task. Let me explain why.

Generally accepted international regulations, practices and procedures

23. It is well known that the Convention, as a comprehensive framework of legal principles, does not, in general, attempt to prescribe a detailed set of rules or standards for the various subjects it deals with. Instead, the Convention first formulates a general duty, and then refers to and incorporates those rules or standards developed in other legal instruments into its ambit. This approach is intended to give specific content to the general duty enunciated by the Convention. It also serves a useful purpose of enabling the Convention to update the content of the general duty, thus ensuring the long-term relevance and validity of the Convention. This so-called rule of reference is widely employed, particularly in Part XII of the Convention on the protection and

preservation of the marine environment. One of the consequences of employing the rule of reference is to impose legal obligations on a State to apply certain rules and standards which it would otherwise not have been legally bound to apply. In such a situation, the rules and standards apply to the State not because they are legally binding as either treaty or custom but because they are incorporated into the Convention through the rule of reference.

24. Article 94 of the Convention, in fact, employs the rule of reference in regard to the exercise of flag State duties. Paragraph 5 of this article provides that

[i]n taking the measures called for in paragraphs 3 and 4 *each State is required to conform to generally accepted international regulations, procedures and practices* and to take any steps which may be necessary to secure their observance. (emphasis added)

Although the rule of reference is used in this paragraph to specify the duties of the flag State to ensure safety at sea, there is no reason to confine the rule of reference approach only to that context. True, there is no provision in the Convention that directly addresses the general duties of the flag State in respect of IUU fishing, still less any provision referring to generally accepted international regulations, procedures and practice in implementing such duties. However, as stated above, the combination of articles 94 and 58, paragraph 3, of the Convention provides a solid basis for the general obligation of the flag State to ensure that fishing vessels flying its flag comply with the laws and regulations of the coastal State when fishing in its EEZ. I would further argue that the rule of reference employed in Part XI of the Convention in general, and in article 94, paragraph 5, of the Convention in particular, can be extended and applied by analogy to give effective content to the general yet rather vague obligations of the flag State in respect of IUU fishing.

25. To state that the flag State has an obligation to ensure compliance without specifying what measures it must take would result in leaving a large measure of discretion to the flag State. It is not hard to predict what will happen in that case. In coping with ever worsening problems of IUU fishing, such an approach would prove to be far less than satisfactory. This is why specific content must be given to the obligation of the flag State.

26. Thus the measures to be taken to ensure compliance must be specific and conform to generally accepted international regulations, procedures and practices, lest the obligation of the flag State be rendered empty. In this regard it should be noted that there is no agreed definition of “generally accepted”. Nor is it clear what is meant by “regulations”, “procedures” or “practices”. However, it is evident that such regulations, procedures or practices need not be customary law or treaties of general acceptance. Requiring such a stringent threshold would be contrary to the very objective the rule of reference is intended to achieve. In my view, regulations, procedures or practices established in international legal instruments that are accepted by a sufficient number of States may be regarded as being generally accepted. It may also be relevant that those regulations, procedures or practices are consistently upheld by a series of legal instruments.

27. Thus what constitutes generally accepted international regulations, procedures and practices to which the measures to be taken by the flag State must conform requires an examination of those international agreements and legal instruments addressing flag State responsibility in respect of IUU fishing. This is a reason why the Tribunal should look carefully into the post-UNCLOS legal developments, not because they are binding upon States as either treaty law or customary law, but rather because they are indicative of such regulations, procedures and practices.

Necessary measures to be taken by the flag State

28. As stated earlier, it is beyond the scope of this opinion to undertake a comprehensive study of a range of international legal agreements or instruments relevant to the present case. One thing I want to clarify in this regard, though, is that many of those instruments address the obligation of the flag State in respect of fishing on the high seas rather than in the EEZs. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas is a notable example in this regard. However, there is no reason why many measures enumerated in the above agreement cannot be applied in respect of foreign fishing in the EEZ of the coastal State. For example, requirements of authorization or of the vessels being marked in accordance with generally accepted standards can be applied to fishing vessels regardless of the location of their activities.

