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LAW OF THE SEA

PROFESSOR NILUFER ORAL

Codification Division of the United Nations Office of Legal Affairs

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Outline

Legal instruments and documents

1. United Nations Convention on the Law of the Sea, 1982

   For text, see *The Law of the Sea*, 1997 (United Nations Publication, Sales No. E.97.V.10) pp. 1-207
2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994

   For text, see *The Law of the Sea*, 1997 (United Nations Publication, Sales No. E.97.V.10) pp. 208-231
3. 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 Fish Stocks and Highly Migratory Fish Stocks (Straddling Fish Stocks Agreement), 1995

Case Law

4. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion of 2 April 2015, International Tribunal for the Law of the Sea, pp.14-20, 22-23, 31-42, 50-54; paras. 37-63, 70-79 (Jurisdiction), 109-140 (Flag State obligations), 141-150 (State responsibility and liability), 182-201(Coastal State responsibility)
5. *The M/V "Virginia G." Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, International Tribunal for the Law of the Sea, pp. 25-27, 51-68; paras. 55-63 (Background), 161-236 (Bunkering in the EEZ)
6. *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, 110-130; paras. 115-122, 150-204, 210-218
7. *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, International Tribunal for the Law of the Sea, pp. 103-115, 131-143, paras. 341-394, 450-499

Legal writings

Required readings

8. Tim Stephens, "ITLOS Advisory Opinion: Coastal and Flag State Duties to Ensure Sustainable Fisheries Management," Available at http://www.asil.org/insights/volume/19/issue/8/itlos-advisory-opinion-coastal-and-flag-state-duties-ensure
9. Nilufer Oral, "Transit Passage Rights in the Strait of Hormuz and Iran's Threats to

Block the Passage of Oil Tankers," available at https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage

10. Ashley Roach, "China's Shifting Sands," available at https://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys

Suggested readings (not reproduced)

11. Tullio Treves, "Historical Treatment of the Law of the Sea", *The Oxford Manual of the Law of the Sea*, Donald R. Rothwell, Alex G Oude Elferink, Karen N. Scott & Tim Stephens (eds.), Oxford University Press, 2015, pp. 1-23
12. Bernard H Oxman, "Courts and Tribunals: The ICJ, ITLOS, And Arbitral Tribunals", *The Oxford Manual of the Law of the Sea*, Donald R. Rothwell, Alex G Oude Elferink, Karen N. Scott & Tim Stephens (eds.), Oxford University Press, 2015, pp. 395-415
13. Yoshifumi Tanaka, "Navigational Rights and Freedoms", *The Oxford Manual of the Law of the Sea*, Donald R. Rothwell, Alex G Oude Elferink, Karen N. Scott & Tim Stephens (eds.), Oxford University Press, 2015, pp. 536-558
14. Moritaka Hayashi, "The 1995 UN Fish Stocks Agreement And the Law of the Sea", *Order for the Oceans at the Turn of the Century*, Davor Vidas & Willy Ostreng (eds.), Kluwer Law International, 1999, pp. 37-53
15. Gudmumdur Eiriksson "The Bay of Bengal Case before the International Tribunal for the Law of the Sea", *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, *Liber Amicorum Judge Hugo Caminos*, Lilian del Castillo (ed.), Brill Nijhoff, 2015, pp. 512-528
16. Jon Van Dyke and Sherry Broder, "Particularly Sensitive Areas-Protecting the Marine Environment in the Territorial Seas and Exclusive Economic Zones", *Denver Journal of International Law and Policy*, Vol. 40, 2011-2012, pp. 472-481

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 Fish Stocks and Highly Migratory Fish Stocks, 1995

UNTS, vol. 2167, p. 88

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New York, 2003

No. 37924

Multilateral

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 Fisb Stocks and Highly Migratory Fish Stocks (with annexes). New York, 4 August 1995

Entry into force: *11 December 2001, in accordance with article 40 (1) (see following page)*

Authentic texts: *Arabic, Chinese, English, French, Russian and Spanish*

Registration with the Secretariat of the United Nations: *ex officio, 11 December 2001*

Multilatéral

Accord aux fins de l'application des dispositions de la Couvention des Nations Unies sur le droit de la mer du 10 décembre 1982 relatives à la conservation et à la gestion des stocks de poissons dont les déplacements s'effectuent tant à l'intérieur qu'au delà de zones économiques exclusives (stocks chevauchants) et des stocks de poissons grands migrateurs (avec annexes). New York, 4 août 1995

Entrée en vigueur : *11 décembre 2001, conformément au paragraphe 1 de l'article 40 (voir la page suivante)*

Textes authentiques : *arabe, chinois, anglais, français, russe et espagnol*

Enregistremeut auprès du Secrétariat des Nations Unies : *d'office, 11 décembre 2001*

[ENGLISH TEXT — TEXTE ANGLAIS]

AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OFTHE UNITED NATIONS CONVENTION ON THE LAW OF THE SEAOF 10 DECEMBER 1982 RELATING TO THE CONSERVATION ANDMANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLYMIGRATORY FISH STOCKS

The States Parties to this Agreement,

Recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982,

Determined to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks,

Resolved to improve cooperation between States to that end,

Calling for more effective enforcement by flag States, port States and coastal States of the conservation and management measures adopted for such stocks,

Seeking to address in particular the problems identified in chapter 17, programme area C, of Agenda 21 adopted by the United Nations Conference on Environment and Development, namely, that the management of high seas fisheries is inadequate in many areas and that some resources are overutilized; noting that there are problems of unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States,

Committing themselves to responsible fisheries,

Conscious of the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations,

Recognizing the need for specific assistance, including financial, scientific and technological assistance, in order that developing States can participate effectively in the conservation, management and sustainable use of straddling fish stocks and highly migratory fish stocks,

Convinced that an agreement for the implementation of the relevant provisions of the Convention would best serve these purposes and contribute to the maintenance of international peace and security,

Affirming that matters not regulated by the Convention or by this Agreement continue to be governed by the rules and principles of general international law,

Have agreed as follows:

PART I
GENERAL PROVISIONS
Article 1
Use of terms and scope

1. For the purposes of this Agreement:

(a) "Convention" means the United Nations Convention on the Law of the Sea of 10 December 1982;

(b) "conservation and management measures" means measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement;

(c) "fish" includes molluscs and crustaceans except those belonging to sedentary species as defined in article 77 of the Convention; and

(d) "arrangement" means a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, inter alia, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.

2. (a) "States Parties" means States which have consented to be bound by this Agreement and for which the Agreement is in force.

(b) This Agreement applies mutatis mutandis:

(i) to any entity referred to in article 305, paragraph 1 (c), (d) and (e), of the Convention and

(ii) subject to article 47, to any entity referred to as an "international organization" in Annex IX, article 1, of the Convention

which becomes a Party to this Agreement, and to that extent "States Parties" refers to those entities.

3. This Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas.

Article 2
Objective

The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

Article 3
Application

1. Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.

2. In the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal State shall apply mutatis mutandis the general principles enumerated in article 5.

3. States shall give due consideration to the respective capacities of developing States to apply articles 5, 6 and 7 within areas under national jurisdiction and their need for assistance as provided for in this Agreement. To this end, Part VII applies mutatis mutandis in respect of areas under national jurisdiction.

Article 4
Relationship between this Agreement and the Convention

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.

PART II
CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKSAND HIGHLY MIGRATORY FISH STOCKS

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.

Article 6
Application of the precautionary approach

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

2. 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.

3. In implementing the precautionary approach, States shall:
(a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty;

(b) apply the guidelines set out in Annex II and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;

(c) take into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and

(d) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans

which are necessary to ensure the conservation of such species and to protect habitats of special concern.

4. States shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event that they are exceeded, States shall, without delay, take the action determined under paragraph 3 (b) to restore the stocks.

5. Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.

6. For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.

7. If a natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific evidence available.

Article 7
Compatibility of conservation and management measures

1. Without prejudice to the sovereign rights of coastal

States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

(b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

2. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks. In determining compatible conservation and management measures, States shall:

(a) take into account the conservation and management measures adopted and applied in accordance with article 61 of the Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such mea-

sures;

(b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;

(c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;

(d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;

(e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and

(f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

3. 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.

4. 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.

5. 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. In the event that they are unable to agree on such arrangements, any

of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII.

6. Provisional arrangements or measures entered into or prescribed pursuant to paragraph 5 shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure.

7. Coastal States shall regularly inform States fishing on the high seas in the subregion or region, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for straddling fish stocks and highly migratory fish stocks within areas under their national jurisdiction.

8. States fishing on the high seas shall regularly inform other interested States, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for regulating the activities of vessels flying their flag which fish for such stocks on the high seas.

PART III
MECHANISMS FOR INTERNATIONAL COOPERATION CONCERNING STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Article 8
Cooperation for conservation and management

1. Coastal States and States fishing on the high seas shall, 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.

2. States shall 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. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.

3. Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

4. Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have

access to the fishery resources to which those measures apply.

5. Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.

6. Any State intending to propose that action be taken by an intergovernmental organization having competence with respect to living resources should, where such action would have a significant effect on conservation and management measures already established by a competent subregional or regional fisheries management organization or arrangement, consult through that organization or arrangement with its members or participants. To the extent practicable, such consultation should take place prior to the submission of the proposal to the intergovernmental organization.

Article 9
Subregional and regional fisheries management organizations and arrangements

1. In establishing subregional or regional fisheries management organizations or in entering into subregional or regional fisheries management arrangements for straddling fish stocks and highly migratory fish stocks, States shall agree, inter alia, on:

(a) the stocks to which conservation and management measures apply, taking into account the biological characteristics of the stocks concerned and the nature of the fisheries involved;

(b) the area of application, taking into account article 7, paragraph 1, and the characteristics of the subregion or

region, including socio-economic, geographical and environmental factors;

(c) the relationship between the work of the new organization or arrangement and the role, objectives and operations of any relevant existing fisheries management organizations or arrangements; and

(d) the mechanisms by which the organization or arrangement will obtain scientific advice and review the status of the stocks, including, where appropriate, the establishment of a scientific advisory body.

2. States cooperating in the formation of a subregional or regional fisheries management organization or arrangement shall inform other States which they are aware have a real interest in the work of the proposed organization or arrangement of such cooperation.

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.

Article 11
New members or participants

In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States shall take into account, inter alia:

(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.

Article 12

Transparency in activities of subregional and regional fisheriesmanagement organizations and arrangements

1. States shall provide for transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements.

2. Representatives from other intergovernmental organizations and representatives from non-governmental organizations concerned with straddling fish stocks and highly migratory fish stocks shall be afforded the opportunity to take part in meetings of subregional and regional fisheries management organizations and arrangements as observers or otherwise, as appropriate, in accordance with the procedures of the organization or arrangement concerned. Such proce-

dures shall not be unduly restrictive in this respect. Such intergovernmental organizations and non-governmental organizations shall have timely access to the records and reports of such organizations and arrangements, subject to the procedural rules on access to them.

Article 13

Strengthening of existing organizations and arrangements

States shall cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures for straddling fish stocks and highly migratory fish stocks.

Article 14

Collection and provision of information and cooperationin scientific research

1. States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement. To this end, States shall in accordance with Annex I:

(a) collect and exchange scientific, technical and statistical data with respect to fisheries for straddling fish stocks and highly migratory fish stocks;

(b) ensure that data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements of subregional or regional fisheries management organizations or arrangements; and

(c) take appropriate measures to verify the accuracy of such data.

2. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements:

(a) to agree on the specification of data and the format in which they are to be provided to such organizations or

arrangements, taking into account the nature of the stocks and the fisheries for those stocks; and

(b) to develop and share analytical techniques and stock assessment methodologies to improve measures for the conservation and management of straddling fish stocks and highly migratory fish stocks.

3. Consistent with Part XIII of the Convention, States shall cooperate, either directly or through competent international organizations, to strengthen scientific research capacity in the field of fisheries and promote scientific research related to the conservation and management of straddling fish stocks and highly migratory fish stocks for the benefit of all. To this end, a State or the competent international organization conducting such research beyond areas under national jurisdiction shall actively promote the publication and dissemination to any interested States of the results of that research and information relating to its objectives and methods and, to the extent practicable, shall facilitate the participation of scientists from those States in such research.

Article 15
Enclosed and semi-enclosed seas

In implementing this Agreement in an enclosed or semi-enclosed sea, States shall take into account the natural characteristics of that sea and shall also act in a manner consistent with Part IX of the Convention and other relevant provisions thereof.

Article 16
Areas of high seas surrounded entirely by an area underthe national jurisdiction of a single State

1. States fishing for straddling fish stocks and highly migratory fish stocks in an area of the high seas surrounded entirely by an area under the national jurisdiction of a single State and the latter State shall cooperate to establish conservation and management measures in respect of those

stocks in the high seas area. Having regard to the natural characteristics of the area, States shall pay special attention to the establishment of compatible conservation and management measures for such stocks pursuant to article 7. Measures taken in respect of the high seas shall take into account the rights, duties and interests of the coastal State under the Convention, shall be based on the best scientific evidence available and shall also take into account any conservation and management measures adopted and applied in respect of the same stocks in accordance with article 61 of the Convention by the coastal State in the area under national jurisdiction. States shall also agree on measures for monitoring, control, surveillance and enforcement to ensure compliance with the conservation and management measures in respect of the high seas.

2. Pursuant to article 8, States shall act in good faith and make every effort to agree without delay on conservation and management measures to be applied in the carrying out of fishing operations in the area referred to in paragraph 1. If, within a reasonable period of time, the fishing States concerned and the coastal State are unable to agree on such measures, they shall, having regard to paragraph 1, apply article 7, paragraphs 4, 5 and 6, relating to provisional arrangements or measures. Pending the establishment of such provisional arrangements or measures, the States concerned shall take measures in respect of vessels flying their flag in order that they not engage in fisheries which could undermine the stocks concerned.

PART IV
NON-MEMBERS AND NON-PARTICIPANTS

Article 17
Non-members of organizations and non-participantsin arrangements

1. A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to coop-

erate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.

2. Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.

3. States which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement shall, individually or jointly, request the fishing entities referred to in article 1, paragraph 3, which have fishing vessels in the relevant area to cooperate fully with such organization or arrangement in implementing the conservation and management measures it has established, with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area. Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.

4. States which are members of such organization or participants in such arrangement shall exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organization nor participants in the arrangement and which are engaged in fishing operations for the relevant stocks. They shall take measures consistent with this Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures.

PART V
DUTIES OF THE FLAG STATE
Article 18
Duties of the flag State

1. A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.

2. A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.

3. Measures to be taken by a State in respect of vessels flying its flag shall include:

(a) control of such vessels on the high seas by means of fishing licences, authorizations or permits, in accordance with any applicable procedures agreed at the subregional, regional or global level;

(b) establishment of regulations:

(i) to apply terms and conditions to the licence, authorization or permit sufficient to fulfil any subregional, regional or global obligations of the flag State;

(ii) to prohibit fishing on the high seas by vessels which are not duly licensed or authorized to fish, or fishing on the high seas by vessels otherwise than in accordance with the terms and conditions of a licence, authorization or permit;

(iii) to require vessels fishing on the high seas to carry the licence, authorization or permit on board at all times and to produce it on demand for inspection by a duly authorized person; and

(iv) to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States;

(c) establishment of a national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States, taking into account any national laws of the flag State regarding the release of such information;

(d) requirements for marking of fishing vessels and fishing gear for identification in accordance with uniform and internationally recognizable vessel and gear marking systems, such as the Food and Agriculture Organization of the United Nations Standard Specifications for the Marking and Identification of Fishing Vessels;

(e) requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional and global standards for collection of such data;

(f) requirements for verifying the catch of target and non-target species through such means as observer programmes, inspection schemes, unloading reports, supervision of transshipment and monitoring of landed catches and market statistics;

(g) monitoring, control and surveillance of such vessels, their fishing operations and related activities by, inter alia:

(i) the implementation of national inspection schemes and subregional and regional schemes for cooperation in enforcement pursuant to articles 21 and 22, including requirements for such vessels to permit access by duly authorized inspectors from other States;

(ii) the implementation of national observer programmes and subregional and regional observer programmes in which the flag State is a participant, including requirements for such vessels to permit access by observers from other States to carry out the functions agreed under the programmes; and

(iii) the development and implementation of vessel monitoring systems, including, as appropriate, satellite transmitter systems, in accordance with any national programmes and those which have been subregionally, regionally or globally agreed among the States concerned;

(h) regulation of transshipment on the high seas to ensure that the effectiveness of conservation and management measures is not undermined; and

(i) regulation of fishing activities to ensure compliance with subregional, regional or global measures, including those aimed at minimizing catches of non-target species.

4. Where there is a subregionally, regionally or globally agreed system of monitoring, control and surveillance in effect, States shall ensure that the measures they impose on vessels flying their flag are compatible with that system.

PART VI
COMPLIANCE AND ENFORCEMENT

Article 19
Compliance and enforcement by the flag State

1. A State shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks. To this end, that State shall:

(a) enforce such measures irrespective of where violations occur;

(b) investigate immediately and fully any alleged violation of subregional or regional conservation and management measures, which may include the physical inspection of the vessels concerned, and report promptly to the State alleging the violation and the relevant subregional or regional organization or arrangement on the progress and outcome of the investigation;

(c) require any vessel flying its flag to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation;
(d) if satisfied that sufficient evidence is available in respect of an alleged violation, refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned; and

(e) ensure that, where it has been established, in accordance with its laws, a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.

2. All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.

Article 20
International cooperation in enforcement

1. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements, to ensure compliance with and enforcement of subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks.

2. A flag State conducting an investigation of an alleged violation of conservation and management measures for straddling fish stocks or highly migratory fish stocks may

request the assistance of any other State whose cooperation may be useful in the conduct of that investigation. All States shall endeavour to meet reasonable requests made by a flag State in connection with such investigations.

3. A flag State may undertake such investigations directly, in cooperation with other interested States or through the relevant subregional or regional fisheries management organization or arrangement. Information on the progress and outcome of the investigations shall be provided to all States having an interest in, or affected by, the alleged violation.

4. States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.

5. States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other States evidence relating to alleged violations of such measures.

6. Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal State, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. The flag State shall cooperate with the coastal State in taking appropriate enforcement action in such cases and may authorize the relevant authorities of the coastal State to board and inspect the vessel on the high seas. This paragraph is without prejudice to article 111 of the Convention.

7. States Parties which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement may take action in accordance with international law, including through recourse to subregional or regional proce-

dures established for this purpose, to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas in the subregion or region until such time as appropriate action is taken by the flag State.

Article 21

Subregional and regional cooperation in enforcement

1. In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.

2. States shall establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection pursuant to paragraph 1, as well as procedures to implement other provisions of this article. Such procedures shall be consistent with this article and the basic procedures set out in article 22 and shall not discriminate against non-members of the organization or non-participants in the arrangement. Boarding and inspection as well as any subsequent enforcement action shall be conducted in accordance with such procedures. States shall give due publicity to procedures established pursuant to this paragraph.

3. If, within two years of the adoption of this Agreement, any organization or arrangement has not established such procedures, boarding and inspection pursuant to paragraph 1, as well as any subsequent enforcement action, shall, pending the establishment of such procedures, be conducted in accordance with this article and the basic procedures set out in article 22.

4. Prior to taking action under this article, inspecting States shall, either directly or through the relevant subregional or regional fisheries management organization or arrangement, inform all States whose vessels fish on the high seas in the subregion or region of the form of identification issued to their duly authorized inspectors. The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service. At the time of becoming a Party to this Agreement, a State shall designate an appropriate authority to receive notifications pursuant to this article and shall give due publicity of such designation through the relevant subregional or regional fisheries management organization or arrangement.

5. Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures referred to in paragraph 1, the inspecting State shall, where appropriate, secure evidence and shall promptly notify the flag State of the alleged violation.

6. The flag State shall respond to the notification referred to in paragraph 5 within three working days of its receipt, or such other period as may be prescribed in procedures established in accordance with paragraph 2, and shall either:

(a) fulfil, without delay, its obligations under article 19 to investigate and, if evidence so warrants, take enforcement action with respect to the vessel, in which case it shall promptly inform the inspecting State of the results of the investigation and of any enforcement action taken; or

(b) authorize the inspecting State to investigate.

7. Where the flag State authorizes the inspecting State to investigate an alleged violation, the inspecting State shall, without delay, communicate the results of that inves-

tigation to the flag State. The flag State shall, if evidence so warrants, fulfil its obligations to take enforcement action with respect to the vessel. Alternatively, the flag State may authorize the inspecting State to take such enforcement action as the flag State may specify with respect to the vessel, consistent with the rights and obligations of the flag State under this Agreement.

8. Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting State shall immediately inform the flag State of the name of the port to which the vessel is to proceed. The inspecting State and the flag State and, as appropriate, the port State shall take all necessary steps to ensure the well-being of the crew regardless of their nationality.

9. The inspecting State shall inform the flag State and the relevant organization or the participants in the relevant arrangement of the results of any further investigation.

10. The inspecting State shall require its inspectors to observe generally accepted international regulations, procedures and practices relating to the safety of the vessel and the crew, minimize interference with fishing operations and, to the extent practicable, avoid action which would adversely affect the quality of the catch on board. The inspecting State shall ensure that boarding and inspection is not conducted in a manner that would constitute harassment of any fishing vessel.

11. For the purposes of this article, a serious violation means:

(a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with article 18, paragraph 3 (a);

(b) failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;

(c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;

(d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;

(e) using prohibited fishing gear;

(f) falsifying or concealing the markings, identity or registration of a fishing vessel;

(g) concealing, tampering with or disposing of evidence relating to an investigation;

(h) multiple violations which together constitute a serious disregard of conservation and management measures; or

(i) such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement.

12. Notwithstanding the other provisions of this article, the flag State may, at any time, take action to fulfil its obligations under article 19 with respect to an alleged violation. Where the vessel is under the direction of the inspecting State, the inspecting State shall, at the request of the flag State, release the vessel to the flag State along with full information on the progress and outcome of its investigation.

13. This article is without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws.

14. This article applies mutatis mutandis to boarding and inspection by a State Party which is a member of a subregional or regional fisheries management organization or a participant in a subregional or regional fisheries management arrangement and which has clear grounds for believing that a fishing vessel flying the flag of another State Party has engaged in any activity contrary to relevant conservation and management measures referred to in paragraph 1 in the high seas area covered by such organization or arrangement, and such vessel has subsequently, during the same fishing trip, entered into an area under the national jurisdiction of the inspecting State.

