Written Statement of the Caribbean Regional Fisheries Mechanism (CRFM), with Annexes 1 to 13

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION

WRITTEN STATEMENT OF THE CARIBBEAN REGIONAL FISHERIES MECHANISM

27 NOVEMBER 2013

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CHAPTER 1

INTRODUCTION

I. The Caribbean Regional Fisheries Mechanism

1. In its Order 2013/2 dated 24 May 2013, the International Tribunal for the Law of the Sea (hereafter "the Tribunal" or "ITLOS") invited the States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "UNCLOS"), the Sub-Regional Fisheries Commission (hereinafter "the SRFC" or "the requesting organization") and certain intergovernmental organizations and entities listed in an annex to the Order to present written statements on four questions in Case No. 21 pertaining to illegal, unreported and unregulated ("IUU") fishing activities offshore.[1]

2. The Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM" or "the Mechanism") is an intergovernmental organization for regional fisheries cooperation founded in 2002 pursuant to the Agreement Establishing the Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM Agreement").[2] It has its headquarters in Belize. As the CRFM is listed in the Annex to the Tribunal's Order 2013/2, it wishes to avail itself of the opportunity afforded by the Order to make a written statement on the request by the SRFC for an advisory opinion of the Tribunal. This statement by the CRFM addresses the jurisdiction of the Tribunal to give an advisory opinion in response to the request by the SRFC and the questions put by the SRFC in that request.

3. The CRFM's status and mission are similar to the SRFC's, even though their regional sphere of influence differs and the CRFM's membership is more than double the SRFC's. The CRFM aims to promote the sustainable use of fisheries and aquatic resources in and among the Caribbean Community (CARICOM) Member States, by development, management and conservation of these resources in collaboration with stakeholders to benefit the people of the Caribbean region. It is beyond doubt that the fragile economies of the Member States of both organizations suffer serious damage

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1 IUU fishing is further defined in Chapter 3 of this written statement. In short, IUU fishing is "any fishing which undermines or disregards national, regional or international fisheries conservation and management arrangements and measures." Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing (hereinafter "the Castries Declaration"), first preambular paragraph, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia, on 28 July 2010 (see full text in Annex 1 to this written statement).

2 See full text in Annex 2 to this written statement. The text of the Agreement is also available from the CRFM's Web site, <www.crfm.net> (under tab "About the CRFM").

from IUU fishing activities, which also threatens border security of the countries affected by such activities.[3]

4. The combined land area of the CRFM Member States is 433,549 sq. km. and their coastal fronts extend over nearly 10,000 km. The CRFM Member States have an aggregate population of approximately 17 million, with annual per capita consumption of fisheries products estimated at 31 kg. The fisheries of CRFM Member States are an important foreign exchange earner and a primary contributor to income, employment, food security and social and economic stability, especially in coastal communities. In 2010, 62,217 persons were employed in direct production in the marine capture fisheries, with a total fleet of fishing vessels operating in the commercial capture fisheries of just under 25,000 vessels and some 40 foreign-owned and operated fishing vessels registered under open registry arrangements (Belize and St. Vincent and the Grenadines). The presence of transboundary fish stocks and fish stocks of common interest is of great benefit to the CRFM Member States, whose total marine capture fish production averaged 136,148 metric tons between 2006 and 2010. During the period 2008-2009, at ex-vessel prices the value of the marine capture fishery production for the region from domestic fleets was approximately USD 543,200,000.[4]

5. There are few large surplus stocks in the Caribbean region, with the exception of Guyana, Suriname and, to a lesser extent, Belize. The following categories of fisheries have traditionally been acknowledged by the CRFM region: small coastal pelagic fishery, small offshore pelagic fishery, large offshore pelagic fishery, shallow shelf and reef finfish fishery, shallow shelf and reef lobster fishery, shelf and deep slope fishery, shrimp fishery, conch fishery, echinoderms fishery (locally called the sea urchin or sea cucumber fishery), sea turtle fishery and fishery for sea mammals.[5]

6. The CRFM has two categories of membership, namely, Member States and Associate Members of CARICOM.[6] Most of the CRFM's 17 members are developing countries and small island developing States, or SIDS. They are listed in the table below.