29. I would like to point out that perusal of those relevant instruments suggests some common measures to be taken by the flag State that conform to “generally accepted international regulations, standards or practices”. They include, in my view, the following:

- Control of its fishing vessels by means of fishing authorization, that is to say, prohibition of fishing for its fishing vessels in the EEZ of the coastal State without the authorization of the flag State;
- Establishment and maintenance of a national record of fishing vessels;
- Requiring its fishing vessels to be marked and readily identified in accordance with generally accepted standards;
- Monitoring, control and surveillance of its fishing vessels and their operations;
- Making fishing in contravention of the laws and regulations of the coastal State in its EEZ an offence under the national legislation of the flag State and enforcement, including imposition of sanctions of sufficient gravity.

In concluding, I believe that the flag State has an obligation to ensure that fishing vessels flying its flag comply with the laws and regulations of the SRFC Member States and thus do not engage in IUU fishing within their EEZs. The necessary measures to be taken by the flag State in order to fulfil this obligation include the measures stated above.

Question 4

The key issue

30. Question 4 is concerned with the rights and obligations of the SRFC Member States with respect to the sustainable management of the shared living resources in their EEZs. In light of the background information provided by the SRFC and its written and oral statement, it is clear that the key legal problem the SRFC requests the Tribunal to address is that arising from the lack of cooperation between the SRFC Member States concerning the conservation and management of shared resources. According to the SRFC, some Member States experience serious difficulties in effectively conserving and managing their shared resources due to a lack of cooperation. In particular, the SRFC notes the practice of some States of issuing fishing licenses in respect of such resources without consultation with neighbouring States.

31. If this is the case, the main task of the Tribunal in answering Question 4 should be to clarify the meaning and scope of the duties to cooperate in managing the shared resources laid down in the relevant provisions of the Convention, and possibly of the MCA Convention, and to examine how they should be applied between the SRFC Member States. In particular, the Tribunal needs to address the relationship between the duties to cooperate and the sovereign rights of the coastal State to conserve and manage living resources in its EEZ, which, I think, is at the core of the legal difficulty faced by the SRFC Member States. Only then can the present Opinion be of some meaningful help in mitigating the predicament of the SRFC Member States and in facilitating cooperation between them for the sustainable management of shared resources. I regret that the present Opinion is rather short on this aspect.

Obligation to cooperate for conservation and management of shared stocks

32. Under article 56, paragraph 1, of the Convention, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources in its EEZ. The sovereign rights of the coastal State are, however, conditioned by its obligations to conserve and utilize those resources in accordance with articles 61 and 62 of the Convention. The above sovereign rights and obligations of the coastal State extend to the transboundary stocks, the straddling stocks and the highly migratory species within its EEZ.

33. For transboundary stocks, article 63, paragraph 1, of the Convention imposes upon the coastal States an obligation to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. However, this obligation is without prejudice to the other provisions in Part V of the Convention. For straddling stocks, article 63, paragraph 2, of the Convention imposes upon the coastal State and the States fishing for such stocks in the adjacent area the obligation to seek to agree upon the measures necessary for the conservation of these stocks in the adjacent area. It should be noted, however, that this provision is not relevant to this case and is thus inapplicable as its subject matter goes beyond the jurisdiction of the Tribunal in the present proceedings. On the other hand, to the extent that those stocks are found within the EEZs of two or more coastal States, article 63,

paragraph 1, of the Convention can be applied. For highly migratory species, article 64 of the Convention imposes upon the coastal State and other States whose nationals fish in the region for that species an obligation to cooperate 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.

34. It is undisputed that cooperation is a key element in the sustainable management of shared resources. Such resources, by their very nature, cannot be conserved or managed effectively without cooperation. However, in addressing the problem arising from the lack of cooperation in this case, simply emphasizing the obligation of cooperation or repeating the relevant provisions of the Convention would hardly be sufficient. In a sense, it begs the question what specifically is required to discharge that obligation, a question this Opinion does not answer satisfactorily.

Meaning and scope of obligation to cooperate

35. The obligation under article 63, paragraph 1, of the Convention is an obligation to “seek to agree”. This obligation does not impose an obligation to reach an agreement. Rather it embodies the notion of a *pactum de negotiando*, an obligation to enter into negotiation in good faith with a view to reaching an agreement. The International Court of Justice elaborated this notion, stating that “the parties are under the obligation to enter into negotiations with a view to arriving at agreement, not merely to go through a formal process of negotiation . . . ; they are under the obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at paragraph 85).