15. Where a subregional or regional fisheries management organization or arrangement has established an alternative mechanism which effectively discharges the obligation under this Agreement of its members or participants to ensure compliance with the conservation and management measures established by the organization or arrangement, members of such organization or participants in such arrangement may agree to limit the application of paragraph 1 as between themselves in respect of the conservation and management measures which have been established in the relevant high seas area.

16. Action taken by States other than the flag State in respect of vessels having engaged in activities contrary to subregional or regional conservation and management measures shall be proportionate to the seriousness of the violation.

17. Where there are reasonable grounds for suspecting that a fishing vessel on the high seas is without nationality, a State may board and inspect the vessel. Where evidence so warrants, the State may take such action as may be appropriate in accordance with international law.

18. States shall be liable for damage or loss attributable to them arising from action taken pursuant to this article when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this article.

Article 22
Basic procedures for boarding and inspection pursuantto article 21

1. The inspecting State shall ensure that its duly authorized inspectors:

(a) present credentials to the master of the vessel and produce a copy of the text of the relevant conservation and management measures or rules and regulations in force in the high seas area in question pursuant to those measures;

(b) initiate notice to the flag State at the time of the boarding and inspection;

(c) do not interfere with the master's ability to communicate with the authorities of the flag State during the boarding and inspection;

(d) provide a copy of a report on the boarding and inspection to the master and to the authorities of the flag State, noting therein any objection or statement which the master wishes to have included in the report;

(e) promptly leave the vessel following completion of the inspection if they find no evidence of a serious violation; and

(f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

2. The duly authorized inspectors of an inspecting State

shall have the authority to inspect the vessel, its licence, gear, equipment, records, facilities, fish and fish products and any relevant documents necessary to verify compliance with the relevant conservation and management measures.

3. The flag State shall ensure that vessel masters:
(a) accept and facilitate prompt and safe boarding by the inspectors;
(b) cooperate with and assist in the inspection of the vessel conducted pursuant to these procedures;
(c) do not obstruct, intimidate or interfere with the inspectors in the performance of their duties;

(d) allow the inspectors to communicate with the authorities of the flag State and the inspecting State during the boarding and inspection;

(e) provide reasonable facilities, including, where appropriate, food and accommodation, to the inspectors; and

(f) facilitate safe disembarkation by the inspectors.
4. In the event that the master of a vessel refuses to accept boarding and inspection in accordance with this article and article 21, the flag State shall, except in circumstances where, in accordance with generally accepted international regulations, procedures and practices relating to safety at sea, it is necessary to delay the boarding and inspection, direct the master of the vessel to submit immediately to boarding and inspection and, if the master does not comply with such direction, shall suspend the vessel's authorization to fish and order the vessel to return immediately to port. The flag State shall advise the inspecting State of the action it has taken when the circumstances referred to in this paragraph arise.

Article 23

Measures taken by a port State

1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation

and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.

2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

3. 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.

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

PART VII

REQUIREMENTS OF DEVELOPING STATES

Article 24

Recognition of the special requirements of developing States

1. States shall give full recognition to the special requirements of developing States in relation to conservation and management of straddling fish stocks and highly migratory fish stocks and development of fisheries for such stocks. To this end, States shall, either directly or through the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and other specialized agencies, the Global Environment Facility, the Commission on Sustainable Development and other appropriate international and regional organizations and bodies, provide assistance to developing States.

2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling fish stocks and highly migratory fish stocks, States shall take into account the special requirements of developing States, in particular:

(a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;

(b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; and

(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States.

Article 25

Forms of cooperation with developing States

1. States shall cooperate, either directly or through subregional, regional or global organizations:

(a) to enhance the ability of developing States, in particular the least-developed among them and small island developing States, to conserve and manage straddling fish stocks and highly migratory fish stocks and to develop their own fisheries for such stocks;

(b) to assist developing States, in particular the least-developed among them and small island developing States, to enable them to participate in high seas fisheries for such stocks, including facilitating access to such fisheries subject to articles 5 and 11; and

(c) to facilitate the participation of developing States in subregional and regional fisheries management organizations and arrangements.

2. Cooperation with developing States for the purposes set out in this article shall include the provision of financial assistance, assistance relating to human resources development, technical assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services.

3. Such assistance shall, inter alia, be directed specifically towards:

(a) improved conservation and management of straddling fish stocks and highly migratory fish stocks through collection, reporting, verification, exchange and analysis of fisheries data and related information;

(b) stock assessment and scientific research; and

(c) monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level, development and funding of national and regional observer programmes and access to technology and equipment.

Article 26

Special assistance in the implementation of this Agreement

1. States shall cooperate to establish special funds to assist developing States in the implementation of this Agreement, including assisting developing States to meet the costs involved in any proceedings for the settlement of disputes to which they may be parties.

2. States and international organizations should assist developing States in establishing new subregional or regional fisheries management organizations or arrangements, or in strengthening existing organizations or arrangements, for the conservation and management of straddling fish stocks and highly migratory fish stocks.

PART VIII

PEACEFUL SETTLEMENT OF DISPUTES

Article 27

Obligation to settle disputes by peaceful means

States have the obligation to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrange-

ments, or other peaceful means of their own choice.

Article 28
Prevention of disputes

States shall cooperate in order to prevent disputes. To this end, States shall agree on efficient and expeditious decision-making procedures within subregional and regional fisheries management organizations and arrangements and shall strengthen existing decision-making procedures as necessary.

Article 29
Disputes of a technical nature

Where a dispute concerns a matter of a technical nature, the States concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the States concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.

Article 30
Procedures for the settlement of disputes

1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

2. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.

3. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part,

unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.

4. A State Party to this Agreement which is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party which is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with Annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in Annex V, article 2, Annex VII, article 2, and Annex VIII, article 2, for the settlement of disputes under this Part.

5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

Article 31
Provisional measures

1. Pending the settlement of a dispute in accordance with this Part, the parties to the dispute shall make every effort to enter into provisional arrangements of a practical nature.

2. Without prejudice to article 290 of the Convention, the court or tribunal to which the dispute has been submitted

under this Part may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question, as well as in the circumstances referred to in article 7, paragraph 5, and article 16, paragraph 2.

3. A State Party to this Agreement which is not a Party to the Convention may declare that, notwithstanding article 290, paragraph 5, of the Convention, the International Tribunal for the Law of the Sea shall not be entitled to prescribe, modify or revoke provisional measures without the agreement of such State.

Article 32

Limitations on applicability of procedures for thesettlement of disputes

Article 297, paragraph 3, of the Convention applies also to this Agreement.

PART IX

NON-PARTIES TO THIS AGREEMENT

Article 33

Non-parties to this Agreement

1. States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.

2. States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement.

PART X

GOOD FAITH AND ABUSE OF RIGHTS

Article 34

Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not con-

stitute an abuse of right.

Part XI

RESPONSIBILITY AND LIABILITY

Article 35

Responsibility and liability

States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement.

PART XII

REVIEW CONFERENCE

Article 36

Review conference

1. Four years after the date of entry into force of this Agreement, the Secretary-General of the United Nations shall convene a conference with a view to assessing the effectiveness of this Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks. The Secretary-General shall invite to the conference all States Parties and those States and entities which are entitled to become parties to this Agreement as well as those intergovernmental and non-governmental organizations entitled to participate as observers.

2. The conference shall review and assess the adequacy of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks.

PART XIII

FINAL PROVISIONS

Article 37

Signature

This Agreement shall be open for signature by all States and the other entities referred to in article 1, paragraph 2(b), and shall remain open for signature at United Nations Headquarters for twelve months from the fourth of December 1995.

Article 38

Ratification

This Agreement is subject to ratification by States and the other entities referred to in article 1, paragraph 2(b). The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 39

Accession

This Agreement shall remain open for accession by States and the other entities referred to in article 1, paragraph 2(b). The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 40

Entry into force

1. This Agreement shall enter into force 30 days after the date of deposit of the thirtieth instrument of ratification or accession.

2. For each State or entity which ratifies the Agreement or accedes thereto after the deposit of the thirtieth instrument of ratification or accession, this Agreement shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.

Article 41

Provisional application

1. This Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.

2. Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate

provisional application.

Article 42

Reservations and exceptions

No reservations or exceptions may be made to this Agreement.

Article 43

Declarations and statements

Article 42 does not preclude a State or entity, when signing, ratifying or acceding to this Agreement, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or entity.

Article 44

Relation to other agreements

1. This Agreement shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Agreement and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement.

2. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Agreement, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement.

3. States Parties intending to conclude an agreement referred to in paragraph 2 shall notify the other States Parties through the depositary of this Agreement of their intention to conclude the agreement and of the modification

or suspension for which it provides.

Article 45
Amendment

1. A State Party may, by written communication addressed to the Secretary-General of the United Nations, propose amendments to this Agreement and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.

2. The decision-making procedure applicable at the amendment conference convened pursuant to paragraph 1 shall be the same as that applicable at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, unless otherwise decided by the conference. The conference should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.

3. Once adopted, amendments to this Agreement shall be open for signature at United Nations Headquarters by States Parties for twelve months from the date of adoption, unless otherwise provided in the amendment itself.

4. Articles 38, 39, 47 and 50 apply to all amendments to this Agreement.
5. Amendments to this Agreement shall enter into force for the States Parties ratifying or acceding to them on the thirtieth day following the deposit of instruments of ratification or accession by two thirds of the States Parties. Thereafter, for each State Party ratifying or acceding to an amendment after the deposit of the required number of such instruments, the amendment shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.

6. An amendment may provide that a smaller or a larger number of ratifications or accessions shall be required for its entry into force than are required by this article.

7. A State which becomes a Party to this Agreement after the entry into force of amendments in accordance with paragraph 5 shall, failing an expression of a different intention by that State:

(a) be considered as a Party to this Agreement as so amended; and
(b) be considered as a Party to the unamended Agreement in relation to any State Party not bound by the amendment.

Article 46
Denunciation

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, denounce this Agreement and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Agreement to which it would be subject under international law independently of this Agreement.

Article 47
Participation by international organizations

1. In cases where an international organization referred to in Annex IX, article 1, of the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply mutatis mutandis to participation by such international organization in this Agreement, except that the following provisions of that Annex shall not apply:

(a) article 2, first sentence; and
(b) article 3, paragraph 1.
2. In cases where an international organization referred to

in Annex IX, article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by such international organization in this Agreement:

(a) at the time of signature or accession, such international organization shall make a declaration stating:

(i) that it has competence over all the matters governed by this Agreement;

(ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the international organization has no responsibility; and

(iii) that it accepts the rights and obligations of States under this Agreement;

(b) participation of such an international organization shall in no case confer any rights under this Agreement on member States of the international organization;

(c) in the event of a conflict between the obligations of an international organization under this Agreement and its obligations under the agreement establishing the international organization or any acts relating to it, the obligations under this Agreement shall prevail.

Article 48
Annexes

1. The Annexes form an integral part of this Agreement and, unless expressly provided otherwise, a reference to this Agreement or to one of its Parts includes a reference to the Annexes relating thereto.

2. The Annexes may be revised from time to time by States Parties. Such revisions shall be based on scientific and technical considerations. Notwithstanding the provisions of article 45, if a revision to an Annex is adopted by consensus

at a meeting of States Parties, it shall be incorporated in this Agreement and shall take effect from the date of its adoption or from such other date as may be specified in the revision. If a revision to an Annex is not adopted by consensus at such a meeting, the amendment procedures set out in article 45 shall apply.

Article 49
Depositary

The Secretary-General of the United Nations shall be the depositary of this Agreement and any amendments or revisions thereto.

Article 50
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized thereto, have signed this Agreement.

OPENED FOR SIGNATURE at New York, this fourth day of December, one thousand nine hundred and ninety-five, in a single original, in the Arabic, Chinese, English, French, Russian and Spanish languages.

ANNEX I
STANDARD REQUIREMENTS FOR THE COLLECTION AND SHARING OF DATA

Article 1
General principles

1. The timely collection, compilation and analysis of data are fundamental to the effective conservation and management of straddling fish stocks and highly migratory fish stocks. To this end, data from fisheries for these stocks on the high seas and those in areas under national jurisdiction are required and should be collected and compiled in such a way as to enable statistically meaningful analysis for the purposes of fishery resource conservation and management. These

data include catch and fishing effort statistics and other fishery-related information, such as vessel-related and other data for standardizing fishing effort. Data collected should also include information on non-target and associated or dependent species. All data should be verified to ensure accuracy. Confidentiality of non-aggregated data shall be maintained. The dissemination of such data shall be subject to the terms on which they have been provided.

2. Assistance, including training as well as financial and technical assistance, shall be provided to developing States in order to build capacity in the field of conservation and management of living marine resources. Assistance should focus on enhancing capacity to implement data collection and verification, observer programmes, data analysis and research projects supporting stock assessments. The fullest possible involvement of developing State scientists and managers in conservation and management of straddling fish stocks and highly migratory fish stocks should be promoted.

Article 2

Principles of data collection, compilation and exchange

The following general principles should be considered in defining the parameters for collection, compilation and exchange of data from fishing operations for straddling fish stocks and highly migratory fish stocks:

(a) States should ensure that data are collected from vessels flying their flag on fishing activities according to the operational characteristics of each fishing method (e.g., each individual tow for trawl, each set for long-line and purse-seine, each school fished for pole-and-line and each day fished for troll) and in sufficient detail to facilitate effective stock assessment;

(b) States should ensure that fishery data are verified through an appropriate system;

(c) States should compile fishery-related and other supporting scientific data and provide them in an agreed format and in a timely manner to the relevant subregional or regional

fisheries management organization or arrangement where one exists. Otherwise, States should cooperate to exchange data either directly or through such other cooperative mechanisms as may be agreed among them;

(d) States should agree, within the framework of subregional or regional fisheries management organizations or arrangements, or otherwise, on the specification of data and the format in which they are to be provided, in accordance with this Annex and taking into account the nature of the stocks and the fisheries for those stocks in the region. Such organizations or arrangements should request non-members or non-participants to provide data concerning relevant fishing activities by vessels flying their flag;

(e) such organizations or arrangements shall compile data and make them available in a timely manner and in an agreed format to all interested States under the terms and conditions established by the organization or arrangement; and

(f) scientists of the flag State and from the relevant subregional or regional fisheries management organization or arrangement should analyse the data separately or jointly, as appropriate.

Article 3

Basic fishery data

1. States shall collect and make available to the relevant subregional or regional fisheries management organization or arrangement the following types of data in sufficient detail to facilitate effective stock assessment in accordance with agreed procedures:

(a) time series of catch and effort statistics by fishery and fleet;

(b) total catch in number, nominal weight, or both, by species (both target and non-target) as is appropriate to each fishery. [Nominal weight is defined by the Food and Agriculture Organization of the United Nations as the live-weight equivalent of the landings];

(c) discard statistics, including estimates where necessary, reported as number or nominal weight by species, as is appropriate to each fishery;

(d) effort statistics appropriate to each fishing method; and
(e) fishing location, date and time fished and other statistics on fishing operations as appropriate.
2. States shall also collect where appropriate and provide to the relevant subregional or regional fisheries management organization or arrangement information to support stock assessment, including:

(a) composition of the catch according to length, weight and sex;
(b) other biological information supporting stock assessments, such as information on age, growth, recruitment, distribution and stock identity; and

(c) other relevant research, including surveys of abundance, biomass surveys, hydro-acoustic surveys, research on environmental factors affecting stock abundance, and oceanographic and ecological studies.

Article 4
Vessel data and information

1. States should collect the following types of vessel-related data for standardizing fleet composition and vessel fishing power and for converting between different measures of effort in the analysis of catch and effort data:

(a) vessel identification, flag and port of registry;
(b) vessel type;
(c) vessel specifications (e.g., material of construction, date built, registered length, gross registered tonnage, power of main engines, hold capacity and catch storage methods); and

(d) fishing gear description (e.g., types, gear specifications and quantity).

2. The flag State will collect the following information:
(a) navigation and position fixing aids;
(b) communication equipment and international radio call sign; and
(c) crew size.

Article 5
Reporting

A State shall ensure that vessels flying its flag send to its national fisheries administration and, where agreed, to the relevant subregional or regional fisheries management organization or arrangement, logbook data on catch and effort, including data on fishing operations on the high seas, at sufficiently frequent intervals to meet national requirements and regional and international obligations. Such data shall be transmitted, where necessary, by radio, telex, facsimile or satellite transmission or by other means.

Article 6
Data verification

States or, as appropriate, subregional or regional fisheries management organizations or arrangements should establish mechanisms for verifying fishery data, such as:
(a) position verification through vessel monitoring systems;
(b) scientific observer programmes to monitor catch, effort, catch composition (target and non-target) and other details of fishing operations;

(c) vessel trip, landing and transshipment reports; and
(d) port sampling.

Article 7
Data exchange

1. Data collected by flag States must be shared with other flag States and relevant coastal States through appropriate subregional or regional fisheries management organizations or arrangements. Such organizations or arrangements shall compile data and make them available in a timely manner and in an agreed format to all interested States under the terms and conditions established by the organization or arrangement, while maintaining confidentiality of non-aggregated data, and should, to the extent feasible, develop database

systems which provide efficient access to data.

2. At the global level, collection and dissemination of data should be effected through the Food and Agriculture Organization of the United Nations. Where a subregional or regional fisheries management organization or arrangement does not exist, that organization may also do the same at the subregional or regional level by arrangement with the States concerned.

ANNEX II
GUIDELINES FOR THE APPLICATION OF PRECAUTIONARY REFERENCE-POINTS IN CONSERVATION AND MANAGEMENT OF STRADDLING FISH-STOCKS AND HIGHLY MIGRATORY FISH STOCKS

1. A precautionary reference point is an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for fisheries management.

2. Two types of precautionary reference points should be used: conservation, or limit, reference points and management, or target, reference points. Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. Target reference points are intended to meet management objectives.

3. Precautionary reference points should be stock-specific to account, inter alia, for the reproductive capacity, the resilience of each stock and the characteristics of fisheries exploiting the stock, as well as other sources of mortality and major sources of uncertainty.

4. Management strategies shall seek to maintain or restore populations of harvested stocks, and where necessary associated or dependent species, at levels consistent with previously agreed precautionary reference points. Such reference

points shall be used to trigger pre-agreed conservation and management action. Management strategies shall include measures which can be implemented when precautionary reference points are approached.

5. Fishery management strategies shall ensure that the risk of exceeding limit reference points is very low. If a stock falls below a limit reference point or is at risk of falling below such a reference point, conservation and management action should be initiated to facilitate stock recovery. Fishery management strategies shall ensure that target reference points are not exceeded on average.

6. When information for determining reference points for a fishery is poor or absent, provisional reference points shall be set. Provisional reference points may be established by analogy to similar and better-known stocks. In such situations, the fishery shall be subject to enhanced monitoring so as to enable revision of provisional reference points as improved information becomes available.

7. The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target.

International Tribunal for the Law of the Sea

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)
Advisory Opinion of 2 April 2015

ITLOS Reports, vol. 15 (2015) [forthcoming], pp.14-20, 22-23, 31-42, 50-54; paras. 37-63, 70-79, 109-140, 141-150, 182-201

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2015

2 April 2015

List of cases:
No. 21

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) (Request for Advisory Opinion submitted to the Tribunal)

ADVISORY OPINION

organizations which had participated in the oral proceedings to submit comments on those documents by 3 November 2014.

35. In an electronic communication dated 3 November 2014, the SRFC requested an extension of the time-limit for the submission of its comments on the additional documents submitted by the European Union. By letter dated 4 November 2014, the Registrar informed the SRFC that the President had agreed to an extension of the time-limit to 5 November 2014. The States Parties and the intergovernmental organizations which had participated in the oral proceedings were informed accordingly. The SRFC submitted comments on the additional documents by letter dated 6 November 2014, the filing of which was accepted by decision of the President. By letter dated 11 November 2014, the Registrar transmitted these comments to the participants in the oral proceedings. By letter dated 13 November 2014, the Registrar, at the request of the President, informed the SRFC that the comments contained in its letter dated 6 November 2014 would be considered by the Tribunal to the extent that they related to the Request as submitted to it by the SRFC on 28 March 2013.

36. President Yanai, whose term of office as President expired on 30 September 2014, continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules. In accordance with article 17 of the Rules, Judges Nelson and Türk, whose term of office expired on 30 September 2014, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion.

II. Jurisdiction

37. The Tribunal will first consider whether it has jurisdiction to give the advisory opinion requested by the SRFC.

38. The Tribunal wishes to draw attention to articles 16 and 21 of the Statute and article 138 of the Rules with regard to the jurisdiction of the Tribunal to deliver advisory opinions. Article 16 of the Statute reads as follows:

> The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.

Article 21 of the Statute reads:

> The 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.

Article 138 of the Rules reads:

> 1. 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.
> 2. 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.
> 3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

39. While some participants have argued in favour of the jurisdiction of the Tribunal to entertain the Request, other participants have contended that the Tribunal is not competent to entertain the Request. The Tribunal will proceed to examine these arguments.

40. The main arguments against the advisory jurisdiction of the Tribunal are that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting *ultra vires* under the Convention.

41. It has also been contended that the Tribunal has no implied powers to serve as an independent source of authority to confer upon itself an advisory jurisdiction that it does not otherwise possess.

42. It has been argued that article 138 of the Rules cannot serve as a basis for the exercise of any jurisdiction to give advisory opinions since the Rules of the Tribunal, being procedural provisions, “cannot override” the provisions of the Convention.

43. It has been contended that article 21 of the Statute is intended to encapsulate the contentious jurisdiction of the Tribunal, which is set out more fully in the Convention, in particular article 288 thereof. Accordingly, it has been argued that article 21 of the Statute has to be interpreted consistently with article 288, paragraph 2, of the Convention, which reads:

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

44. It has also been contended that article 288, which is contained in Part XV of the Convention dealing with “Settlement of Disputes”, provides for the contentious jurisdiction of the Tribunal in clear and express terms and so does article 21 of the Statute.

45. It has been argued that, had the States which negotiated the Convention intended to confer advisory jurisdiction on the Tribunal, the inclusion of an express provision in the Convention would have been straightforward, but they did not do so.

46. It has also been argued that the word “matters” in the concluding phrase of article 21 of the Statute, i.e. “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”, refers to contentious cases, as may be seen from the use of a same word in article 36, paragraph 1, of the Statute of the International Court of Justice (hereinafter “the ICJ”) and article 36 of the Statute of the Permanent Court of International Justice (hereinafter “the PCIJ”).

47. It has been further contended that the Request does not fulfil the essential conditions set out in article 138 of the Rules.

48. Other participants have spoken in favour of the advisory jurisdiction of the Tribunal. They have argued that article 21 of the Statute by itself serves as a sufficient legal basis for the competence of the full Tribunal to accept a request for an advisory opinion if it is specifically provided for by a relevant international agreement and that there is no reason to assume that the wording "all matters" does not cover a request for an advisory opinion. They have added that the arguments that the expression "all matters" must be read as meaning "all disputes" and that the jurisdiction of the Tribunal is limited by article 288, paragraph 2, of the Convention cannot be accepted. They have pointed out that article 288 of the Convention is complemented by the Statute, including its article 21.

49. It has also been argued that the purpose of article 21 of the Statute is to shape the Tribunal as a living institution and to expressly provide room for States to enter into bilateral or multilateral agreements conferring jurisdiction on the Tribunal.

50. It has been pointed out that article 138 of the Rules does not create a new type of jurisdiction but only specifies the prerequisites that the Tribunal has established for exercising its jurisdiction.

51. It has been contended that, if the drafters of the Convention had intended to limit the Tribunal's jurisdiction under article 21 of the Statute to contentious jurisdiction, they would have used the expression "confers contentious jurisdiction on the Tribunal" as opposed to "confers jurisdiction on the Tribunal", the words employed in article 21 of the Statute.

52. At the outset, the Tribunal wishes to clarify the relationship between the Statute in Annex VI to the Convention and the Convention. As specified by article 318 of the Convention, Annexes "form an integral part of this Convention". As stated in article 1, paragraph 1, of the Statute, "[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute." It follows from the above that the Statute enjoys the same status as the Convention. Accordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention.

53. Neither the Convention nor the Statute makes explicit reference to the advisory jurisdiction of the Tribunal. Those who argued against the advisory jurisdiction of the Tribunal as also those who considered that the Tribunal has such jurisdiction centred their arguments on article 21 of the Statute.

54. Article 21 of the Statute, which is reproduced in paragraph 38, deals with the "jurisdiction" of the Tribunal. It provides that the jurisdiction of the Tribunal comprises three elements: (i) all "disputes" submitted to the Tribunal in accordance with the Convention; (ii) all "applications" submitted to the Tribunal in accordance with the Convention; and (iii) all "matters" ("toutes les fois que cela" in French) specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

55. The use of the word "disputes" in article 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word "applications" refers to applications in contentious cases submitted to the Tribunal in accordance with the Convention. This is made clear by article 23 of the Statute, which provides: "The Tribunal shall decide all disputes and applications in accordance with article 293." Article 293 is found in Part XV of the Convention, dealing with "Settlement of Disputes". Reference may also be made to articles 292 on "Prompt release of vessels and crews" and 294 on "Preliminary proceedings" in this Part, which make provision for "applications".

56. It is the third element which has attracted diverse interpretations. The words all "matters" ("toutes les fois que cela" in French) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That something more must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal."

57. The argument that the expression all "matters" should have the same meaning here as it has in the Statutes of the PCIJ and ICJ is not tenable. As the Tribunal held in the *MOX Plant Case*.

> the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.
> (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 106, para. 51)

58. The Tribunal wishes to clarify that the expression "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the "other agreement" which confers such jurisdiction on the Tribunal. When the "other agreement" confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to "all matters" specifically provided for in the "other agreement". Article 21 and the "other agreement" conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.

59. The argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal and that, being a procedural provision, article 138 cannot form a basis for the advisory jurisdiction of the Tribunal is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.

60. These prerequisites are: an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and such an opinion may be given on "a legal question" .

61. In the present case, the prerequisites specified in article 138 of the Rules are satisfied.

62. The Tribunal notes that, in the present case, 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 (hereinafter "the MCA Convention") is an international agreement concluded by seven States. Article 33 of this agreement provides that "[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 of the Law of the Sea for advisory opinion." The Tribunal further notes that, at its fourteenth extraordinary session, the Conference of Ministers of the SRFC adopted a resolution by which it decided, in accordance with article 33 of the MCA Convention, to authorize the Permanent Secretary of the Commission to seize the Tribunal in order to obtain an advisory opinion. The text of that resolution was transmitted to the Tribunal by a letter from the Permanent Secretary of the Commission dated 27 March 2013, which was received by the Registry on 28 March 2013.

63. As stated in its preamble, the objective of the MCA Convention is to implement the Convention "especially its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector as well [as] the other relevant international treaties" and ensure that the policies and legislation of its Member States "are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under their respective jurisdictions, for the benefit of current and future generations". The MCA Convention is thus closely related to the purposes of the Convention.

64. A further issue is whether the questions asked of the Tribunal are legal in nature. The questions read as follows:

> 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?

provided for in any other agreement" in article 21 of the Statute should be interpreted restrictively.

69. For the reasons given above, the Tribunal finds that it has jurisdiction to entertain the Request submitted to it by the SRFC. As held later in this Advisory Opinion, the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States.

III. Discretionary power

70. The Tribunal will now turn to the issue of its discretionary power to render an advisory opinion in the present case.

71. Article 138 of the Rules, which provides that "the Tribunal may give an advisory opinion", should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.

72. It has been argued that the questions raised by the SRFC, though legal, are vague, general and unclear. In the view of the Tribunal, these questions are clear enough to enable it to deliver an advisory opinion. It is also well settled that an advisory opinion may be given "on any legal question, abstract or otherwise" (see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 57, at p. 61).

73. It has also been contended that, while the four questions may be couched as legal questions, what the SRFC actually seeks is not answers *lex lata*, but *lex ferenda* and that is outside the functions of the Tribunal as a judicial body.

74. The Tribunal does not consider that, in submitting this Request, the SRFC is seeking a legislative role for the Tribunal. The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions.

75. It has been argued that in this case the Tribunal should not pronounce on the rights and obligations of third States not members of the SRFC without their consent. It has also been observed that the present Request for an advisory opinion does not involve an underlying dispute and that the issue of State consent simply does not arise in this advisory proceeding.

76. The Tribunal wishes to clarify in this regard that in advisory proceedings the consent of States not members of the SRFC is not relevant (see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 71). The advisory opinion as such has no binding force and is given only to the SRFC, which considers it to be desirable "in order to obtain enlightenment as to the course of action it should take" (*ibid.,* p. 71). The object of the request by the SRFC is to seek guidance in respect of its own actions.

77. The Tribunal is mindful of the fact that by answering the questions it will assist the SRFC in the performance of its activities and contribute to the implementation of the Convention (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 24, para. 30).

78. In view of what is stated above, the Tribunal does not find any compelling reasons to use its discretionary power not to give an advisory opinion.

79. Accordingly, the Tribunal deems it appropriate to render the advisory opinion requested by the SRFC.

105. To ensure compliance with its laws and regulations concerning the conservation and management measures for living resources pursuant to article 73, paragraph 1, of the Convention, the coastal State may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

106. Thus, in light of the special rights and responsibilities given to the coastal State in the exclusive economic zone under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State.

107. This responsibility of the coastal State is also acknowledged in the MCA Convention, which states in article 25 that the SRFC Member States commit themselves to take such measures, and, to this end, to strengthen cooperation to fight against IUU fishing, in accordance with international law.

108. The Tribunal wishes to emphasize that the primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard.

109. The Tribunal will now turn to the examination of the obligations of flag States in the exclusive economic zones of the SRFC Member States in relation to the living resources in these zones. These will be considered from two perspectives: that of general obligations of States under the Convention with regard to the conservation and management of marine living resources and that of specific obligations of flag States in the exclusive economic zone of the coastal State.

110. The Tribunal observes that the issue of flag State responsibility for IUU fishing activities is not directly addressed in the Convention. Therefore, this issue is examined by the Tribunal in light of general and specific obligations of flag States under the Convention for the conservation and management of marine living resources.

111. The Convention contains provisions concerning general obligations which are to be met by the flag State in all maritime areas regulated by the Convention, including the exclusive economic zone of the coastal State. These general obligations are set out in articles 91, 92 and 94 as well as articles 192 and 193 of the Convention. At the same time, the Convention imposes specific obligations on the flag State in article 58, paragraph 3, and article 62, paragraph 4, of the Convention with regard to its activities within the exclusive economic zone of the coastal State, in particular in respect of fishing activities conducted by nationals of the flag State.

112. The Tribunal wishes to observe that general and specific obligations of flag States for the conservation and management of marine living resources set out in the Convention are further specified in fisheries access agreements concluded between coastal States and flag States concerned. The Tribunal also observes, in this regard, that the MCA Convention contains specific provisions on the minimum conditions for access and exploitation of marine resources within the maritime zones under the jurisdiction of the SRFC Member States.

113. The Tribunal notes that the provisions of the MCA Convention require, *inter alia*, that fishing vessels belonging to a non-Member State obtain a fishing licence issued by the SRFC Member State concerned and land all their catches in the ports of the SRFC Member State that issued the fishing licence. Such provisions also require fishing vessels to carry out any transhipment in harbours designated by the SRFC Member State, provide declarations of catches in their logbook, and refrain from employing prohibited gear or equipment. In addition, the provisions of the MCA Convention require fishing vessels to give notice of their entry into and exit from maritime zones under the jurisdiction of an SRFC Member State and to take on board observers or inspectors from the SRFC Member State.

114. The Tribunal further notes that bilateral fisheries access agreements concluded by the SRFC Member States contain provisions setting out obligations for the flag State and vessels flying its flag. Such obligations require the flag State, *inter alia*, to: ensure compliance by its vessels with the laws and regulations of the SRFC Member State governing fisheries in the maritime zone under the jurisdiction of the

SRFC Member State as well as with the relevant fisheries access agreements; ensure that its vessels undertake responsible fishing on the basis of the principle of sustainable exploitation of fishery resources; and, with regard to highly migratory species, ensure compliance with measures and recommendations of the International Commission for the Conservation of Atlantic Tunas (hereinafter "ICCAT"). Vessels of the flag State are required, *inter alia*, to: possess a valid fishing authorization issued by the SRFC Member State; forward to the SRFC Member State statements of their catches; report to the SRFC Member State the date and time of their entry into and exit from the maritime zones; allow on board officials from the SRFC Member State for the inspection and control of fishing activities; take on board observers appointed by the SRFC Member State; be equipped with a satellite monitoring system. In addition, such vessels are required to send the position messages to the SRFC Member State when they are in the maritime zones under its jurisdiction.

115. Article 92 of the Convention stipulates that, save in exceptional cases expressly provided for in international treaties or in the Convention, ships are subject to the exclusive jurisdiction of the flag State on the high seas; by virtue of article 58, this also applies to the exclusive economic zone in so far as it is not incompatible with Part V of the Convention.

116. Article 94, paragraph 1, of the Convention requires the flag State to effectively exercise its jurisdiction and control over ships flying its flag in "administrative, technical and social matters". To achieve this purpose, the flag State is required by article 94, paragraph 2, subparagraph (b), to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship." Article 94 specifies in paragraphs 2, subparagraph (a), 3 and 4, that such exercise of jurisdiction and control by the flag State must include, in particular, maintaining a register of ships containing the names and particulars of the ships flying its flag, and taking necessary measures: to ensure safety of navigation and periodical surveying by a qualified surveyor of ships; to ensure that each ship flying its flag is in the charge of a master and officers who possess appropriate qualifications; and to ensure that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship.

117. The Tribunal holds the view that, since article 94, paragraph 2, of the Convention starts with the words "[i]n particular", the list of measures that are to be taken by the flag State to ensure effective exercise of its jurisdiction and control over ships flying its flag in administrative, technical and social matters is only indicative, not exhaustive.

118. Further, under article 94, paragraph 6, of the Convention, if a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the facts to the flag State and the latter is obliged to investigate the matter upon receiving such a report and, if appropriate, take any action necessary to remedy the situation. The Tribunal is of the view that the flag State is under the obligation to inform the reporting State about the action taken.

119. It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

120. Article 192 of the Convention imposes on all States Parties an obligation to protect and preserve the marine environment. Article 193 of the Convention provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." In the *Southern Bluefin Tuna Cases*, the Tribunal observed that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August*

1999, ITLOS Reports 1999, p. 280, at p. 295, para. 70). As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.

121. As to the specific obligations of flag States in the exclusive economic zone of the coastal State, article 58, paragraph 3, of the Convention provides that:

> In exercising their rights and performing their duties … 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 and other rules of international law in so far as they are not incompatible with this Part.

122. The Convention further stipulates, in article 62, paragraph 4, that "[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

123. The Tribunal is of the view that article 62, paragraph 4, of the Convention imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.

124. It follows from article 58, paragraph 3, and article 62, paragraph 4, as well as from article 192, of the Convention that flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities. In accordance with the MCA Convention and the national legislation of the SRFC Member States, such activities also constitute an infringement of the conservation and management measures adopted by these States within their exclusive economic zones. In other words, while under the Convention the primary responsibility for the conservation and management of living resources in the exclusive economic zone, including the adoption of such measures as may be necessary to ensure compliance with the laws and regulations enacted by the coastal State in this regard, rests with the coastal State, flag States also have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the exclusive economic zones of the SRFC Member States.

125. In this regard, the Tribunal draws attention to the clarifications given by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. Although the relationship between sponsoring States and contractors is not entirely comparable to that existing between the flag State and vessels flying its flag which are engaged in fishing activities in the exclusive economic zone of the coastal State, the Tribunal holds the view that the clarifications provided by the Seabed Disputes Chamber regarding the meaning of the expression "responsibility to ensure" and the interrelationship between the notions of obligations "of due diligence" and obligations "of conduct" referred to in paragraph 129 are fully applicable in the present case.

126. With reference to the meaning of the expression "responsibility to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at pp. 40-41, para. 108)

127. In the present case, as has been explained earlier, the flag State has the "responsibility to ensure", pursuant to articles 58, paragraph 3, and 62, paragraph 4, of the Convention, compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. The flag State

must meet this responsibility by taking measures defined in paragraphs 134 to 140 as well as by effectively exercising its jurisdiction and control in "administrative, technical and social matters" over ships flying its flag in accordance with article 94, paragraph 1, of the Convention.

128. As to the meaning of the term "to ensure", the Seabed Disputes Chamber in its Advisory Opinion states that:

> 110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".
>
> 111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay: "*An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).
>
> 112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 41, paras. 110-112)

129. In the case of IUU fishing in the exclusive economic zones of the SRFC Member States, the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation "of conduct". In other words, as stated in the Advisory Opinion of the Seabed Disputes Chamber, this is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag. However, as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result". This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The 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.

130. The Tribunal will now address the question of what constitutes the "due diligence obligation" of the flag State in the present case.

131. As to the meaning of "due diligence obligation", the Seabed Disputes Chamber referred to the following clarification provided by the ICJ in the *Pulp Mills on the River Uruguay* case:

> It is an obligation which 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, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.
> *(Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 79, para. 197)

132. The Seabed Disputes Chamber in its Advisory Opinion pointed out that:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. ... The standard of due diligence has to be more severe for the riskier activities.
> (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 43, para. 117)

133. The Tribunal holds that, in the present case, 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.

134. The Tribunal observes that, under articles 58, paragraph 3, and 62, paragraph 4, of the Convention, the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States in accordance with the provisions of the Convention.

135. The aforementioned provisions of the Convention also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorized by the SRFC Member States.

136. Pursuant to articles 192 and 193 of the Convention, the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States.

137. Article 94, paragraphs 1 and 2, of the Convention provides that the flag State is under an obligation to exercise effectively its jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked.

138. While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.

139. In accordance with article 94, paragraph 6, of the Convention, "[a] State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State" and "upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation." In the view of the Tribunal, this obligation equally applies to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action. The action to be taken by the flag State is without prejudice to the rights of the coastal State to take measures pursuant to article 73 of the Convention.

140. The Tribunal wishes to recall that, as stated in the *MOX Plant Case*,

> 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 …
> (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82)

The Tribunal holds that this obligation extends also to cases of alleged IUU fishing activities.

VI. Question 2

141. The second question submitted to the Tribunal is as follows:

> *To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?*

142. The Tribunal wishes to note that neither the Convention nor the MCA Convention provides guidance on the issue of liability of the flag State for IUU fishing activities conducted by vessels under its flag.

143. Pursuant to article 293 of the Convention, the Tribunal, in examining this question, will therefore be guided by relevant rules of international law on responsibility of States for internationally wrongful acts.

144. In light of international jurisprudence, including its own, the Tribunal finds that the following rules reflected in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Draft Articles on State Responsibility") are the rules of general international law relevant to the second question:

(i) Every internationally wrongful act of a State entails the international responsibility of that State
(article 1 of the ILC Draft Articles on State Responsibility);

(ii) There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State
(article 2 of the ILC Draft Articles on State Responsibility); and

(iii) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act
(article 31, paragraph 1, of the ILC Draft Articles on State Responsibility).

145. In answering the second question, the Tribunal finds it appropriate to clarify the meaning of the term "liable" referred to in this question. The Tribunal observes that, in the context of State responsibility, the English term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. While the French term "*responsabilité*" generally refers to both primary and secondary obligations, for the purposes of the second and third questions, the Tribunal wishes to clarify that the French term "*responsabilité*" is used to cover secondary obligations (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at pp. 30-31, paras. 64-71).

146. In the present case, the liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State. The liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.

147. The Tribunal is of the view that the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations referred to in the reply to the first question (see paragraphs 109 to 140; see also *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170).

148. However, the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

149. The meaning of "due diligence" obligations has been explained in paragraphs 131 and 132.

150. The Tribunal also wishes to address the issue as to whether isolated IUU fishing activities or only a repeated pattern of such activities would entail a breach of "due diligence" obligations of the flag State. As explained in paragraphs 146 to 148, the Tribunal finds that a breach of "due diligence" obligations of a flag State arises if it has not taken all necessary and appropriate measures to meet its obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States. Therefore, the frequency of IUU fishing activities by vessels in the exclusive economic zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State.

179. The Tribunal recalls 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.

180. The Tribunal observes that the Convention contains several provisions, namely articles 61, 62, 73, 192 and 193, concerning general rights and obligations of the coastal State in ensuring the conservation and management of living resources in its exclusive economic zone.

181. The Tribunal notes, however, that the fourth question addresses specifically the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna.

182. The focus of the fourth question is therefore on the rights and obligations of the SRFC Member States in ensuring the sustainable management of the fish stocks in their exclusive economic zones when such fish stocks are shared with other SRFC Member States or between them and non-Member States fishing for such stocks in an area beyond and adjacent to those zones.

183. The Tribunal wishes to clarify the meaning of the expressions “shared stocks” and “stocks of common interest”.

184. The Tribunal observes that these expressions are not found in the Convention. However, the expression “shared stocks” is defined in article 2, paragraph 12, of the MCA Convention as “stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it.”

185. The Tribunal observes that there is no established definition of “stocks of common interest”. However, the Tribunal notes that, in its statement made during the oral proceedings, the SRFC provided the following explanation with respect to the meaning of the expression “stocks of common interest”:

> In the central eastern Atlantic, a number of migratory pelagic species move between the exclusive economic zones of several States (“transboundary stocks” or “stocks of common interest”) and/or between the exclusive economic zones and the waters beyond (“straddling stocks”). Thus, these are stocks which are shared between two neighbouring coastal States, two non-neighbouring coastal States located on either side of a gulf or an ocean, or a coastal State and the flag State of the vessel fishing the stock.

186. As the definition of “shared stocks” contained in article 2, paragraph 12, of the MCA Convention applies to both situations described in paragraphs 1 and 2 of article 63 of the Convention, the Tribunal considers that this expression as well as the expression “stocks of common interest” cover all stocks addressed in that article of the Convention.

187. The Tribunal now wishes to clarify its understanding of the expression “sustainable management”.

188. 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. This article rather deals with cooperation regarding measures necessary to coordinate and ensure the “conservation and development of such stocks” when they occur within the exclusive economic zones of two or more States, and cooperation regarding measures necessary for the “conservation of these stocks in the adjacent area” when they “occur both within the exclusive economic zone and in an area beyond and adjacent to the zone”.

189. The Tribunal, however, considers that article 61 of the Convention, which sets out the basic framework concerning the conservation and management of the living resources in the exclusive economic zone, provides guidance as to the meaning of “sustainable management”. In this connection paragraphs 2, 3 and 4 of this article are of particular relevance; they read as follows:

Article 61
Conservation of the living resources

> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
>
> 3. Such measures shall also be designed 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, including the economic needs of coastal fishing communities and 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.
>
> 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

190. The Tribunal observes that the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource.

191. The Tribunal will therefore construe the expression “sustainable management” as used in the fourth question as meaning “conservation and development”, as referred to in article 63, paragraph 1, of the Convention.

192. The Tribunal will now identify the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks occurring within their exclusive economic zones and shared stocks occurring both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, especially small pelagic species. The Tribunal will first examine the applicable provisions of the Convention.

193. In the view of the Tribunal, these provisions are: article 63, paragraph 1, of the Convention, on the same stocks or stocks of associated species occurring within the exclusive economic zones of two or more coastal States; paragraph 2 of the same article on the same stock or stocks of associated species occurring within the exclusive economic zone and in an area beyond and adjacent to the zone; and article 64, paragraph 1, of the Convention, on the highly migratory species listed in Annex I to the Convention.

194. Article 63 of the Convention, which relates to stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it, covers shared stocks as defined by article 2, paragraph 12, of the MCA Convention.

195. Article 63, paragraph 1, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

196. Article 63, paragraph 2, of the Convention reads as follows:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall 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.

197. The Tribunal notes that article 63, paragraph 1, of the Convention establishes that the coastal States concerned “shall seek ... to agree” on the necessary measures to coordinate and ensure “conservation and development” of shared stocks. While article 61 of the Convention provides guidance regarding “conservation”, the term “development” needs to be clarified.

198. The Tribunal is of the view that the term “development of such stocks” used in article 63, paragraph 1, of the Convention suggests that these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime. This may include the exploitation of non-exploited stocks or an increase in the exploitation of under-exploited stocks through the development of responsible fisheries, as well as more effective fisheries management schemes to ensure the

long-term sustainability of exploited stocks. This may also include stock restoration, guided by the requirement under article 61 of the Convention that a given stock is not endangered by over-exploitation, thus preserving it as a long-term viable resource.

199. Article 63, paragraph 2, of the Convention establishes a cooperation regime between the coastal State and the States fishing for the same stocks and stocks of associated species with a view to agreeing on measures necessary for the conservation of these stocks in the adjacent area.

200. Since the Tribunal has jurisdiction to entertain the Request only in so far as it relates to the exclusive economic zones of the SRFC Member States, article 63, paragraph 2, of the Convention, as far as it relates to "States fishing for such stocks in the adjacent area", is not applicable to the exclusive economic zones of the SRFC Member States.

201. While article 63, paragraph 2, of the Convention does not apply to the exclusive economic zones of the SRFC Member States, the part of the straddling stocks that occurs within these zones is not left unprotected. These straddling stocks are subject to the cooperation regime of article 63, paragraph 1, of the Convention, as they occur within the exclusive economic zones of the SRFC Member States.