36. On the other hand, the obligation to cooperate under article 64, paragraph 1, of the Convention may be understood to be of more general nature and have a broader scope. Like the obligation to seek to agree under article 63, it does not entail an obligation to arrive at an agreement. The obligation to cooperate may include duties to notify, to exchange information, and to consult and negotiate. While it is unclear how this obligation is to be discharged, the UN Fish Stocks Agreement is instructional in this regard, as it gives a few indications about how the obligation to cooperate on the conservation and

management of straddling fish stocks and highly migratory fish stocks is to be performed. For example, article 7, paragraphs 3, 4 and 5, of the Agreement provides that in giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time; if no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII; and pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature.

Rights and obligations of the SRFC Member States

37. Understood this way, the SRFC Member States have an obligation to cooperate for the sustainable management of their shared resources. For transboundary stocks, they must exchange information and data relevant to their conservation and management and negotiate in good faith with a view to agreeing upon cooperative arrangements. Such arrangements may include, *inter alia*: joint determination of the total allowable catches for those stocks, their allocation among States concerned, the coordination or joint adoption of conservation measures, and the establishment of mechanisms for effective monitoring, control and surveillance. Once the allocation is determined, unless agreed otherwise, each SRFC Member State has sovereign rights to utilize the allocated resources in its EEZ, but only pursuant to article 62 of the Convention. However, if the SRFC Member States are unable to reach an agreement after negotiation in good faith, then each Member State must conserve and manage those stocks occurring within its EEZ in accordance with articles 61 and 62 of the Convention. On the other hand, if a Member State of the SRFC unjustifiably refuses to consult or negotiate, or wilfully delays in responding to proposals for conservation and management measures, such conduct could result in the breach of the State's obligation under article 63, paragraph 1, of the Convention and entail liability. It should be noted in this regard that any dispute arising from the alleged failure to comply with the obligation under article 63, paragraph 1, of the Convention, unlike those disputes arising from the exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, can be submitted to the compulsory procedure under Part XV, section 2, of the Convention.

38. However, the failure to comply with an obligation to cooperate under article 63, paragraph 1, of the Convention does not entail any constraint or restriction on the exercise of the sovereign rights of the SRFC Member State to conserve and manage the transboundary stocks within its EEZ such as the determination of the total allowable catch and giving other States access to the surplus of the allowable catch, as that obligation is “without prejudice to” the other provisions in Part V, including article 56 of the Convention. Thus the right course of action for a SRFC Member State in cases where another Member State sharing the transboundary stocks refuses to cooperate without justifiable reasons is to invoke the liability of that State for the breach of obligations under article 63, paragraph 1, of the Convention, not to try to restrict the exercise of its sovereign rights in the EEZ.

Implication of the MCA Convention

39. Finally, it should be noted that the MCA Convention, which applies to the present case, contains some provisions relevant to the question at hand. For example, article 3.3 (Authorization of access to surplus resources) of the MCA Convention provides that the access agreements or other arrangements made by the SRFC Member States to authorize access by foreign fishing vessels shall contain clauses on the adaptation to the allowed fishing effort according to the availability of resource and “in line with the principle of precautionary and the ecosystem-based approach”. In addition, article 9.2 (Fisheries management) of the MCA Convention provides that Member States shall give “priority” to the establishment of concerted fisheries management plans for shared stocks. It is clear that emphasis is laid on the need to apply the precautionary approach and the ecosystem-based approach in authorizing access to non-Member flag States and on the need to establish concerted management for shared stocks. It remains to be seen how those provisions, in particular article 9.2 of the MCA Convention requiring the SRFC Member States to give “priority” to the establishment of concerted management plans for shared stocks, are to be interpreted and applied in relation to sovereign rights of a SRFC Member State to conserve and manage shared resources in its EEZ. It may be arguable that the MCA Convention could be interpreted as attaching greater weight or higher priority to the obligation to cooperate, in relation to the sovereign rights of the coastal State, than the Convention. This point is not addressed in the Opinion but is worth noting.

(signed) J.-H. Paik