202. The reference to tuna in the fourth question necessarily invokes the provision contained in article 64, paragraph 1, of the Convention, which reads:

> The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall 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. In regions for which no appropriate international organizations exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

203. This provision establishes the cooperation regime on conservation of the highly migratory species listed in Annex I to the Convention. As tuna stocks are

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The M/V "Virginia G." Case (Panama/Guinea-Bissau) Judgment of 14 April 2014

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THE M/V "VIRGINIA G" CASE

(PANAMA/GUINEA-BISSAU)

JUDGMENT

B- Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau in Paragraph 266 of its Counter-Memorial, or in an amount deemed appropriate by the International Tribunal.

C- Panama is to reimburse all legal and other costs the Republic of Guinea-Bissau has incurred with this case.

III. Factual background

55. The *M/V Virginia G* was an oil tanker flying the flag of Panama at the time of its arrest on 21 August 2009. It held a Statutory Certificate of Register issued by the Panama Maritime Authority on 23 August 2007 and valid until 16 November 2011. A further Statutory Certificate of Register was issued for the vessel by the Panama Maritime Authority on 5 October 2011 and is valid until 16 November 2016.

56. According to Panama, the *M/V Virginia G* is owned by Penn Lilac Trading S.A. (Penn Lilac), a company incorporated in Panama in 1998. In January 2000, Penn Lilac bought the vessel and in January 2002 concluded an agency commission agreement with Gebaspe SL (Gebaspe), a Spanish company acting as intermediary between fuel suppliers and owners of commercial fishing vessels. In 2009, the vessel was chartered out to Lotus Federation (Lotus), an Irish company selling and supplying gas oil to fishing vessels, and remained chartered out to that company at the time of the arrest.

57. At the time of the arrest, the captain of the vessel was Mr Eduardo Blanco Guerrero, a national of Cuba. There were eleven crew members on board, seven of whom were nationals of Cuba, three of Ghana, and one of Cape Verde (now "Cabo Verde").

58. On 7 August 2009, Empresa Balmar Pesquerías de Atlántico (Balmar) contracted the services of Lotus for the provision of gas oil by the *M/V Virginia G* to the following fishing vessels operated by Balmar: *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*. The fishing vessels were flying the flag of Mauritania.

59. On 14 August 2009, Balmar's agent in Guinea-Bissau, Bijagos Lda (Bijagos), submitted a written request for authorization from the National Fisheries Inspection and Control Service (Serviço Nacional de Fiscalização e Controlo das Actividades de Pesca) (hereinafter "FISCAP"), a national agency operating under the auspices of the Ministry of Fisheries of Guinea-Bissau, to carry out refuelling operations in the exclusive economic zone of Guinea-Bissau. By letter of the same date, FISCAP acknowledged receipt of the letter from Bijagos and stated:

> The content of your letter has been analysed and in conclusion the FISCAP authorizes the supply of fuel to the respective vessels under the following conditions:
> 1. To indicate before the operation:
> a. The coordinates of the operation of the supply of fuel;
> b. Date, time and name of the ship with which the vessels AMABAL I, … AMABAL II, RIMBAL I and RIMBAL II will perform the operation.

60. By letter dated 20 August 2009, Bijagos informed FISCAP of the coordinates, date, and time of the refuelling operations to be carried out by the *M/V Virginia G*. According to Guinea-Bissau, FISCAP responded to Bijagos by letter sent on the same day and stating that

> the content of your correspondence was analysed and in conclusion FISCAP, ***although it has received the information requested, further proposes that your agency certify whether the vessel supplying fuel is duly authorised for this operation in the EEZ of Guinea-Bissau***.

In its Counter-Memorial, Guinea-Bissau stated that "[t]his correspondence never received a reply". During the hearing, Panama stated that the letter of FISCAP of 20 August 2009 was "never seen by the *Virginia G*" and that it was "never presented by the Guinea-Bissau administration in reply to the many communications sent to the ship owners"; instead, according to Panama, it "appeared for the very first time in the Counter-Memorial".

61. According to the Memorial of Panama, on 20 August 2009, the *M/V Virginia G* supplied gas oil to *Rimbal I* and to *Rimbal II* in the exclusive economic zone of Guinea-Bissau. The *Amabal II* was supplied with gas oil on 21 August 2009.

62. On 21 August 2009, before proceeding to refuel the *Amabal I*, the *M/V Virginia G* was approached, at 19:00 hrs at latitude 11º 48' N and longitude 017° 31.6' W, approximately 60 miles off the coast of Guinea-Bissau, by speedboats carrying FISCAP officials. The officials boarded the vessel and ordered the captain to sail to the port of Bissau, where the *M/V Virginia G* arrived on 22 August 2009 at 14:00 hrs. The views of the Parties differ on the circumstances of the arrest of the *M/V Virginia G* and the situation of the vessel thereafter. The positions of the Parties are reflected in paragraphs 333 to 339, 350 to 358 and 365 to 372.

63. Together with the *M/V Virginia G*, the fishing vessels *Amabal I* and *II* were also arrested and brought to the port of Bissau. Those fishing vessels were released on 28 August 2009.

64. On 27 August 2009, the Inter-Ministerial Commission for Maritime Surveillance of Guinea-Bissau (*Comissão Interministerial da Fiscalização Marítima)* (hereinafter "CIFM") adopted the following decision 07/CIFM/09:

> Confiscate ex-officio the tanker VIRGINIA G, with its gear, equipment and products on board in favor of the State of Guinea Bissau for the repeated practice of fishing related activities in the form of "unauthorized sale of fuel to ships fishing in our EEZ, namely the N/M AMABAL [II], in accordance with paragraph 1 of Article 52, as currently worded in Decree No. 1-A/2005 in conjunction with Article 3 c) and Article 23, all of Decree-Law No. 6-A/ 2000.

FISCAP notified the ship-owner of the CIFM decision by letter dated 31 August 2009.

65. After the arrest of the *M/V Virginia G*, the owner of the vessel, Penn Lilac, contacted the company Africargo, the representative of its P&I Club (Navigator) in Guinea-Bissau, and requested its assistance in obtaining the release of the vessel.

66. By letter dated 4 September 2009 addressed to the FISCAP Coordinator, the Director-General of Africargo, representing the owner of the *M/V Virginia G*, transmitted a communication by which Penn Lilac requested to be informed

> on the way to settle this difficult and unpleasant situation, as soon as possible or to observe the procedures established in the law and the

VII. Articles 56, 58 and 73, paragraph 1, of the Convention

161. The Tribunal will now turn to the question whether Guinea-Bissau violated the Convention when it arrested, and later confiscated, the *M/V Virginia G*. To answer this question the Tribunal will have to ascertain whether Guinea-Bissau under the Convention had, as it claims, jurisdiction to regulate bunkering of foreign vessels fishing in its exclusive economic zone, whether the relevant laws and regulations of Guinea-Bissau are in conformity with the Convention and whether their application in the case of the *M/V Virginia G* violated the Convention.

162. Panama defines bunkering as "the term used in the shipping industry to describe the selling of fuel from specialised vessels, such as oil tankers, which supply fuel (such as light fuel, gas oil and marine diesel) to other vessels whilst at sea". Guinea-Bissau considers the description by Panama of the economic activity of bunkering "to be in general correct".

163. Panama points out that "the activity of providing bunkering services in the EEZ of a coastal State is neither dealt with specifically in the Convention, nor settled by international case law".

164. Panama submits that "it was, and is, unlawful for Guinea Bissau to exercise sovereign rights and jurisdictional rights not attributed to it under the Convention". It maintains that the extent to which Guinea-Bissau's "sovereignty and jurisdiction were extended to the activities of the *VIRGINIA G* and the resulting denial of freedom of navigation was not consistent with the provisions of the Convention".

165. Panama argues that "the bunkering services provided by the *VIRGINIA G* in the EEZ of Guinea Bissau fall within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom in terms of Article 58(1)."

166. In addition, Panama considers that the requirement of authorization and the imposition of fees for refuelling vessels in the exclusive economic zone of Guinea-Bissau as provided for in its laws and regulations are contrary to the freedoms set out in article 58 of the Convention.

167. Panama argues that "[p]rincipal among the rights of other States in the EEZ of a coastal State, are the freedoms accorded to all States in terms of Article 58 of the Convention". In this context Panama maintains that

> the exclusion of the freedoms listed in Article 87(d), (e) and (f) from Article 58(1), and their express embodiment and articulation in Article 56(1) indicates that the freedom of the seas should only be limited where the rights are recognised expressly to a coastal State in terms of Article 56(1).

168. Panama states that "Article 58(1), by referring to Article 87, appears to want to equate the freedoms exercisable in the EEZ to those of the high seas, even applying the provisions of articles 88 to 115 of the Convention."

169. Panama further argues that

> in respect of the three freedoms (navigation, overflight and communication) in case of a dispute, the shift should be in favour of those freedoms and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships".

170. Panama maintains that the bunkering activity carried out by the *M/V Virginia G* is a "commercial activity for which vessels, including fishing vessels, in the EEZ of West African coastal States offer a particular market for selling gas oil", and that the supply of bunkers to vessels is, therefore, the very purpose of the navigation of that vessel. It explains that it is because of the inherent connection between bunkering and navigation, that bunkering activities should be considered to be more intimately linked with the freedom to navigate and other internationally lawful uses of the sea in the sense of article 58, paragraph 1, of the Convention.

171. Panama maintains that, in accordance with article 56, paragraph 2, of the Convention, a coastal State, in exercising its rights and performing its duties under the Convention in the exclusive economic zone, must have due regard to the rights and duties of other States, among which are the freedoms accorded to all States in terms of article 58 of the Convention.

172. Panama observes that "Decree Law 6-A/2000 infringes the provisions of the Convention because it grants Guinea-Bissau with certain sovereignty rights and jurisdiction which are not granted to coastal States under the Convention".

173. In this context, Panama questions the lack of distinction in Decree-Law 6-A/2000 between fishing vessels and non-fishing vessels as well as "a broad definition of 'fishing-related activities' which include 'logistical support activities' and which are defined ... in subsidiary legislation rather than in Decree Law 6-A/2000 itself". Panama maintains that a bunkering vessel is neither a fishing vessel nor, by definition, a vessel engaged in exploring, exploiting or utilizing the natural resources in the exclusive economic zone of Guinea-Bissau in the context of the rights and jurisdiction accorded to Guinea-Bissau under Part V of the Convention. Panama explains that "[b]unkering activities to fishing vessels within an EEZ is a very ancillary activity that cannot be considered as a related fishing activity".

174. According to Panama, Decree-Law 6-A/2000 of Guinea-Bissau is not in conformity with the principles and purposes of the international legal regime concerning the exclusive economic zone. Panama states that the main purpose of the establishment of the exclusive economic zone, as *a sui generis* zone, is to enable coastal States to control and manage their marine resources. It further argues that "Article 56 (1) of the Convention confers certain sovereign rights and a defined jurisdiction … in favour of Guinea Bissau, in its EEZ, for the purpose of exploring and exploiting, conserving and managing living or non-living resources". Panama states that articles 61 and 62 of the Convention articulate the manner in which a coastal State can regulate the conservation and utilization of its living resources.

175. Panama questions the qualification of bunkering in the exclusive economic zone as a fishing-related activity subject to national regulation and control. It takes the view that

> [t]he material scope of Guinea Bissau's rights and jurisdiction over living resources in its EEZ relate to their conservation and management and to the exploration and exploitation or utilisation of such living resources, and it is perhaps reasonable that these terms can even be described as "sufficiently wide to embrace all normal enterprisory and governmental functions that pertain to living resources." However, it would also be reasonable to state that even a wider interpretation would necessarily preserve the fundamental link to the living resources themselves.

176. According to Panama,

> Guinea Bissau's practice appears to be that of extending its interpretation of fishing activities and fishing related activities to include bunkering … the only reasonable interpretative extension in classifying certain related activities as fishing related activities, or logistical support activities, should be limited to those activities which are actually and strictly related to fishing, rather than to general services rendered to any vessels as a most basic necessity – such as bunkering.

Panama disagrees with this approach advanced by Guinea-Bissau.

177. As to the argument advanced by Guinea-Bissau that bunkering of fishing vessels is commonly treated as a fisheries-related activity in West Africa, Panama considers the statement to be inadequate in suggesting that the Tribunal could deem an alleged regional tendency sufficient to establish the existence of a legal norm. According to Panama, a majority of States throughout the world do not consider vessels engaged in fishing-related activities to be fishing vessels. Panama acknowledges that

> a fishing vessel might well be subject to specific rules by virtue of its location in the EEZ of Guinea Bissau and by virtue of the fishing activities it carries out. However, it does not necessarily follow … that the rules applied to that fishing vessel would apply also to the bunkering vessel, in this case, the *VIRGINIA G*.

178. Panama states that

> Guinea-Bissau's manifest acknowledgement of the financial benefits of regulating bunkering in its EEZ … and Guinea-Bissau's request for payment from bunkering vessels for the issuance of its consent, is, in reality, a manifestation of a situation where the authorisation or consent is given the same treatment as a licence, and one whereby Guinea-Bissau **imposes a form of tax or customs duty on bunkering activities carried out in its EEZ**.

179. Panama further states that

> the unilateral extension by Guinea-Bissau of the scope of the Convention through its national fisheries legislation to cover also re-fuelling

> operations carried out in the EEZ, such that prior authorisation is requested **against payment**, is, in reality, intended solely to extend a customs-type radius: a situation that was not, in fact, accepted by the International Tribunal in the *Saiga No.2* 1999 judgement yet would appear to still be present, in disguised form, in Guinea-Bissau's Decree Law 6-A/2000.

180. In this context Panama refers to a passage in the Joint Order No 2/2001 of 1 October 2001 of the Minister of Fisheries and the Sea and the Minister of Economy and Finance which reads: "Considering the Government's Policy of encouraging and promoting private initiative in order for the private sector to make a positive contribution towards the country's economic and social development".

181. To underline the necessity of bunkering fishing vessels in the exclusive economic zone of Guinea-Bissau, Panama further observes that "bunkering services rendered in this area are … particularly important owing to the general lack of bunkering facilities and gas oil product in the area" and that "the Port of Bissau, 'does not have suitable facilities'".

182. In respect of the environmental concerns invoked by Guinea-Bissau to justify its regulating of bunkering, Panama argues that "the risks during the bunkering operations are minimal" and that "vessels like the *Virginia G* do not supply heavy fuel oil but just gas oil ... (a clean and volatile product) [which] has not caused relevant marine environmental problems". Panama further points out that "Guinea-Bissau's contention that it was necessary to regulate the *VIRGINIA G*'s activities at national law within the context of protection and conservation of its resources" cannot be sustained, "especially since the law that was enforced against the *VIRGINIA G* was the national Fisheries law of Guinea-Bissau ... Guinea-Bissau cannot now be heard to raise its 'protection and conservation of its resources' concerns for the first time, in its Counter-Memorial".

183. In addition, in the view of Panama, the principle of sustainable fisheries, invoked by Guinea-Bissau, does not support the case presented by that State. Panama reasons that the arguments presented by Guinea-Bissau are contradictory and that Guinea-Bissau is not even a member of the International Commission for the Conservation of Atlantic Tunas.

184. Relying on the legislative history of the exclusive economic zone concept, Panama finally denies that coastal States enjoy a residual authority in the exclusive economic zone. Panama states that "[t]here is no residual authority in a coastal State to make laws which themselves violate or result in a violation of the Convention".

185. Guinea-Bissau argues that it "has not violated Article 58 of the Convention as bunkering is an economic activity, which is not included in freedom of navigation or other internationally lawful uses of the sea".

186. Guinea-Bissau points out that "the EEZ has a *sui generis* status, but in this status the interests of the coastal state in the preservation of maritime resources and the regulation of fisheries prevail over the economic interest of bunkering activities carried out by tankers".

187. Guinea-Bissau stresses that

> [a]ccording to an evolutionary interpretation of the Convention, … the regulation of bunkering of fishing vessels in the exclusive economic zone is admissible owing to the sovereign rights and jurisdiction of the coastal State, recognized in articles 56, 61, 62 and 73 of the Convention.

188. Guinea-Bissau states therefore that its laws and regulations and their implementation *vis-à-vis* the activities of *M/V Virginia G* are in accordance with the Convention and other rules of international law. Guinea-Bissau argues that as

> the activity of bunkering is instrumental to and supports fishing operations, one naturally has to consider it a fishing related operation, and it is therefore regulated, both under the legislation of Guinea-Bissau and under the legislation of the other States of the sub-region.

189. According to Guinea-Bissau "Guinea-Bissau, in article 3, paragraphs 1 and 2 and paragraph 3(b) and (c), as well as article 23 of Decree-Law No. 6-A/2000, established the qualification of bunkering as a fishing-related operation".

190. The relevant articles of Decree-Law 6-A/2000 of 22 August 2000 read:

Article 3 of Decree-Law 6-A/2000:
[Translation into English provided by Panama
in Annex 9 to its Memorial]

ARTICLE 3
(Definition of fishing)

1. Fishing is understood to be the act of catching or harvesting by any means of biological species whose normal or most frequent habitat is water.
2. Fishing includes the prior activities whose direct purpose is that of fishing, such as detecting, the discharge or collection of devices used to attract fish, and fishing related operations.
3. For the purposes of the above point, fishing related operations means:
   a) The transhipment of fish or fishery products in the maritime waters of Guinea Bissau;
   b) The transport of fish or any other aquatic organisms which have been caught in the maritime waters of Guinea Bissau until the first landing;
   c) Activities of logistic support to fishing vessels at sea;
   d) The collection of fish from fishermen.

Article 23 of Decree-Law 6-A/2000
[Translation into English provided by Panama
in Annex 9 to its Memorial]

ARTICLE 23
(Fishing related operations)

1. Fishing related operations are subject to the authorisation of a member of the Government responsible for Fisheries.

2. The authorization mentioned above is subject to payments or compensation as well as any other conditions as may be established by the department of the Government responsible for Fisheries, namely regarding the areas or location for the conduct of the fishing related activities and the mandatory presence of observers or inspectors.

191. Guinea-Bissau points out that these rules are "entirely in conformity with the legislative practice of the region". This was further elaborated upon in the testimony of Mr Dywyná Djabulá, an expert called by Guinea-Bissau, who stated:

> Bunkering at sea is provided for in the Convention on Access and Exploitation of Fishery Resources of 1993. This Convention analyzes the legislation of the member States, one of which is Guinea-Bissau. There are others: Senegal, Cape Verde, Sierra Leone. The Convention says that the States themselves are responsible for regulating bunkering at sea. By regulating this matter, the legislation of these States adopts a broad notion of fishing vessel and fishing activities as such. When we speak of fishing vessels in the broad sense, we also include in this notion vessels that provide logistic support, such as vessels supplying fuel. The broad sense of fishing includes not only the actual catching of fish but also the supply of ships at sea, and the legislation of Guinea-Bissau also goes in that direction.

192. Guinea-Bissau states that it

> totally disagrees that the bunkering activity carried out by the *Virginia G* in the exclusive economic zone of Guinea-Bissau falls within the freedom of navigation and other international lawful uses of the sea in terms of article 58(1) of the Convention, and that it required no prior authorization against payment.

193. Guinea-Bissau further states that

> the freedom of navigation of ships with a flag of third States through the exclusive economic zone of coastal States should not include the right to be involved in the economic activity of bunkering of fishing vessels, … given that the activity has a much stronger connection with the exercise of fishing than with the freedom of navigation.

194. Guinea-Bissau argues that "the maritime freedoms benefitting other states in the EEZ may be restricted as far as necessary to ensure the rights of the coastal State (art. 58, no. 3 of the Convention)".

195. In this context Guinea-Bissau also argues that "as bunkering may endanger the right of the coastal State over the existing living resources in its exclusive economic zone, it must be regulated by the latter".

196. According to Guinea-Bissau, "the conditions required in order to refuel at sea … have to be controlled not only due to the economic consequences of predatory fishing, but also due to the high environmental risks this implies".

197. Guinea-Bissau maintains that "[t]he precautionary principle in environmental law obliges the coastal States to take all appropriate measures to avoid any risks to the environment, as it is the case of an oil tanker sailing in the EEZ".

198. In this respect, Guinea-Bissau points out that "the performance of the flag States is not sufficient to prevent the uncontrolled exploitation of marine living resources" and considers that "[t]he regulation of bunkering as a fishing-related activity is a direct consequence of the use of the precautionary approach by Guinea-Bissau".

199. Guinea-Bissau rejects Panama's assertion that Guinea-Bissau's fishing law has nothing to do with the protection of the environment. It argues that bunkering has very serious environmental risks and that for this reason its regulation by coastal States is permitted by articles 61 and 62 of the Convention, which the Tribunal did not consider in the *M/V "SAIGA" (No. 2) Case*. Guinea-Bissau states:

> Is it possible to assume that no oil spills caused by bunkering have occurred in West African countries? The answer must be in the negative, but it is not possible to confirm it with examples. This is the reason why Guinea-Bissau applies a precautionary approach in its fisheries law.

200. Rejecting the conclusion drawn by Panama from the fact that Guinea-Bissau does not have facilities for the fuelling of vessels in its ports, Guinea-Bissau states that this does not preclude its right to control the manner in which this operation is carried out in its exclusive economic zone.

201. Turning to the fee to be paid for bunkering authorization in its exclusive economic zone, Guinea-Bissau emphasizes that the underlying objective is strictly of an environmental nature and the revenue that is obtained is intended only to finance State policies concerning marine pollution.

202. Guinea-Bissau states that

> the coastal State has the right to obtain the corresponding tax revenue resulting from this activity, inasmuch as bunkering prevents the coastal State from collecting the natural taxes for the supply of fuel in its territory, and also in accordance with the "polluter pays principle".

203. In the view of Guinea-Bissau,

> [i]t is therefore normal for the coastal State to demand that the activity of bunkering in its exclusive economic zone implies the payment of the corresponding licences, pursuant to art. 62 of the Convention.

204. Guinea-Bissau emphasizes that, contrary to Panama's position, "Guinea-Bissau never extended its tax legislation to the EEZ, given that it merely charges a small amount for the issue of the refuelling licence, which is well below what it would obtain by way of tax revenue if the refuelling had taken place on land".

205. This issue was further elaborated upon in the testimony of Mr Dywyná Djabulá, where he stated:

> There is a difference in terms of the law between bunkering at sea and bunkering on land. Bunkering in the port, according to current law, is regarded as a commercial activity, and as such it is subject to more of a tax charge. There it will have to pay an import tax; in terms of gas oil it would be a tax of 5% of the value of the product. It would also have to pay an industrial tax, which is 25% on the income, i.e. the amount it earns from this activity. In the case of bunkering at sea it is different. Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects. Even in the joint ordinance it says that we must take account of the environmental aspect, and this activity must be conditioned. So the charge that is made takes account of the principle of environmental protection. The idea of this charge is to influence the work of the agents in this activity and make them think twice, and if they do not want to pay then they will not bunker at sea. If they want to continue bunkering at sea they have to pay this amount to fund environmental policies, the consequences of a spillage and the funding of policies and remedying the damage that can be caused. It is a very small amount in fact, but it can be raised if it is not enough to deter this kind of activity.

206. The Tribunal points out that, as noted earlier, the *M/V Virginia G*, flying the flag of Panama, provided gas oil to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau and was arrested for that activity by the authorities of Guinea-Bissau.

207. The Tribunal wishes to underline, therefore, that its task in the present case is to deal with a dispute relating to bunkering activities in support of foreign vessels fishing in the exclusive economic zone of a coastal State.

208. The question to be addressed by the Tribunal is whether Guinea-Bissau, in the exercise of its sovereign rights in respect of the exploration, exploitation, conservation and management of natural resources in its exclusive economic zone, has the competence to regulate bunkering of foreign vessels fishing in this zone. To answer this question, the Tribunal needs to analyze the relevant provisions of the Convention and the practice of States in this regard.

209. The Tribunal holds that Part V of the Convention, in particular article 56 of the Convention read together with the provisions on living resources in articles 61 to 68 of the Convention, gives sufficient guidance concerning the question whether coastal States have the competence to regulate bunkering of foreign vessels fishing in their exclusive economic zones.

210. Article 56 of the Convention reads as follows:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

211. The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term “sovereign rights” in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures.

212. The use of the terms “conserving” and “managing” in article 56 of the Convention indicates that the rights of coastal States go beyond conservation in its strict sense. The fact that conservation and management cover different aspects is supported by article 61 of the Convention, which addresses the issue of conservation as its title indicates, whereas article 62 of the Convention deals with both conservation and management.

213. The Tribunal emphasizes that in the exercise of the sovereign rights of the coastal State to explore, exploit, conserve and manage the living resources of the exclusive economic zone the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone (articles 56, paragraph 1, and 62, paragraph 4, of the Convention). Under article 62, paragraph 4, of the Convention, the laws and regulations thus adopted must conform to the Convention and may relate to, *inter alia*, the matters listed therein. The Tribunal notes that the list of matters in article 62, paragraph 4, of the Convention covers several measures which may be taken by coastal States. These measures may be considered as management. The Tribunal further notes that the wording of article 62, paragraph 4, of the Convention indicates that this list is not exhaustive.

214. The Tribunal is aware of the decision made by the Arbitral Tribunal in the Filleting within the Gulf of St. Lawrence arbitration between Canada and France which stated in respect of the list in article 62, paragraph 4, of the Convention: “Although the list is not exhaustive, it does not appear that the regulatory authority of the coastal State normally includes the authority to regulate subjects of a different nature than those described” (*Dispute concerning Filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986, ILR* 82*(1990)*, p. 591, at p. 630, para. 52).

215. The Tribunal, however, is of the view that it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing. The Tribunal observes that such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea.

216. In reaching this conclusion the Tribunal is also guided by the definitions of "fishing" and "fishing-related" activities in several of the international agreements referred to below. They all establish the close connection between fishing and the various support activities, including bunkering. The Tribunal takes note, in this regard, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009). Article 1, paragraph (d), of that agreement defines: "fishing related activities" as "any operation in support of, or in preparation for, fishing, including … the provisioning of personnel, fuel, gear and other supplies at sea". Article 2, paragraph 6, of the Convention on the Determination of the Minimum Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (2012) constitutes another example. It states: "Fishing vessels: Any vessel that is used for fishing or for that purpose including support vessels, commercial vessels, and any other vessel participating directly in fishing activities". The Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (1992), the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (2001), the Southern Indian Ocean Fisheries Agreement (2006), the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000) and the Convention for the Conservation of Southern Bluefin Tuna (1993) follow the same example.

217. The Tribunal is of the view that the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the Convention. This view is also confirmed by State practice which has developed after the adoption of the Convention.

218. The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with.

219. In this context, the Tribunal refers again (see paragraph 216) to several international agreements concluded to control and manage fishing activities. The Tribunal notes, in this regard, that they include supply of fuel to fishing vessels in the definition of "fishing-related activities".

220. The Tribunal will now consider the scope of the competence of coastal States to regulate bunkering of foreign vessels in their exclusive economic zones. To do so it will have to establish to what extent bunkering is covered by the freedom of navigation or other internationally lawful uses of the sea under article 58 of the Convention.

221. Article 58 of the Convention reads:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In 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 and other rules of international law in so far as they are not incompatible with this Part.

222. The Tribunal is of the view that article 58 of the Convention is to be read together with article 56 of the Convention. The Tribunal considers that article 58 does not prevent coastal States from regulating, under article 56, bunkering of foreign vessels fishing in their exclusive economic zones. Such competence, as noted in paragraph 213, derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources.

223. The Tribunal emphasizes that the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned. The coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.

224. As to the arguments of the Parties concerning the right of a coastal State to regulate bunkering of fishing vessels for the purpose of protecting the marine environment, the Tribunal considers it unnecessary to scrutinize the relevant arguments and facts presented by the Parties. In the view of the Tribunal, it suffices to point out that Guinea-Bissau incorporated its regulations on bunkering in its legislation on fishing rather than in legislation concerning the protection of the marine environment.

225. The Tribunal will now turn to the next question, whether the legislation of Guinea-Bissau concerning bunkering of fishing vessels conforms to articles 56 and 62 of the Convention.

226. In considering the relevant national law of Guinea-Bissau, the Tribunal recalls the Judgment of the Permanent Court of International Justice in the *Case concerning Certain German Interests in Polish Upper Silesia* where the Court stated:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.
>
> (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7*, p. 19)

227. As already indicated in its Judgment in the *M/V "SAIGA" (No. 2) Case*, the Tribunal observes that, under several provisions of the Convention, it is called upon to determine whether, in enacting or implementing its law, a State Party has acted in conformity with the Convention (see *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 52, para. 121).

228. The relevant provisions of Guinea-Bissau's legislation are articles 3 and 23 of Decree-Law 6-A/2000, the texts of which are reproduced in paragraph 190, as well as article 39 of Decree 4/96, which reads:

> Article 39
> (Logistical support and transhipment operations)
>
> [Translation into English provided by Guinea-Bissau in paragraph 96 of its Counter-Memorial]
>
> 1. Logistical support operations for vessels that operate in waters under national sovereignty and jurisdiction, such as provisioning with victuals, fuel, the delivery or receipt of fishing materials and the transfer of crews, and transhipment of catches must be previously and specifically authorised by the Ministry of Fisheries.
>
> 2. Requests for the authorization of the operations considered in the previous number must be made at least ten (10) days prior to the expected date of entry in the waters under the sovereignty and jurisdiction of Guinea-Bissau of the vessels that should perform said operations and include the following information:
>
> a) A precise description of planned operations;
> b) Identification and characteristics of the vessels used for logistical support or transhipment of catches and the time to be spent in the waters of Guinea-Bissau;
> c) Identification of the vessels that will benefit from operations of logistical support or transhipment of catches.
>
> 3. In no event may the beneficiaries of operations of logistical support or transhipment of catches be vessels that do not hold a valid fishing licence.
>
> 4. The Minister of Fisheries may decide that the operations of logistical support or transhipment of catches take place in a defined area and at a given time and in the presence of qualified maritime enforcement officers.

229. The Tribunal takes note of the arguments advanced by Panama, in particular the argument that the scope of the jurisdiction claimed by Guinea-Bissau is defined too widely. The Tribunal, however, holds that the definition of fishing-related activities contained in article 3 of Decree-Law 6-A/2000 establishes in sufficiently clear terms that the legislation of Guinea-Bissau only encompasses activities which directly support fishing activities in its exclusive economic zone.

230. The Tribunal wishes now to address the question relating to the payment of fees which are imposed by Guinea-Bissau for granting authorization for bunkering.

231. Panama alleges that the payment in question constitutes a tax rather than a fee, whereas Guinea-Bissau asserts that this payment constitutes a fee.

232. In this context the Tribunal refers to its Judgment in the *M/V "SAIGA" (No. 2) Case*, where it stated in paragraph 127:

> The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (articles 2 and 21). In the contiguous zone, a coastal State
>
> > may exercise the control necessary to:
> > (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> >
> > (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
> > (article 33, paragraph 1)
>
> In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above.
> *(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 54, para. 127)

233. The Tribunal upholds this finding, which applies to laws on taxes as it does to laws concerning customs.

234. In view of the explanation provided by Guinea-Bissau (see paragraphs 201 to 204), the Tribunal is satisfied that the charging of fees by Guinea-Bissau is not guided by its fiscal interests but is for services rendered in connection with the authorization of bunkering. Consequently, the Tribunal considers that the imposition of the fee by Guinea-Bissau does not constitute an attempt to extend its tax and customs legislation to the exclusive economic zone, as claimed by Panama.

235. With reference to the question of the procedure for obtaining an authorization for bunkering, the Tribunal holds that this – if properly followed – is not unduly burdensome for an applicant. In particular, the Tribunal does not consider it an undue burden for bunkering vessels to obtain such authorization in writing.

236. For these reasons, the Tribunal holds that the relevant national legislation of Guinea-Bissau conforms to articles 56 and 62, paragraph 4, of the Convention.

237. The Tribunal will now turn to the question whether the *M/V Virginia G* obtained the required authorization for bunkering.

238. Panama argues that if the regulation by the coastal State of bunkering of fishing vessels in the exclusive economic zone is considered to be compatible with the Convention, then the *M/V Virginia G* held an authorization under the laws and regulations of Guinea-Bissau to provide bunkering services to the *Amabal II*.

239. Panama maintains that "the *VIRGINIA G* did, in fact, have the authorisation to provide bunkering services to the *AMABAL II* …, and that, therefore, the requirements of the law of Guinea Bissau were respected and fulfilled by the *VIRGINIA G*, her captain and owners".

240. Panama describes the procedure for bunkering as follows:

> The location, or way point, for refuelling is generally agreed a few weeks or days in advance, between the owners/operators of the *Virginia G* and her customers, taking into account the particular routes of the vessels. Contractual arrangements are made on-shore … Instructions and orders are then executed by email, radio, telephone, or other means, between

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Maritime Delimitation in the Black Sea (Romania *v.* Ukraine) Judgment

I.C.J. Reports 2009, pp. 101-103, 110-130; paras. 115-122, 150-204, 210-218

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DÉLIMITATION MARITIME EN MER NOIRE

(ROUMANIE c. UKRAINE)

ARRÊT DU 3 FÉVRIER 2009

2009

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
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MARITIME DELIMITATION IN THE BLACK SEA

(ROMANIA *v.* UKRAINE)

JUDGMENT OF 3 FEBRUARY 2009

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ARRÊT

DÉLIMITATION MARITIME
EN MER NOIRE

(ROUMANIE c. UKRAINE)

MARITIME DELIMITATION
IN THE BLACK SEA

(ROMANIA *v.* UKRAINE)

3 FEBRUARY 2009

JUDGMENT

7. Delimitation Methodology

115. When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

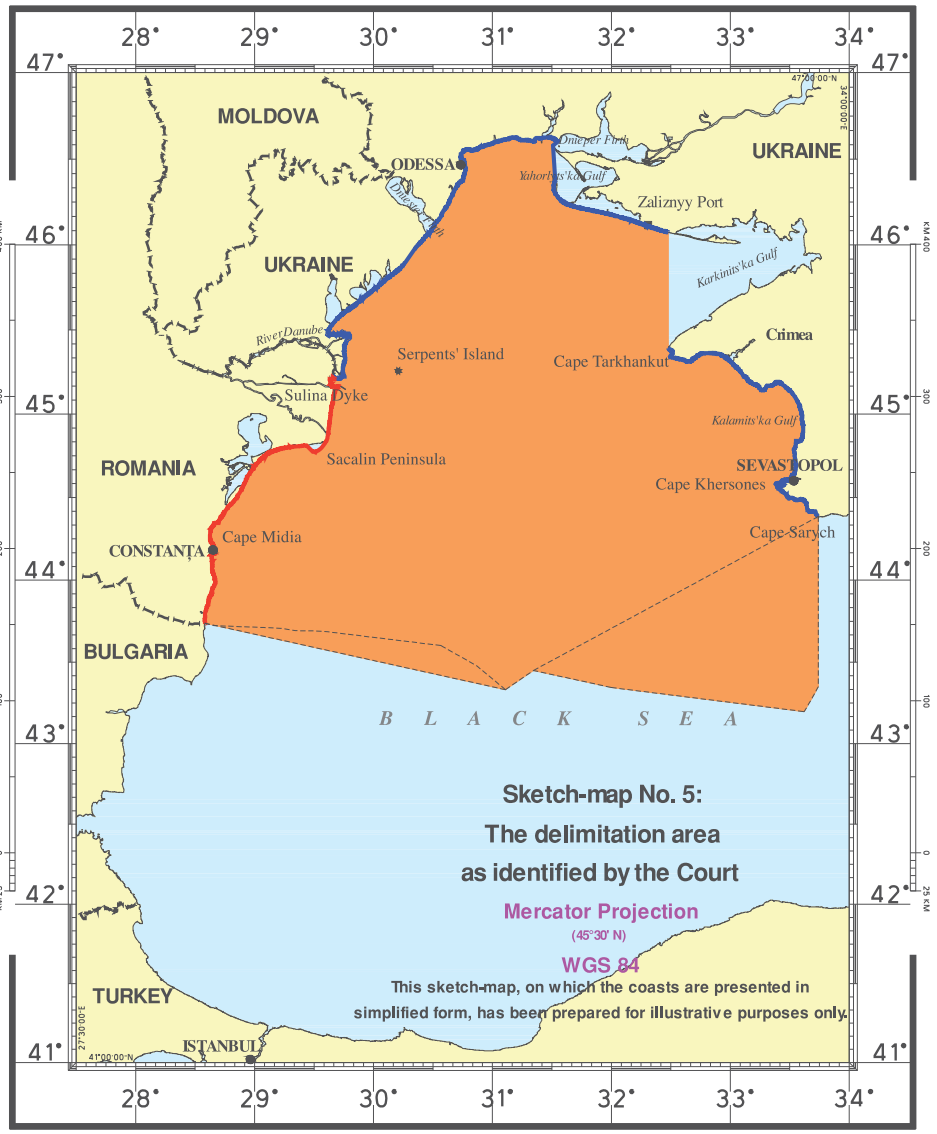
116. These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*Judgment, I.C.J. Reports 1985*, p. 46, para. 60), have in recent decades been specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 745, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both.

117. Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to the delimited. The Court considers elsewhere (see paragraphs 135-137 below) the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the Parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both Parties' coastlines when choosing its own base points for this purpose. The line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts.

118. In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

119. In the present case the Court will thus begin by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which will then continue as a median line between their opposite coasts.

120. The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result (*Land and Maritime Boundary between Cameroon and*



Nigeria (Cameroon v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 741, para. 271).

121. This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

122. Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line (see paragraphs 214-215). A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa" (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 67, para. 64).

8. Establishment of the Provisional Equidistance Line

8.1. Selection of Base Points

123. Romania contends that the base points to take into account in constructing the provisional equidistance line between the adjacent coasts of Romania and Ukraine are, on the Romanian coast, the seaward end of the Sulina dyke, and on the Ukrainian coast, a point on the island of Kubansky and Cape Burnas. In addition, in Romania's view, the base points on the opposite coasts of Romania and Ukraine are, on the Romanian coast, the seaward end of the Sulina dyke and the outer end of the Sacalin Peninsula, and on the Ukrainian coast, Capes Tarkhankut and Khersones. Romania points out that the Sacalin Peninsula and the most seaward point of the Sulina dyke are among the relevant points notified by Romania to the United Nations under Article 16 of UNCLOS for measuring the breadth of the territorial sea.

124. Romania argues that no account should be taken of Serpents'

some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting "the coast" of Ukraine.

To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration (cf. the islet of Filfla in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13).

For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine. Further aspects relevant to Serpents' Island are dealt with at paragraphs 179 to 188 below.

8.2. Construction of the Provisional Equidistance Line

150. Romania argues that the first segment of the maritime boundary delimiting the maritime areas of the two States situated beyond their territorial seas was established by successive agreements between Romania and the Soviet Union: from the final point of the boundary separating the territorial seas of the two States at 45° 05′ 21″ N and 30° 02′ 27″ E, the maritime boundary passes along the 12-nautical-mile arc of the circle around Serpents' Island until it reaches a point situated on that arc at 45° 14′ 20″ N and 30° 29′ 12″ E (see Section 4). Romania contends that the maritime boundary beyond that point was never delimited between Romania and the USSR or Ukraine. Romania draws a provisional equidistance line from the final point of the land/river boundary between the two States taking into account the salient base points of the adjacent Romanian and Ukrainian coasts. These are: on the Romanian coast, the seaward end of the Sulina dyke; and on the Ukrainian coast, the island of Kubansky and Cape Burnas. As the point lying on the arc around Serpents' Island at 45° 14′ 20″ N and 30° 29′ 12″ E, is not situated on the equidistance line, but about 2.5 nautical miles to the north, the delimitation of the maritime boundary beyond this point must, in Romania's view, start by joining it to the provisional equidistance line. The line thus drawn passes through the point at 45° 11′ 59″ N and 30° 49′ 16″ E, situated practically midway between the 12-nautical-mile arc around Serpents' Island and the tripoint as between the Romanian and Ukrainian adjacent coasts and the opposite Crimean coast, situated at 45° 09′ 45″ N and 31° 08′ 40″ E. Romania contends that, from this point southwards, the delimitation is governed by the opposite Romanian and Ukrainian coasts.

151. Romania calculates the median line taking into account the salient base points on the relevant opposite coasts of the two States (the seaward end of the Sulina dyke and the outer end of the Sacalin Peninsula on the Romanian coast, and Capes Tarkhankut and Khersones on the Ukrainian coast). Romania's equidistance line in the sector of opposite coasts thus coincides with the segment of the median line running from, in the north, the tripoint as between the Romanian and Ukrainian adjacent coasts and the opposite Crimean coast to, in the south, the point beyond which the interests of third States may be affected, which Romania situates at 43° 26′ 50″ N and 31° 20′ 10″ E.

*

152. Ukraine maintains that the provisional equidistance line must be constructed by reference to the base points on each Party's baselines from which the breadth of its territorial sea is measured. Thus, on the Romanian side, Ukraine uses the base points at the seaward end of the Sulina dyke and on the Sacalin Peninsula. On its own side, it uses the base points on Serpents' Island and at the tip of Cape Khersones. The provisional equidistance line advocated by Ukraine starts at the point of intersection of the territorial seas of the Parties identified in Article 1 of the 2003 State Border Régime Treaty (45° 05′ 21″ N and 30° 02′ 27″ E). The line then runs in a southerly direction until the point at 44° 48′ 24″ N and 30° 10′ 56″ E, after which it turns to run in a south-easterly direction until the point at 43° 55′ 33″ N and 31° 23′ 26″ E and thereafter continues due south.

* *

153. The Court recalls that the base points which must be used in constructing the provisional equidistance line are those situated on the Sacalin Peninsula and the landward end of the Sulina dyke on the Romanian coast, and Tsyganka Island, Cape Tarkhankut and Cape Khersones on the Ukrainian coast.

154. In its initial segment the provisional equidistance line between the Romanian and Ukrainian adjacent coasts is controlled by base points located on the landward end of the Sulina dyke on the Romanian coast and south-eastern tip of Tsyganka Island on the Ukrainian coast. It runs in a south-easterly direction, from a point lying midway between these two base points, until Point A (with co-ordinates 44° 46′ 38.7″ N and 30° 58′ 37.3″ E) where it becomes affected by a base point located on the Sacalin Peninsula on the Romanian coast. At Point A the equidistance line slightly changes direction and continues to Point B (with co-ordinates 44° 44′ 13.4″ N and 31° 10′ 27.7″ E) where it becomes affected by the base point located on Cape Tarkhankut on Ukraine's opposite coasts.

At Point B the equidistance line turns south-south-east and continues to Point C (with co-ordinates 44° 02′ 53.0″ N and 31° 24′ 35.0″ E), calculated with reference to base points on the Sacalin Peninsula on the Romanian coast and Capes Tarkhankut and Khersones on the Ukrainian coast. From Point C the equidistance line, starting at an azimuth of 185° 23′ 54.5″ [4], runs in a southerly direction. This line remains governed by the base points on the Sacalin Peninsula on the Romanian coast and Cape Khersones on the Ukrainian coast.

(For the construction of the equidistance line see sketch-maps Nos. 6 and 7, pp. 114-115.)

9. Relevant Circumstances

155. As the Court indicated above (paragraphs 120-121), once the provisional equidistance line has been drawn, it shall "then [consider] whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). Such factors have usually been referred to in the jurisprudence of the Court, since the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, as the relevant circumstances (*Judgment, I.C.J. Reports 1969*, p. 53, para. 53). Their function is to verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable. If such would be the case, the Court should adjust the line in order to achieve the "equitable solution" as required by Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS.

156. The Parties suggested and discussed several factors which they consider as the possible relevant circumstances of the case. They arrive at different conclusions. Romania argues that its provisional equidistance line achieves the equitable result and thus does not require any adjustment. Ukraine, on the other hand, submits that there are relevant circumstances which call for the adjustment of its provisional equidistance line "by moving the provisional line closer to the Romanian coast".

[4] The geographical co-ordinates used by the Parties for the drawing of the equidistance lines proposed by them are given by reference to Pulkovo datum. The Court, for its part, has chosen to use WGS 84 datum. The positions of Points A, B and C are given by reference to that geodetic datum. The equidistance line described in this paragraph is a geodetic line and the azimuth given is a geodetic azimuth based on WGS 84 datum.

157. Before addressing the relevant circumstances referred to by the Parties, the Court wishes to recall that the provisional equidistance line it has drawn in Section 8 above does not coincide with the provisional lines drawn either by Ukraine or Romania. Therefore, it is this line, drawn by the Court, and not by Romania or Ukraine, which will be in the focus of the Court's attention when analysing what the Parties consider to be the relevant circumstances of the case.

9.1. Disproportion between Lengths of Coasts

158. The circumstance which Ukraine invokes in order to justify its claim that the provisional equidistance line should be adjusted by moving the delimitation line closer to Romania's coast is the disparity between the length of the Parties' coasts abutting on the delimitation area.

*

159. Romania acknowledges that the general configuration of the coasts may constitute, given the particular geographical context, a relevant circumstance that can be taken into consideration with a view to adjusting the equidistance line. However, with regard specifically to any disproportion between the lengths of the Parties' coasts, Romania notes that in a maritime delimitation it is rare for the disparities between the Parties' coasts to feature as a relevant circumstance. Moreover, in the present case, there is no manifest disparity in the respective coastal lengths of Romania and Ukraine.

160. Romania adds that in any event proportionality should be dealt with "only after having identified the line resulting from the application of the equitable principles/special circumstances approach".

161. In conclusion Romania is of the view that the alleged "geographical predominance of Ukraine in the area" and "the disparity between coastal lengths" of the Parties should not be considered relevant circumstances in the case.

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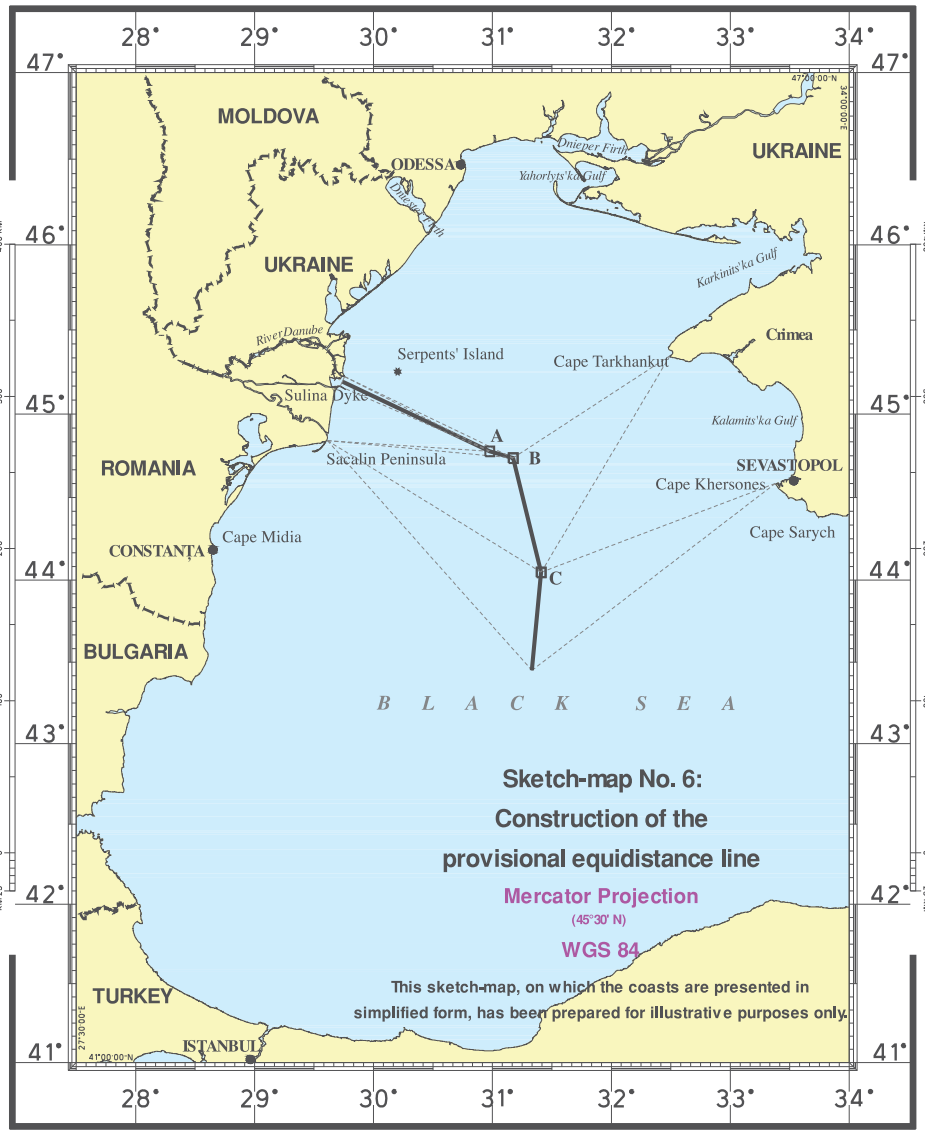
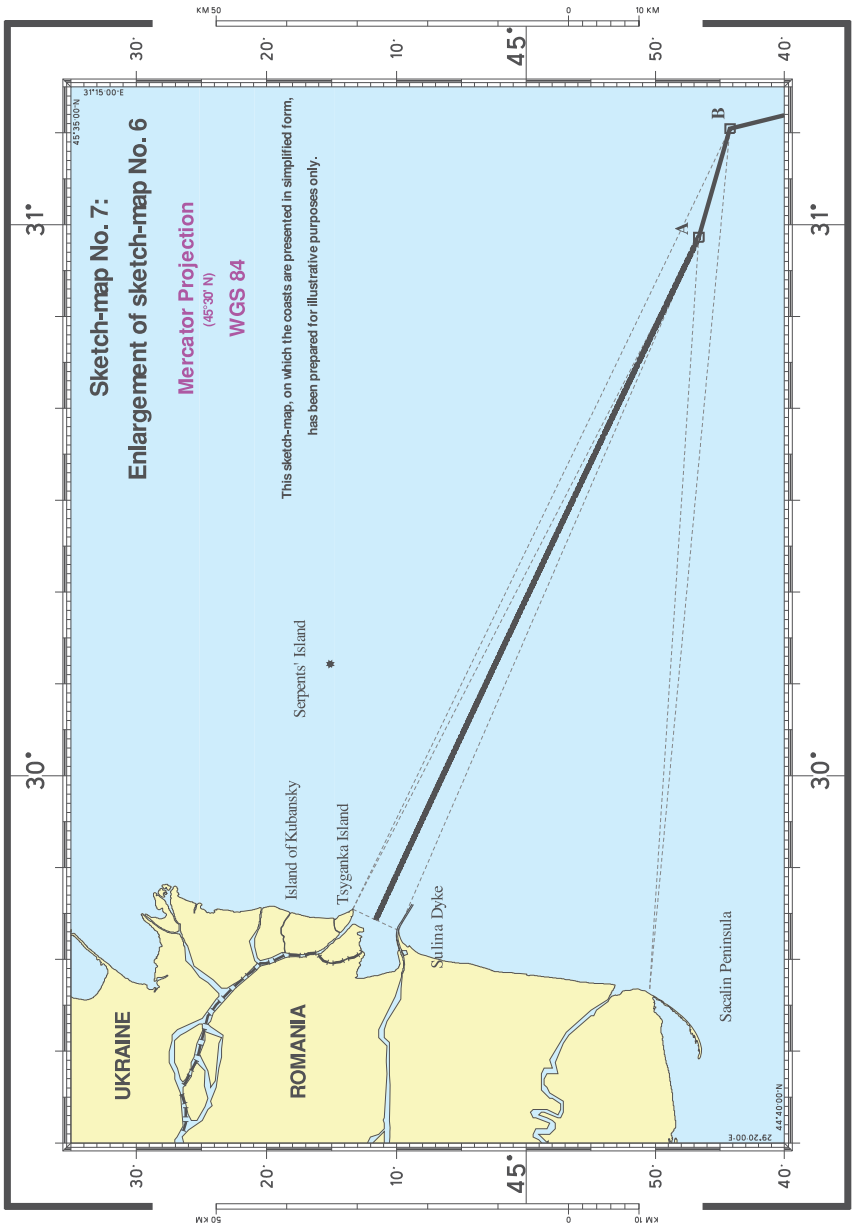
162. With regard to the role which may be played by the coastal configuration, Ukraine states that there is a broad margin of appreciation as to its scope as a relevant circumstance. In the circumstances of the current case, Ukraine argues that the coastal configuration clearly shows the geographical predominance of Ukraine in the relevant area which also finds an expression in terms of coastal length: the Ukrainian relevant coast is more than four times longer than the coast of Romania. Ukraine notes that in almost all maritime delimitation cases dealt with by international tribunals, "comparison of the lengths of the relevant coasts has occupied a quite significant place and even played a decisive role in a number of the decisions taken". Thus, according to Ukraine, the marked


MOLDOVA
ODESSA
UKRAINE
Dnieper Firth
Yahorlyts'ka Gulf
Dniester River
UKRAINE
Karkinits'ka Gulf
River Danube
Crimea
Serpents' Island
Cape Tarkhankut
Sulina Dyke
Kalamits'ka Gulf
A
B
ROMANIA
Sacalin Peninsula
SEVASTOPOL
Cape Khersones
Cape Midia
Cape Sarych
CONSTANTA
C
BULGARIA
B L A C K S E A
Sketch-map No. 6:
Construction of the
provisional equidistance line
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in
simplified form, has been prepared for illustrative purposes only.
TURKEY
ISTANBUL
28°
29°
30°
31°
32°
33°
34°
47°
46°
45°
44°
43°
42°
41°


Sketch-map No. 7:
Enlargement of sketch-map No. 6
Mercator Projection
(45°30' N)
WGS 84
This sketch-map, on which the coasts are presented in simplified form,
has been prepared for illustrative purposes only.
A
B
Serpents' Island
Island of Kubansky
Tsyganka Island
Sulina Dyke
Sacalin Peninsula
UKRAINE
ROMANIA
30°
31°
45°

disproportion between lengths of the Parties' coasts is a relevant circumstance to be taken into account in the construction of a delimitation line and should result in a shifting of the provisional equidistance line in order to produce an equitable result.

* *

163. The Court observes that the respective length of coasts can play no role in identifying the equidistance line which has been provisionally established. Delimitation is a function which is different from the apportionment of resources or areas (see *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18). There is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line.

164. Where disparities in the lengths of coasts are particularly marked, the Court may choose to treat that fact of geography as a relevant circumstance that would require some adjustments to the provisional equidistance line to be made.

165. In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, the Court acknowledged "that a *substantial* difference in the lengths of the parties' respective coastlines *may* be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line" (*Judgment, I.C.J. Report 2002*, p. 446, para. 301; emphasis added), although it found that in the circumstances there was no reason to shift the equidistance line.

166. In the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*, the Court found that the disparity between the lengths of the coasts of Jan Mayen and Greenland (approximately 1:9) constituted a "special circumstance" requiring modification of the provisional median line, by moving it closer to the coast of Jan Mayen, to avoid inequitable results for both the continental shelf and the fisheries zone. The Court stated that:

> "It should, however, be made clear that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front of eastern Greenland and that of Jan Mayen." (*Judgment, I.C.J. Reports 1993*, p. 69, para. 69.)

Then it recalled its observation from the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration; for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence." *Judgment, I.C.J. Reports 1985*, p. 45, para. 58.)

In the latter case, the Court was of the view that the difference in the lengths of the relevant coasts of Malta and Libya (being in ratio 1:8) "is so *great* as to justify the adjustment of the median line" (*ibid.*, p. 50, para. 68; emphasis added). The Court added that "the degree of such adjustment does not depend upon a mathematical operation and remains to be examined" *(ibid.)*.

167. The Court further notes that in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* case, the Chamber considered that "in certain circumstances, the appropriate consequences may be drawn from any *inequalities* in the extent of the coasts of two States into the same area of delimitation" (*Judgment, I.C.J. Reports 1984*, p. 313, para. 157; emphasis added). However, it must be kept in mind that the Chamber did so in the context of discussing what could be "the *equitable* criteria that may be taken into consideration for an international maritime delimitation" (*ibid.*, p. 312, para. 157; emphasis added). It then further elaborated on this point by stating

> "[...] that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation. The Chamber recognizes that this concept is put forward mainly as a means of checking whether a provisional delimitation established initially on the basis of other criteria, and by the use of a method which has nothing to do with that concept, can or cannot be considered satisfactory in relation to certain geographical features of the specific case, and whether it is reasonable or otherwise to correct it accordingly. The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a *substantial* disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction." (*Ibid.*, p. 323, para. 185; emphasis added.)

168. In the present case, however the Court sees no such particularly marked disparities between the relevant coasts of Ukraine and Romania

that would require it to adjust the provisional equidistance line at this juncture. Although there is doubtless a difference in the length of the relevant coasts of the Parties, the Court recalls that it previously (see paragraph 100 above) excluded the coast of Karkinits'ka Gulf (measuring some 278 km) from further consideration. The Court further notes that it cannot disregard the fact that a good portion of the Ukrainian coast which it considers as relevant projects into the same area as other segments of the Ukrainian coast, thus strengthening but not spatially expanding the Ukrainian entitlement.

9.2. The Enclosed Nature of the Black Sea and the Delimitations Already Effected in the Region

169. Romania notes that the enclosed nature of the Black Sea is also a relevant circumstance as part of the wider requirement to take account of the geographical context of the area to be delimited. According to Romania, in considering the equitable nature of an equidistance line, the "general maritime geography" of the Black Sea must be assessed. In Romania's view, this geographical factor is to be considered together with any pre-existing delimitation agreements so that any new delimitation should not dramatically depart from the method previously used in the same sea between other riparian States in order not to produce an inequitable result.

170. Romania contends that all the delimitation agreements concluded in the Black Sea used equidistance as the method for the delimitation of the continental shelf and the exclusive economic zones. Romania adds that the lines of delimitation established by two of these agreements end with provisionally defined segments, the definitive course of which is to depend on subsequent discussions, and that the reason for this was that the Parties wished to avoid prejudicing the interests of third parties and that they had Romania in mind.

171. Romania concludes that the Black Sea's nature as an enclosed sea and its rather small size, together with the agreed solutions established in the delimitation agreements in force, constitute a relevant circumstance which must be taken into account in the delimitation process for Romania's and Ukraine's maritime areas.

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172. In Ukraine's view, there is "no support in law or in the factual context" for Romania's arguments regarding the characterization of the Black Sea as an enclosed sea and the importance of maritime delimitation agreements previously concluded between certain States bordering the Black Sea. According to Ukraine, there is no special régime governing delimitations taking place in an enclosed sea simply because of this

nature. Ukraine therefore considers that the enclosed character of the Black Sea "is not by itself a circumstance which ought to be regarded as relevant for delimitation purposes" and has no bearing on the method of delimitation to be applied in the present proceedings.

173. Ukraine further notes that in general terms, bilateral agreements cannot affect the rights of third parties and, as such, the existing maritime delimitation agreements in the Black Sea cannot influence the present dispute.

Ukraine states that only in a limited sense can the presence of third States in the vicinity of the area to be delimited be considered a relevant circumstance. However, this has nothing to do with the choice of the actual method of delimitation or the character of a sea (whether or not it is enclosed). According to Ukraine, the presence of third States may be relevant only to the extent that the Court may have to take precautions in identifying a precise endpoint of the delimitation line so as to avoid potential prejudice to States situated on the periphery of the delimitation area.

* *

174. The Court recalls that it has intimated earlier, when it briefly described the delimitation methodology, that it would establish a provisional equidistance line (see paragraph 116 above). This choice was not dictated by the fact that in all the delimitation agreements concerning the Black Sea this method was used.

175. Two delimitation agreements concerning the Black Sea were brought to the attention of the Court. The first agreement, the Agreement concerning the Delimitation of the Continental Shelf in the Black Sea, was concluded between Turkey and the USSR on 23 June 1978. Some eight years later, they agreed, through an Exchange of Notes dated 23 December 1986 and 6 February 1987, that the continental shelf boundary agreed in their 1978 Agreement would also constitute the boundary between their exclusive economic zones. The westernmost segment of the line, between two points with co-ordinates 43° 20′ 43″ N and 32° 00′ 00″ E and co-ordinates 43° 26′ 59″ N and 31° 20′ 48″ E, respectively, remained undefined and to be settled subsequently at a convenient time. After the dissolution of the USSR at the end of 1991, the 1978 Agreement and the Agreement reached through the Exchange of Notes remained in force not only for the Russian Federation, as the State continuing the international legal personality of the former USSR, but also the successor States of the USSR bordering the Black Sea, Ukraine being one of them.

176. The second agreement is the Agreement between Turkey and Bulgaria on the determination of the boundary in the mouth area of the Rezovska/Mutludere River and delimitation of the maritime areas between the two States in the Black Sea, signed on 4 December 1997. The

drawing of the delimitation line of the continental shelf and the exclusive economic zone further to the north-east direction, between geographical point 43° 19′ 54″ N and 31° 06′ 33″ E and geographical point 43° 26′ 49″ N and 31° 20′ 43″ E, was left open for subsequent negotiations at a suitable time.

177. The Court will bear in mind the agreed maritime delimitations between Turkey and Bulgaria, as well as between Turkey and Ukraine, when considering the endpoint of the single maritime boundary it is asked to draw in the present case (see Section 10 below).

178. The Court nevertheless considers that, in the light of the above-mentioned delimitation agreements and the enclosed nature of the Black Sea, no adjustment to the equidistance line as provisionally drawn is called for.

9.3. The Presence of Serpents' Island in the Area of Delimitation

179. The Parties disagree as to the proper characterization of Serpents' Island and the role this maritime feature should play in the delimitation of the continental shelf and the Parties' exclusive economic zones in the Black Sea.

180. Romania maintains that Serpents' Island is entitled to no more than a 12-nautical-mile territorial sea, and that it cannot be used as a base point in drawing a delimitation line beyond the 12-mile limit. Romania claims that Serpents' Island is a rock incapable of sustaining human habitation or economic life of its own, and therefore has no exclusive economic zone or continental shelf, as provided for in Article 121, paragraph 3, of the 1982 UNCLOS. According to Romania, Serpents' Island qualifies as a "rock" because: it is a rocky formation in the geomorphologic sense; it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna. Romania claims that human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities. It adds that "[t]he presence of some individuals, . . . because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained 'human habitation'".

181. Romania further argues that Serpents' Island does not form part of the coastal configuration of the Parties and that its coast cannot therefore be included among Ukraine's relevant coasts for purposes of the delimitation.

182. Romania nevertheless admits that in the present case the presence of Serpents' Island "with its already agreed belt of 12-nautical-mile territorial sea" might be a relevant circumstance. It asserts that under international jurisprudence and State practice, small islands, irrespective of their legal characterization, have frequently been given very reduced or

no effect in the delimitation of the continental shelf, exclusive economic zone or other maritime zones due to the inequitable effect they would produce. Thus, contends Romania, in the present case the provisional equidistance line should be drawn between the relevant mainland coasts of the Parties, with minor maritime formations only being considered at a later stage as possible relevant circumstances. Romania states that Serpents' Island, given its location, could be considered as a relevant circumstance only in the sector of the delimitation area where the coasts are adjacent (in other words, the provisional equidistance line would have to be shifted so as to take into consideration the maritime boundary along the 12-nautical-mile arc around Serpents' Island, which "cannot generate maritime zones beyond 12 nautical miles"). Owing to its remoteness from the Ukrainian coast of Crimea, Serpents' Island cannot, according to Romania, play any role in the delimitation in the area where the coasts are opposite. In short, Romania considers that, although Serpents' Island may qualify as a "special circumstance", it should not be given any effect beyond 12 nautical miles.

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183. Ukraine argues that Serpents' Island has a baseline which generates base points for the construction of the provisional equidistance line. Thus, in Ukraine's view, the coast of the island constitutes part of Ukraine's relevant coasts for purposes of the delimitation and cannot be reduced to just a relevant circumstance to be considered only at the second stage of the delimitation process after the provisional equidistance line has been established.

184. According to Ukraine, Serpents' Island is indisputably an "island" under Article 121, paragraph 2, of UNCLOS, rather than a "rock". Ukraine contends that the evidence shows that Serpents' Island can readily sustain human habitation and that it is well established that it can sustain an economic life of its own. In particular, the island has vegetation and a sufficient supply of fresh water. Ukraine further asserts that Serpents' Island "is an island with appropriate buildings and accommodation for an active population". Ukraine also argues that paragraph 3 of Article 121 is not relevant to this delimitation because that paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision that has no practical application with respect to a maritime area that is, in any event, within the 200-mile limit of the exclusive economic zone and continental shelf of a mainland coast.

* *

185. In determining the maritime boundary line, in default of any delimitation agreement within the meaning of UNCLOS Articles 74 and 83, the Court may, should relevant circumstances so suggest, adjust the provisional equidistance line to ensure an equitable result. In this phase, the Court may be called upon to decide whether this line should be adjusted because of the presence of small islands in its vicinity. As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 104, para. 219; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 751 *et seq.*, paras. 302 *et seq.*).

186. The Court recalls that it has already determined that Serpents' Island cannot serve as a base point for the construction of the provisional equidistance line between the coasts of the Parties, that it has drawn in the first stage of this delimitation process, since it does not form part of the general configuration of the coast (see paragraph 149 above). The Court must now, at the second stage of the delimitation, ascertain whether the presence of Serpents' Island in the maritime delimitation area constitutes a relevant circumstance calling for an adjustment of the provisional equidistance line.

187. With respect to the geography of the north-western part of the Black Sea, the Court has taken due regard of the fact that Ukraine's coast lies on the west, north and east of this area. The Court notes that all of the areas subject to delimitation in this case are located in the exclusive economic zone and the continental shelf generated by the mainland coasts of the Parties and are moreover within 200 nautical miles of Ukraine's mainland coast. The Court observes that Serpents' Island is situated approximately 20 nautical miles to the east of Ukraine's mainland coast in the area of the Danube delta (see paragraph 16 above). Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast because of the southern limit of the delimitation area as identified by the Court (see paragraph 114 and sketch-map No. 5, p. 102). Further, any possible entitlements generated by Serpents' Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also notes that Ukraine itself, even though it considered Serpents' Island to fall under Article 121, paragraph 2, of UNCLOS, did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpents' Island in the area of delimitation (see sketch-map No. 3, p. 92).

In the light of these factors, the Court concludes that the presence of Serpents' Island does not call for an adjustment of the provisional equidistance line.

In view of the above, the Court does not need to consider whether Serpents' Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS nor their relevance to this case.

188. The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents' Island pursuant to agreements between the Parties. It concludes that, in the context of the present case, Serpents' Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical-mile arc of its territorial sea.

9.4. The Conduct of the Parties (Oil and Gas Concessions, Fishing Activities and Naval Patrols)

189. Ukraine suggests that State activities in the relevant area "constitute a relevant circumstance which operates in favour of the continental shelf/EEZ claim line proposed by Ukraine". Ukraine explains that it does not point to this conduct of the Parties in order to show the existence of a line arising from a tacit agreement or a *modus vivendi*. Instead, Ukraine seeks to assess the claims of the Parties in relation to their actual conduct. According to Ukraine, it is significant that Romania's activities, or lack of them, are "fundamentally inconsistent" with Romania's argument that there was a pre-existing maritime delimitation in the disputed area extending out to "Point X". Furthermore, Ukraine contends that the lack of any comparable operations by Romania in the disputed area is incompatible with the position taken by Romania in the proceedings before the Court.

190. Ukraine argues that in 1993, 2001 and 2003 it licensed activities relating to the exploration of oil and gas deposits within the continental shelf/exclusive economic zone area claimed by Ukraine in the current case. It asserts that the existence of these licences demonstrates that Ukraine, both before and after the 1997 Additional Agreement, authorized activities relating to the exploration of oil and gas deposits in areas of the continental shelf to which Romania lays claim in these proceedings. It adds that prior to 2001, Romania never protested Ukraine's oil and gas activities in areas now claimed by Romania.

Ukraine concludes on this point that its oil-related activities are consistent with its delimitation line and should be taken into account together with the other relevant circumstances, in particular the physical geography, in order to achieve an equitable solution.

191. Ukraine further argues that the exclusive economic zone and continental shelf boundary it claims furthermore corresponds generally to the limit of the Parties exclusive fishing zones "as respected by both Romania and Ukraine in their administration of fishing in the north-west part of the Black Sea". Ukraine emphasizes that it was Ukraine and not Romania that has been active in policing that part of the area. Ukraine contends that Romania has neither demonstrated any interest in patrolling the area nor has it objected to the fact that the Ukrainian coastguard assumed the sole responsibility of intercepting illegal fishing vessels and, when possible, escorting them out of Ukraine's exclusive economic zone and taking any other appropriate measures.

192. With regard to the notion of a critical date introduced by Romania, Ukraine states that "even assuming that there was a critical date at all, and that the critical date would have a role to play in maritime delimitation, it is the date of Romania's Application: 16 September 2004".

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193. Romania does not consider that State activities in the relevant area, namely licences for the exploration and exploitation of oil and gas and fishing practices, constitute relevant circumstances. As a matter of legal principle, *effectivités* or "State activities" cannot constitute an element to be taken into account for the purposes of maritime delimitation. Romania notes that maritime *effectivités* can only be taken into account if they "reflect a tacit agreement" which might constitute a relevant circumstance for delimitation. In order to come within this "exception" to the general rule, it notes that only State activities prior to the critical date may be relevant and that they must be sufficient to prove that "a tacit agreement or *modus vivendi* exists". According to Romania, the *effectivités* presented by Ukraine do not reveal the existence of a "*de facto* line" or of a "pattern of conduct" proving one way or another an agreement between the Parties, or acquiescence by Romania relating in any way to maritime delimitation. These activities cannot therefore constitute an element "undermining Romania's argument regarding the 1949 Procès-Verbaux". Romania concludes that it is evident from all the elements regarding the "State activities" in the disputed area that Ukraine has "failed to demonstrate that these State activities comply, in fact or in law, with the necessary criteria that might transform them into a relevant circumstance able to have an impact on [the] delimitation".

194. Romania further recalls that under the 1997 Additional Agreement the two Parties clearly recognized in writing the existence of a dispute regarding the maritime delimitation, and set the framework for future negotiations to conclude a delimitation agreement. Romania adds

that the Agreement's provisions regarding the existence of the dispute were a mere confirmation of a factual situation that had already existed for a long time. Thus any oil-related practice occurring after the conclusion of the 1997 Additional Agreement is, in its view, irrelevant in the present proceedings as the dispute had already crystallized by that date.

195. Romania concludes that Ukraine's oil concessions practice offers no support to the latter's claimed delimitation for the following reasons. First, the area covered by the Ukrainian concessions "does not even roughly correspond to its claim in the present proceedings". Second, two of the three licences were issued in 2001 and 2003, i.e., after the critical date of 1997. Moreover, Romania consistently objected to Ukrainian hydrocarbon activity.

196. With regard to fishing activities, Romania contests that the practice of the Parties has any bearing on the maritime delimitation in the present case since neither Party economically depends on fisheries activities in an area in which pelagic fish stocks are limited; the practice invoked by Ukraine is recent and only covers a small part of the area in dispute; and it has always been challenged by Romania and has never been recognized by third States. With regard to the naval patrols, Romania submits, even if they could be considered a relevant circumstance, *quod non*, all the naval incidents reported by Ukraine are subsequent to the critical date and as such are in any event irrelevant.

* *

197. The Court recalls that it had earlier concluded that there is no agreement in force between the Parties delimiting the continental shelf and the exclusive economic zones of the Parties (see paragraph 76 above).

It further notes that Ukraine is not relying on State activities in order to prove a tacit agreement or *modus vivendi* between the Parties on the line which would separate their respective exclusive economic zones and continental shelves. It rather refers to State activities in order to undermine the line claimed by Romania.

198. The Court does not see, in the circumstances of the present case, any particular role for the State activities invoked above in this maritime delimitation. As the Arbitral Tribunal in the case between Barbados and Trinidad and Tobago observed,

> "[r]esource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance" (*Award of 11 April 2006, RIAA*, Vol. XXVII, p. 214, para. 241).

With respect to fisheries, the Court adds that no evidence has been submitted to it by Ukraine that any delimitation line other than that claimed by it would be "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 342, para. 237).

Since the Court does not consider that the above-mentioned State activities constitute a relevant circumstance in the present case, the issue of critical date discussed by the Parties does not require a response from the Court.

9.5. Any Cutting Off Effect

199. Romania contends that its proposed maritime boundary does not cut off the entitlements to the continental shelf and to the exclusive economic zone of either Romania or Ukraine. The area attributed to each Party does not encroach on the natural prolongation of the other.

Romania argues that Ukraine's delimitation line leads to a cut-off of Romania's maritime entitlements, in particular in the northern sector of its coast between the Sulina dyke and the Sacalin Peninsula. Romania states that the delimitation line advocated by Ukraine would make it extremely difficult for Romania to gain access to the port of Sulina and the maritime branch of the Danube, which is an important route for the transit of merchandise. In short, according to Romania, Ukraine's claimed line results in a dramatic curtailment of the maritime areas off the Romanian coast, "as if the projection of every stretch of Ukraine's coast run unobstructed in every direction while there is no opposing or adjacent Romanian territory".

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200. According to Ukraine, Romania's line results in a two-fold cut-off of Ukraine's maritime entitlements. First, the maritime entitlements of Serpents' Island are dramatically truncated by allocating no continental shelf and no exclusive economic zone to it. Second, Ukraine's south-facing mainland coast is deprived of the area to which it is legally entitled: "[T]he end result is clearly inequitable and represents a fundamental encroachment on continental shelf and exclusive economic areas that should appertain to Ukraine . . .." Thus, Ukraine argues that "Romania's versions of equidistance produces a marked cut-off effect of the projection of Ukraine's coastal front north of the land boundary". Moreover Ukraine asserts that

> "not only does Romania's line encroach upon the extension or projection of Ukraine's south-east-facing coast — the coast just above the land boundary — it also produces a cut-off effect on the projection of Ukraine's south-facing coast lying beyond Odessa".

Ukraine argues that its line fully respects the principle of non-encroachment. It reflects the geographical fact that "Ukraine's coast fronting the area to be delimited projects in essentially three directions while Romania's coast projects basically in a single direction — south-eastwards".

* *

201. The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula.

By contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground.

9.6. The Security Considerations of the Parties

202. Romania asserts that there is no evidence to suggest that the delimitation advanced by it would adversely affect Ukraine's security interests, including Serpents' Island, which has a belt of maritime space of 12 nautical miles.

In Romania's view, Ukraine's delimitation line runs unreasonably close to the Romanian coast and thus encroaches on the security interests of Romania.

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203. Ukraine claims that its line in no way compromises any Romanian security interests because Ukraine's delimitation line accords to Romania areas of continental shelf and exclusive economic zone off its coastline. In this regard Ukraine refers to "the predominant interest Ukraine has for security and other matters as a function of its geographical position along this part of the Black Sea on three sides of the coast" and maintains that Ukraine has been the only Party to police the area and to prevent illegal fishing and other activities in that area. According

to Ukraine, its claim is consistent with this aspect of the conduct of the Parties, whereas Romania's claim is not.

* *

204. The Court confines itself to two observations. First, the legitimate security considerations of the Parties may play a role in determining the final delimitation line (see *Continental Shelf (Libyan Arab Jamahiriyal Malta), Judgment, I.C.J. Reports 1985*, p. 42, para. 51). Second, in the present case however, the provisional equidistance line it has drawn substantially differs from the lines drawn either by Romania or Ukraine. The provisional equidistance line determined by the Court fully respects the legitimate security interests of either Party. Therefore, there is no need to adjust the line on the basis of this consideration.

10. The Line of Delimitation

205. The Court takes note of the fact that Article 1 of the 2003 State Border Régime Treaty situates the meeting point of the territorial seas of the Parties at 45° 05′ 21″ N and 30° 02′ 27″ E. This suffices for the fixing of the starting-point.

Romania and Ukraine have both indicated, in considerable detail, the course that their respective delimitation lines would then follow beyond the point fixed by Article 1 of the 2003 State Border Régime Treaty (see paragraph 13 above and sketch-map No. 1, p. 69). The Court notes that the Parties' positions differ in this regard.

206. The delimitation line decided by the Court, for which neither the seaward end of the Sulina dyke nor Serpents' Island is taken as a base point, begins at Point 1 and follows the 12-nautical-mile arc around Serpents' Island until it intersects with the line equidistant from Romania's and Ukraine's adjacent coasts, as defined above; from there, it follows that line until it becomes affected by base points on the opposite coasts of Romania and Ukraine. From this turning point the delimitation line runs along the line equidistant from Romania's and Ukraine's opposite coasts (for the course of the equidistance line see paragraph 154 above).

207. Romania maintains that the endpoint of the delimitation line is situated at co-ordinates 43° 26′ 50″ N and 31° 20′ 10″ E (Point Z). It asserts that drawing the delimitation line up to Point Z does not affect any possible entitlements of third countries to maritime areas, as Point Z is "practically the point equidistant to the Romanian, Ukrainian and Turkish coasts, and is farther to the Bulgarian coast".

208. Ukraine argues that no endpoint of the delimitation should be

specified, so as to avoid any encroachment on possible entitlements of third States; the line would therefore end in an arrow. The line advocated by Ukraine continues from the point identified by it as Point 3 along the azimuth 156 until it reaches the point where the interests of third States potentially come into play.

209. The Court considers that the delimitation line follows the equidistance line in a southerly direction until the point beyond which the interests of third States may be affected.

11. The Disproportionality Test

210. The Court now turns to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. This Court agrees with the observation that

> "it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor . . . there can never be a question of completely refashioning nature . . . it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features" (*Anglo-French Continental Shelf Case*, *RIAA*, Vol. XVIII, p. 58, para. 101).

211. The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, *ex post facto*, on the equitableness of the delimitation line it has constructed (*Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, *RIAA*, Vol. XIX, pp. 183-184, paras. 94-95).

212. This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded.

213. The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still required adjustment. This remains in each case a matter for the Court's appreciation, which it will exercise by reference to the overall geography of the area.

214. In the present case the Court has measured the coasts according to their general direction. It has not used baselines suggested by the Parties for this measurement. Coastlines alongside waters lying behind

gulfs or deep inlets have not been included for this purpose. These measurements are necessarily approximate given that the purpose of this final stage is to make sure there is no significant disproportionality.

215. It suffices for this third stage for the Court to note that the ratio of the respective coastal lengths for Romania and Ukraine, measured as described above, is approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine is approximately 1:2.1.

216. The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.

12. The Maritime Boundary Delimiting the Continental Shelf and Exclusive Economic Zones

217. The Court observes that a maritime boundary delimiting the continental shelf and exclusive economic zones is not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law coastal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty. Consequently, the Court considers that no confusion as to the nature of the maritime boundary delimiting the exclusive economic zone and the continental shelf arises and will thus employ this term.

218. The line of the maritime boundary established by the Court begins at Point 1, the point of intersection of the outer limit of the territorial sea of Romania with the territorial sea of Ukraine around Serpents' Island as stipulated in Article 1 of the 2003 State Border Régime Treaty (see paragraph 28 above). From Point 1 it follows the arc of the 12-nautical-mile territorial sea of Serpents' Island until the arc intersects at Point 2, with co-ordinates 45° 03′ 18.5″ N and 30° 09′ 24.6″ E, with a line equidistant from the adjacent coasts of Romania and Ukraine, plotted by reference to base points located on the landward end of the Sulina dyke and the south-eastern tip of Tsyganka Island. The maritime boundary from Point 2 continues along the equidistance line[5] in a south-easterly direction until Point 3, with co-ordinates 44° 46′ 38.7″ N and 30° 58′ 37.3″ E (Point A of the provisional equidistance line), where the equidistance line becomes affected by a base point located on the Sacalin Peninsula.

[5] For the description of the entire course of the equidistance line, see paragraph 154 above.

International Tribunal for the Law of the Sea

Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) Judgment of 14 March 2012

ITLOS Reports, vol. 12 (2012), pp. 103-115, 131-143, paras. 341-394, 450-499

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2012

14 March 2012

List of cases:
No. 16

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL

(BANGLADESH/MYANMAR)

JUDGMENT

Jurisdiction to delimit the continental shelf in its entirety

341. While the Parties are in agreement that the Tribunal is requested to delimit the continental shelf between them in the Bay of Bengal within 200 nm, they disagree as to whether the Tribunal has jurisdiction to delimit the continental shelf beyond 200 nm and whether the Tribunal, if it determines that it has jurisdiction to do so, should exercise such jurisdiction.

342. As pointed out in paragraph 45, Myanmar does not dispute that "as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 [nm], could fall within the jurisdiction of the Tribunal". However, it raises the issue of the advisability in the present case of the exercise by the Tribunal of its jurisdiction with respect to the delimitation of the continental shelf beyond 200 nm.

343. Myanmar states in its Counter Memorial that the question of the jurisdiction of the Tribunal regarding the delimitation of the continental shelf beyond 200 nm in general should not arise in the present case because the delimitation line, in its view, terminates well before reaching the 200 nm limit from the baselines from which the territorial sea is measured.

344. At the same time Myanmar submits that "[e]ven if the Tribunal were to decide that there could be a single maritime boundary beyond 200 [nm] (*quod non*), the Tribunal would still not have jurisdiction to determine this line because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area".

345. Myanmar further submits that "[a]s long as the outer limit of the continental shelf has not been established on the basis of the recommendations" of the Commission on the Limits of the Continental Shelf (hereinafter "the Commission"), "the Tribunal, as a court of law, cannot

what the outer limits are". It argues in this regard that:

> A review of a State's submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State 'on the basis of these recommendations' under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 [nm] to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to the natural resources of the continental shelf beyond 200 [nm]. [...] To reverse the process [...], to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.

346. In support of its position, Myanmar refers to the Arbitral Award in the *Case concerning the Delimitation of Maritime Areas between Canada and France* of 10 June 1992, which states: "[i]t is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist" *(Decision of 10 June 1992, ILM, Vol. 31 (1992),* p. 1145, at p. 1172, para. 81*).*

347. Myanmar asserts that in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, the ICJ declined to delimit the continental shelf beyond 200 nm between Nicaragua and Honduras because the Commission had not yet made recommendations to the two countries regarding the continental shelf beyond 200 nm.

348. During the oral proceedings Myanmar clarified its position, stating, *inter alia*, that in principle it did not question the jurisdiction of the Tribunal. The Parties accepted the Tribunal's jurisdiction on the same terms, in accordance with the provisions of article 287, paragraph 1, of the Convention, "for the settlement of dispute […] relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal". According to Myanmar, the only problem that arose concerned the possibility that the Tribunal might in continental shelf beyond 200 nm.

349. Myanmar further observed that if the Tribunal "nevertheless were to consider the Application admissible on this point – *quod non* – you could not but defer judgment on this aspect of the matter until the Parties, in accordance with Article 76 of the Convention, have taken a position on the recommendations of the Commission concerning the existence of entitlements of the two Parties to the continental shelf beyond 200 [nm] and, if such entitlements exist, on their seaward extension – i.e., on the outer (not lateral, *outer*) limits of the continental shelf of the two countries".

350. Bangladesh is of the view that the Tribunal is expressly empowered by the Convention to adjudicate disputes between States arising under articles 76 and 83, in regard to the delimitation of the continental shelf. As the Convention draws no distinction in this regard between jurisdiction over the inner part of the continental shelf, i.e., that part within 200 nm, and the part beyond that distance, according to Bangladesh, delimitation of the entire continental shelf is covered by article 83, and the Tribunal plainly has jurisdiction to carry out delimitation beyond 200 nm.

351. Responding to Myanmar's argument that "in any event, the question of delimiting the shelf beyond 200 [nm] does not arise because the delimitation line terminates well before reaching the 200 [nm] limit", Bangladesh states that "Myanmar's argument that Bangladesh has no continental shelf beyond 200 [nm] is based instead on the proposition that once the area *within* 200 [nm] is delimited, the terminus of Bangladesh's shelf falls short of the 200 [nm] limit". Bangladesh contends that "[t]his can only be a valid argument if the Tribunal first accepts Myanmar's arguments in favour of an equidistance line within 200 [nm]. Such an outcome would require the Tribunal to disregard entirely the relevant circumstances relied upon by Bangladesh".

352. With reference to Myanmar's argument regarding the rights of third parties, Bangladesh states that a potential overlapping claim of a third State

between two States that are subject to the jurisdiction of the Tribunal, because third States are not bound by the Tribunal's judgment and their rights are unaffected by it. Bangladesh points out that so far as third States are concerned, a delimitation judgment by the Tribunal is merely *res inter alios acta* and that this assurance is provided in article 33, paragraph 2, of the Statute.

353. Bangladesh also observes that Myanmar's contention "with regard to the international seabed area disregards its own submission to the CLCS, which makes clear that the outer limits of the continental shelf *vis-à-vis* the international seabed are far removed from the maritime boundary with Bangladesh".

354. Bangladesh observes that with respect to the potential areas of overlap with India, Myanmar accepts that even if the Tribunal cannot fix a tripoint between three States, it can indicate the "general direction for the final part of the maritime boundary between Myanmar and Bangladesh", and that doing so would be "in accordance with the well-established practise" of international courts and tribunals.

355. In summarizing its position on the issue of the rights of third parties and the jurisdiction of the Tribunal, Bangladesh states that:

> 1. […]
>
> 2. The delimitation by the Tribunal of a maritime boundary in the continental shelf beyond 200 [nm] does not prejudice the rights of third parties. In the same way that international courts and tribunals have consistently exercised jurisdiction where the rights of third States are involved, ITLOS may exercise jurisdiction, even if the rights of the international community to the international seabed were involved, which in this case they are not.
>
> 3. With respect to the area of shelf where the claims of Bangladesh and Myanmar overlap with those of India, the Tribunal need only determine which of the two Parties in the present proceeding has the better claim, and effect a delimitation that is only binding on Bangladesh and Myanmar. Such a delimitation as on India.

356. Bangladesh observes that there is no conflict between the roles of the Tribunal and the Commission in regard to the continental shelf and that, to the contrary, the roles are complementary. Bangladesh also states that the Tribunal has jurisdiction to delimit boundaries within the outer continental shelf and that the Commission makes recommendations as to the delineation of the outer limits of the continental shelf with the Area, as defined in article 1, paragraph 1, of the Convention, provided there are no disputed claims between States with opposite or adjacent coasts.

357. Bangladesh adds that the Commission may not make any recommendations on the outer limits until any such dispute is resolved by the Tribunal or another judicial or arbitral body or by agreement between the parties, unless the parties give their consent that the Commission review their submissions. According to Bangladesh, in the present case, "the Commission is precluded from acting due to the Parties' disputed claims in the outer continental shelf and the refusal by at least one of them (Bangladesh) to consent to the Commission's actions".

358. Bangladesh points out that if Myanmar's argument were accepted, the Tribunal would have to wait for the Commission to act and the Commission would have to wait for the Tribunal to act. According to Bangladesh, the result would be that, whenever parties are in dispute in regard to the continental shelf beyond 200 nm, the compulsory procedures entailing binding decisions under Part XV, Section 2, of the Convention would have no practical application. Bangladesh adds that "[i]n effect, the very object and purpose of the UNCLOS dispute settlement procedures would be negated. Myanmar's position opens a jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear".

359. Summarizing its position, Bangladesh states that in portraying recommendations by the Commission as a prerequisite to the exercise of

would make the exercise by the Tribunal of its jurisdiction with respect to the continental shelf beyond 200 nm impossible, which is inconsistent with Part XV and with article 76, paragraph 10, of the Convention.

* * *

360. The Tribunal will now consider whether it has jurisdiction to delimit the continental shelf beyond 200 nm.

361. Article 76 of the Convention embodies the concept of a single continental shelf. In accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise does not make any such distinction.

362. In this regard, the Tribunal notes that in the *Arbitration between Barbados and Trinidad and Tobago*, the Arbitral Tribunal decided that "the dispute to be dealt with by the Tribunal includes the outer continental shelf, since […] it either forms part of, or is sufficiently closely related to, the dispute […] and […] in any event there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf" (*Decision of 11 April 2006*, *RIAA*, *Vol. XXVII*, p. 147, at pp. 208-209, para. 213).

363. For the foregoing reasons, the Tribunal finds that it has jurisdiction to delimit the continental shelf in its entirety. The Tribunal will now consider whether, in the circumstances of this case, it is appropriate to exercise that jurisdiction.

364. The Tribunal will first address Myanmar's argument that Bangladesh's continental shelf cannot extend beyond 200 nm because the maritime area in which Bangladesh enjoys sovereign rights with respect to natural resources of the continental shelf does not extend up to 200 nm.

365. The Tribunal notes that this argument cannot be sustained, given its decision, as set out in paragraph 339, that the delimitation line of the exclusive economic zone and the continental shelf reaches the 200 nm limit.

366. The Tribunal will now turn to the question of whether the exercise of its jurisdiction could prejudice the rights of third parties.

367. The Tribunal observes that, as provided for in article 33, paragraph 2, of the Statute, its decision "shall have no binding force except between the parties in respect of that particular dispute". Accordingly, the delimitation of the continental shelf by the Tribunal cannot prejudice the rights of third parties. Moreover, it is established practice that the direction of the seaward segment of a maritime boundary may be determined without indicating its precise terminus, for example by specifying that it continues until it reaches the area where the rights of third parties may be affected.

368. In addition, as far as the Area is concerned, the Tribunal wishes to observe that, as is evident from the Parties' submissions to the Commission, the continental shelf beyond 200 nm that is the subject of delimitation in the present case is situated far from the Area. Accordingly, the Tribunal, by drawing a line of delimitation, will not prejudice the rights of the international community.

369. The Tribunal will now examine the issue of whether it should refrain in the present case from exercising its jurisdiction to delimit the continental shelf beyond 200 nm until such time as the outer limits of the continental shelf have been established by each Party pursuant to article 76, paragraph 8, of the

recommendations to each Party on its submission and each Party has had the opportunity to consider its reaction to the recommendations.

370. The Tribunal wishes to point out that the absence of established outer limits of a maritime zone does not preclude delimitation of that zone. Lack of agreement on baselines has not been considered an impediment to the delimitation of the territorial sea or the exclusive economic zone notwithstanding the fact that disputes regarding baselines affect the precise seaward limits of these maritime areas. However, in such cases the question of the entitlement to maritime areas of the parties concerned did not arise.

371. The Tribunal must therefore consider whether it is appropriate to proceed with the delimitation of the continental shelf beyond 200 nm given the role of the Commission as provided for in article 76, paragraph 8, of the Convention and article 3, paragraph 1, of Annex II to the Convention.

372. Pursuant to article 31 of the Vienna Convention, the Convention is to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose. As stated in the Advisory Opinion of the Seabed Disputes Chamber, article 31 of the Vienna Convention is to be considered "as reflecting customary international law" *(Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1 February 2011,* para. 57*).*

373. The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.

Convention to establish final and binding limits of its continental shelf is a key element in the structure set out in that article. In order to realize this right, the coastal State, pursuant to article 76, paragraph 8, is required to submit information on the limits of its continental shelf beyond 200 nm to the Commission, whose mandate is to make recommendations to the coastal State on matters related to the establishment of the outer limits of its continental shelf. The Convention stipulates in article 76, paragraph 8, that the "limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding".

375. Thus, the Commission plays an important role under the Convention and has a special expertise which is reflected in its composition. Article 2 of Annex II to the Convention provides that the Commission shall be composed of experts in the field of geology, geophysics or hydrography. Article 3 of Annex II to the Convention stipulates that the functions of the Commission are, *inter alia*, to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nm and to make recommendations in accordance with article 76 of the Convention.

376. There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals.

377. There is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental

functions.

378. Article 76, paragraph 10, of the Convention states that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". This is further confirmed by article 9 of Annex II, to the Convention, which states that the "actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".

379. Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

380. Several submissions made to the Commission, beginning with the first submission, have included areas in respect of which there was agreement between the States concerned effecting the delimitation of their continental shelf beyond 200 nm. However, unlike in the present case, in all those situations delimitation has been effected by agreement between States, not through international courts and tribunals.

381. In this respect, the Tribunal notes the positions taken in decisions by international courts and tribunals.

382. The Arbitral Tribunal in the *Arbitration between Barbados and the Republic of Trinidad and Tobago* found that its jurisdiction included the delimitation of the maritime boundary of the continental shelf beyond 200 nm (*Decision of 11 April 2006, RIAA, Vol. XXVII*, p. 147, at p. 209, para. 217). The Arbitral Tribunal, in that case, did not exercise its jurisdiction stating that:

> which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. (*ibid.,* at p. 242, para. 368*)*

383. In the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras),* the ICJ declared that:

> The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-States rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 [nm] from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder. (*Judgment, I.C.J. Reports 2007*, p. 659, at p. 759, para. 319).

384. The Tribunal observes that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case.

385. Pursuant to rule 46 of the Rules of Procedure of the Commission, in the event that there is a dispute in the delimitation of the continental shelf between States with opposite or adjacent coasts, submissions to the Commission shall be considered in accordance with Annex I to those Rules. Annex I, paragraph 2, provides:

> In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be:
>
> (a) Informed of such disputes by the coastal States making the submission; and
>
> (b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.

386. Paragraph 5 (a) of Annex I to the same Rules further provides:

> 5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

387. In the present case, Bangladesh informed the Commission by a note verbale dated 23 July 2009, addressed to the Secretary-General of the United Nations, that, for the purposes of rule 46 of the Rules of Procedure of the Commission, and of Annex I thereto, there was a dispute between the Parties and, recalling paragraph 5 (a) of Annex I to the Rules, observed that:

> given the presence of a dispute between Bangladesh and Myanmar concerning entitlement to the parts of the continental shelf in the Bay of Bengal claimed by Myanmar in its submission, the Commission may not "consider and qualify" the submission made by Myanmar without the "prior consent given by all States that are parties to such a dispute".

388. Taking into account Bangladesh's position, the Commission has deferred consideration of the submission made by Myanmar (Statement by the Chairman of the Commission on the progress of work in the Commission, CLCS/64 of 1 October 2009, p. 10, paragraph 40)

389. The Commission also decided to defer the consideration of the submission of Bangladesh,

> in order to take into account any further developments that might occur in the intervening period, during which the States concerned might wish to take advantage of the avenues available to them, including provisional arrangements of a practical nature as outlined in annex I to the rules of procedure. (Statement by the Chairman of the Commission on the progress of work in the Commission, CLCS/72 of 16 September 2011, p. 7, paragraph 22)

390. The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. The Tribunal notes that the record in on other avenues available to them so long as their delimitation dispute is not settled.

391. A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention.

392. In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf.

393. The Tribunal observes that the exercise of its jurisdiction in the present case cannot be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.

394. For the foregoing reasons, the Tribunal concludes that, in order to fulfil its responsibilities under Part XV, Section 2, of the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention.

Myanmar have entitlements to a continental shelf extending beyond 200 nm. The submissions of Bangladesh and Myanmar to the Commission clearly indicate that their entitlements overlap in the area in dispute in this case.

Delimitation of the continental shelf beyond 200 nautical miles

450. The Tribunal will now proceed to delimit the continental shelf beyond 200 nm. It will turn first to the question of the applicable law and delimitation method.

451. In this context, the Tribunal requested the Parties to address the following question: "Without prejudice to the question whether the Tribunal has jurisdiction to delimit the continental shelf beyond 200 [nm], would the Parties expand on their views with respect of the delimitation of the continental shelf beyond 200 [nm]?"

452. In response, Bangladesh points out that article 83 of the Convention does not distinguish between delimitation of the continental shelf beyond 200 nm and within 200 nm. According to Bangladesh, the objective of delimitation in both cases is to achieve an equitable solution. The merits of any method of delimitation in this context, in Bangladesh's view, can only be judged on a case-by-case basis.

453. Myanmar also argues that the rules and methodologies for delimitation beyond 200 nm are the same as those within 200 nm. According to Myanmar, "nothing either in UNCLOS or in customary international law hints at the slightest difference between the rule of delimitation applicable in the […] areas" beyond and within 200 nm.

454. The Tribunal notes that article 83 of the Convention addresses the delimitation of the continental shelf between States with opposite or adjacent coasts without any limitation as to area. It contains no reference to the limits set forth in article 76, paragraph 1, of the Convention. Article 83 applies

200 nm.

455. In the view of the Tribunal, the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm. This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf. This should be distinguished from the question of the object and extent of those rights, be it the nature of the areas to which those rights apply or the maximum seaward limits specified in articles 57 and 76 of the Convention. The Tribunal notes in this respect that this method can, and does in this case, permit resolution also beyond 200 nm of the problem of the cut-off effect that can be created by an equidistance line where the coast of one party is markedly concave (see paragraphs 290-291).

456. The Tribunal will accordingly proceed to re-examine the question of relevant circumstances in this particular context.

457. Bangladesh contends that the relevant circumstances in the delimitation of the continental shelf beyond 200 nm include the geology and geomorphology of the seabed and subsoil, because entitlement beyond 200 nm depends entirely on natural prolongation while within 200 nm it is based on distance from the coast. According to Bangladesh, its entitlement to the continental shelf beyond 200 nm "rests firmly" on the geological and geomorphological continuity between its land territory and the entire seabed of the Bay of Bengal. Bangladesh states that Myanmar "at best enjoys only geomorphological continuity between its own landmass and the outer continental shelf". In Bangladesh's view, therefore, "an equitable delimitation consistent with article 83 must necessarily take full account of the fact that Bangladesh has the most natural prolongation into the Bay of Bengal, and that Myanmar has little or no natural prolongation beyond 200" nm.

458. Another relevant circumstance indicated by Bangladesh is "the continuing effect of Bangladesh's concave coast and the cut-off effect generated by Myanmar's equidistance line, or by any other version of an equidistance line". According to Bangladesh, "[t]he farther an equidistance or even a modified equidistance line extends from a concave coast, the more it cuts across that coast, continually narrowing the wedge of sea in front of it".

459. Given its position that Bangladesh's continental shelf does not extend beyond 200 nm, Myanmar did not present arguments regarding the existence of relevant circumstances relating to the delimitation of the continental shelf beyond 200 nm. The Tribunal observes that Myanmar stated that there are no relevant circumstances requiring a shift of the provisional equidistance line in the context of the delimitation of the continental shelf within 200 nm.

460. The Tribunal is of the view that "the most natural prolongation" argument made by Bangladesh has no relevance to the present case. The Tribunal has already determined that natural prolongation is not an independent basis for entitlement and should be interpreted in the context of the subsequent provisions of article 76 of the Convention, in particular paragraph 4 thereof. The Tribunal has determined that both Parties have entitlements to a continental shelf beyond 200 nm in accordance with article 76 and has decided that those entitlements overlap. The Tribunal therefore cannot accept the argument of Bangladesh that, were the Tribunal to decide that Myanmar is entitled to a continental shelf beyond 200 nm, Bangladesh would be entitled to a greater portion of the disputed area because it has "the most natural prolongation".

Delimitation line

461. Having considered the concavity of the Bangladesh coast to be a relevant circumstance for the purpose of delimiting the exclusive economic zone and the continental shelf within 200 nm, the Tribunal finds that this relevant circumstance has a continuing effect beyond 200 nm.

462. The Tribunal therefore decides that the adjusted equidistance line delimiting both the exclusive economic zone and the continental shelf within 200 nm between the Parties as referred to in paragraphs 337-340 continues in the same direction beyond the 200 nm limit of Bangladesh until it reaches the area where the rights of third States may be affected.

"Grey area"

463. The delimitation of the continental shelf beyond 200 nm gives rise to an area of limited size located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar, yet on the Bangladesh side of the delimitation line.

464. Such an area results when a delimitation line which is not an equidistance line reaches the outer limit of one State's exclusive economic zone and continues beyond it in the same direction, until it reaches the outer limit of the other State's exclusive economic zone. In the present case, the area, referred to by the Parties as a "grey area", occurs where the adjusted equidistance line used for delimitation of the continental shelf goes beyond 200 nm off Bangladesh and continues until it reaches 200 nm off Myanmar.

465. The Parties differ on the status and treatment of the above-mentioned "grey area". For Bangladesh, this problem cannot be a reason for adhering to an equidistance line, nor can it be resolved by giving priority to the exclusive economic zone over the continental shelf or by allocating water column rights over that area to Myanmar and continental shelf rights to Bangladesh.

466. Bangladesh argues that there is no textual basis in the Convention to conclude that one State's entitlement within 200 nm will inevitably trump another State's entitlement in the continental shelf beyond 200 nm. Bangladesh finds it impossible to defend a proposition that even a "sliver" of exclusive economic zone of one State beyond the outer limit of another State's exclusive economic zone puts an end by operation of law to the

beyond 200 nm under article 76 of the Convention. For Bangladesh, it cannot be the case that:

> a State with a clear and undisputable potential entitlement in the continental shelf beyond 200 miles should for ever be prohibited from reaching that entitlement solely by virtue of the geographical happenstance that it is located in a concavity and there is a slight wedge of potential EEZ separating it from the outer continental shelf.

467. As for differentiating water-column rights and continental-shelf rights, in Bangladesh's view, there is no textual basis in the Convention and such solution could cause great practical inconvenience. According to Bangladesh, "[t]his is why international tribunals have sought at all cost to avoid the problem and why differential attribution of zone and shelf has hardly ever been adopted in State practice".

468. Myanmar contends that "[a]ny allocation of area to Bangladesh extending beyond 200 [nm] off Bangladesh's coast, would trump Myanmar's rights to EEZ and continental shelf within 200 [nm]". According to Myanmar, "[t]o advance a very hypothetical claim to the continental shelf beyond 200 [nm] against the sovereign rights enjoyed by Myanmar automatically under article 77 of the Convention with respect to its continental shelf within this distance, and against Myanmar's right to extend its exclusive economic zone" up to this limit, would be contrary to both the Convention and international practice.

469. Myanmar also points out that the Arbitral Tribunal in the *Arbitration between Barbados and Trinidad and Tobago* ended a maritime boundary at the 200 nm limit of Trinidad and Tobago, thus making clear that Trinidad and Tobago had no access to the continental shelf beyond 200 nm. Therefore, in Myanmar's view, "the extension of the delimitation beyond 200 [nm] would inevitably infringe on Myanmar's indisputable rights". This would then preclude any right of Bangladesh to the continental shelf beyond 200 nm.

470. Myanmar concludes that while the solution submitted by Bangladesh is untenable, the problem of a "grey area" does not arise in the present case, because equitable delimitation does not extend beyond 200 nm.

* * *

471. The Tribunal notes that the boundary delimiting the area beyond 200 nm from Bangladesh but within 200 nm of Myanmar is a boundary delimiting the continental shelves of the Parties, since in this area only their continental shelves overlap. There is no question of delimiting the exclusive economic zones of the Parties as there is no overlap of those zones.

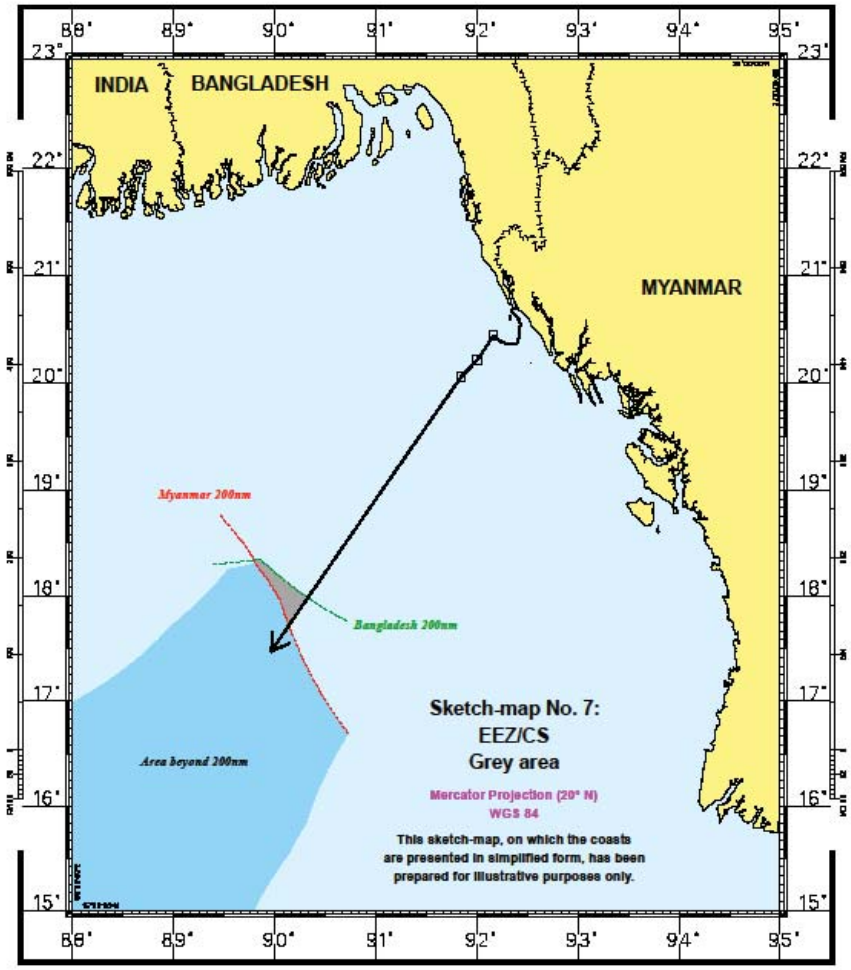
472. The grey area arises as a consequence of delimitation. Any delimitation may give rise to complex legal and practical problems, such as those involving transboundary resources. It is not unusual in such cases for States to enter into agreements or cooperative arrangements to deal with problems resulting from the delimitation.

473. The Tribunal notes that article 56, paragraph 3, of the Convention, provides that the rights of the coastal State with respect to the seabed and subsoil of the exclusive economic zone shall be exercised in accordance with Part VI of the Convention, which includes article 83. The Tribunal further notes that article 68 provides that Part V on the exclusive economic zone does not apply to sedentary species of the continental shelf as defined in article 77 of the Convention.

474. Accordingly, in the area beyond Bangladesh's exclusive economic zone that is within the limits of Myanmar's exclusive economic zone, the maritime boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters.

continental shelf has always coexisted with another legal regime in the same area. Initially that other regime was that of the high seas and the other States concerned were those exercising high seas freedoms. Under the Convention, as a result of maritime delimitation, there may also be concurrent exclusive economic zone rights of another coastal State. In such a situation, pursuant to the principle reflected in the provisions of articles 56, 58, 78 and 79 and in other provisions of the Convention, each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other.

476. There are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements. It is for the Parties to determine the measures that they consider appropriate for this purpose.



477. Having reached the third stage in the delimitation process as referred to in paragraph 240, the Tribunal will, for this purpose, first determine the relevant area, namely the area of overlapping entitlements of the Parties that is relevant to this delimitation. The Tribunal notes in this regard that mathematical precision is not required in the calculation of either the relevant coasts or the relevant area.

478. Bangladesh maintains that the relevant area includes the maritime space "situated in the coastal fronts [of the two Parties] and extending out to the 200 [nm]".

479. Bangladesh recalls that its model of the relevant area does not include maritime spaces landward of the Parties' coastal façades but notes that even if those areas were included they would not make a material difference to the proportionality calculation.

480. In determining the relevant area, Bangladesh excludes the areas claimed by third States. According to Bangladesh, "[i]t cannot be right to credit Bangladesh for maritime spaces that are subject to an active claim by a third State". Bangladesh cautions that "[t]o include those areas in the proportionality calculations would have a dramatic effect on the numbers that distorts reality". Bangladesh therefore submits that areas on the "Indian side" of India's claim are not relevant in the present case.

481. Bangladesh submits that "it is not appropriate to treat as relevant the maritime areas lying off Myanmar's coast between Bhiff Cape and Cape Negrais. […] It would be incongruous to consider as relevant the maritime spaces adjacent to an irrelevant coast".

482. According to Bangladesh, the relevant area measures 175,326.8 square kilometres. On the basis of a different calculation of the kilometres.

483. Myanmar asserts that the relevant maritime area is dependent on the relevant coasts and the projections of these coasts, insofar as they overlap. It describes the relevant area as follows:

> (i) to the north and to the east, it includes all maritime projections from Bangladesh's relevant coasts, except the area where Bangladesh coasts face each other (the triangle between the second and the third segments);
>
> (ii) to the east and to the south, it includes all maritime projections from Myanmar's Rakhine (Arakan) coast, as far as these projections overlap with Bangladesh's;
>
> (iii) to the west, it extends these maritime projections up to the point they overlap.

484. Myanmar submits that Bangladesh has incorrectly portrayed the relevant area. It asserts that in fact "the relevant area consists of the maritime area generated by the projections of Bangladesh's relevant coasts and Myanmar's relevant coast".

485. Myanmar states that there are two issues in relation to which the Parties are not in agreement. One of these issues concerns the exact extent of the relevant area on the Indian side of India's claim. The other issue concerns the relevance of the southern part of the coast of Rakhine.

486. Myanmar disagrees with Bangladesh's contention that the areas on the Indian side of India's claim are not relevant in the present case. According to Myanmar, Bangladesh, in not including these areas, not only excluded a maritime area of more than 11,000 square kilometres, but also made the delimitation between Bangladesh and Myanmar dependent on the claims of a third State, claims that are – according to Bangladesh – changing and in no way established in law or in fact. For this reason, Myanmar is of the view that these areas should be included in the relevant area up to the equidistance line between the coasts of Bangladesh and India.

487. Concerning the southern part of the coast of Rakhine, Myanmar argues that Bangladesh also fails to take into account the south coast of Myanmar which extending all the way to Cape Negrais. Myanmar submits that "this part of the coast is relevant. Its projection overlaps with the projection of the coast of Bangladesh".

488. Myanmar submits that the relevant area has a "total surface of 236,539 square kilometres". During the hearing, however, Myanmar referred to the figure of approximately 214,300 square kilometres.

* * *

489. The Tribunal notes that the relevant maritime area for the purpose of the delimitation of the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is that resulting from the projections of the relevant coasts of the Parties.

490. The Tribunal recalls that the Parties disagree on two points insofar as the determination of the relevant maritime area is concerned. First, the Parties disagree as to the inclusion of the southerly maritime area related to the southern part of the coast of Rakhine which extends to Cape Negrais and, second, they also disagree on the exact extent of the relevant area in the north-west section.

491. Regarding the first issue, the Tribunal recalls that it has already found that the segment of Myanmar's coast that runs from Bhiff Cape to Cape Negrais is to be included in the calculation of the relevant coast. Therefore, the southern maritime area extending to Cape Negrais must be included in the calculation of the relevant area for the purpose of the test of disproportionality. The southern limit of the relevant area will be marked by the parallel westward from Cape Negrais.

the overlapping area, the Tribunal finds that it should be included in the relevant area for the purpose of the test of disproportionality.

493. In this regard, the Tribunal considers that, for the purpose of determining any disproportionality in respect of areas allocated to the Parties, the relevant area should include maritime areas subject to overlapping entitlements of the Parties to the present case.

494. The fact that a third party may claim the same maritime area does not prevent its inclusion in the relevant maritime area for purposes of the disproportionality test. This in no way affects the rights of third parties.

495. For the purposes of the determination of the relevant area, the Tribunal decides that the western limit of the relevant area is marked by a straight line drawn from point ß2 due south.

496. Accordingly, the size of the relevant area has been calculated to be approximately 283,471 square kilometres.

497. The Tribunal will now check whether the adjusted equidistance line has caused a significant disproportion by reference to the ratio of the length of the coastlines of the Parties and the ratio of the relevant maritime area allocated to each Party.

498. The length of the relevant coast of Bangladesh, as indicated in paragraph 202, is 413 kilometres, while that of Myanmar, as indicated in paragraph 204, is 587 kilometres. The ratio of the length of the relevant coasts of the Parties is 1:1.42 in favour of Myanmar.

499. The Tribunal notes that its adjusted delimitation line (see paragraphs 337-340) allocates approximately 111,631 square kilometres of the relevant area to Bangladesh and approximately 171,832 square kilometres to Myanmar. The ratio of the allocated areas is approximately

any significant disproportion in the allocation of maritime areas to the Parties relative to the respective lengths of their coasts that would require the shifting of the adjusted equidistance line in order to ensure an equitable solution.