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3 See, e.g., Ministry of Agriculture and Fisheries of Jamaica, "IUU Fishing and Border Security Issues in Jamaican Waters," Discussion Paper submitted at the Fourth Meeting of the Ministerial Council of the CRFM, 20 May 2011, St. John's, Antigua, text in Annex 3 to this written statement.

4 See J. Masters, *CRFM Statistics and Information Report – 2010* (2012), 65 pp., text available from the CRFM Web site, <http://www.crfm.net/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=33&Itemid=237>, accessed 7 November 2013.

5 Id., p. 15 and Tables 6-7.

6 Article 3, paragraph 1, of the CRFM Agreement provides that "[m]embership of the Mechanism shall be open to Member States and Associate Members of CARICOM." Thus, CARICOM Members and

Anguilla	Antigua and Barbuda	Bahamas
Barbados	Belize	Dominica
Grenada	Guyana	Haiti
Jamaica	Montserrat	St. Kitts and Nevis
Saint Lucia	St. Vincent and the Grenadines	Suriname
Trinidad and Tobago	Turks and Caicos Islands	

7. Similar to the SRFC, all of the Member States of the CRFM have ratified the UNCLOS (Jamaica, the Bahamas and Belize were among the first ten countries to have ratified the Convention).[7] There currently are no Associate Members. Observers of the CRFM include the following:

- CARICOM (Caribbean Community)
- CNFO (Caribbean Network of Fisherfolk Organizations)
- FAO (Food and Agriculture Organization of the United Nations)
- OECS (Organisation of Eastern Caribbean States)
- UWI (the University of the West Indies)
- Bermuda

8. The CRFM has entered into a partnering arrangement with the Dominican Republic's Ministerio de Medio Ambiente y Recursos Naturales and El Consejo Dominicano de Pesca y Acuicultura (CODOPESCA) through a memorandum of understanding.

9. The CRFM is composed of three organs: (a) the Ministerial Council, (b) the Caribbean Fisheries Forum, and (c) the Technical Unit.[8] The Ministerial Council, consisting of the Ministers of Fisheries of the Member States, determines the policy of the Mechanism. The Forum consists of representatives from Member States and Associate Members as well as observers from fisher folk, through the Regional Network of Fisherfolk Organizations (CNFO), and private companies, regional bodies and

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Associate Members may become members of the CRFM. Any other State or territory of the Caribbean region (i.e., States that are not CARICOM Members or Associate Members) may become an Associate Member of the CRFM.

7 Anguilla, Montserrat and the Turks and Caicos Islands are included in the United Kingdom's ratification of the Convention as overseas territories.

8 CRFM Agreement, articles 6-13.

institutions and non-governmental organizations. It determines the technical and scientific work of the Mechanism. The Technical Unit is the permanent secretariat of the Mechanism and is headed by the Executive Director. The Unit has capability for policy and planning, research and resource assessment, fisheries management and development, and statistics and information.

10. The objectives of the CRFM as enunciated by article 4 of its constituent instrument are threefold:

    (a) the efficient management and sustainable development of marine and other aquatic resources within the jurisdiction of Member States;

    (b) the promotion and establishment of co-operative arrangements among interested States for the efficient management of shared, straddling or highly migratory marine and other aquatic resources; and

    (c) the provision of technical advisory and consultative services to fisheries divisions of Member States in the development, management and conservation of their marine and other aquatic resources.

11. Article 5 of the CRFM Agreement provides that, in pursuance of its objectives, the CRFM shall be guided by the following principles:

    (a) maintaining bio-diversity in the marine environment using the best available scientific approaches to management;

    (b) managing fishing capacity and fishing methods so as to facilitate resource sustainability;

    (c) encouraging the use of precautionary approaches to sustainable use and management of fisheries resources;

    (d) promoting awareness of responsible fisheries exploitation through education and training;

    (e) according due recognition to the contribution of small scale and industrial fisheries to employment, income and food security, nationally and regionally; and

    (f) promoting aquaculture as a means of enhancing employment opportunities and food security, nationally and regionally.

12. These provisions clearly indicate that resource management constitutes the primary objective of the CRFM, the provision of technical and consultative services being its secondary objective. Since its creation in 2002, the CRFM has concentrated on the

following areas and activities: coordinating fisheries management activities in the Member States of the Mechanism; conducting research and resource assessments of national and shared fish stocks; strengthening fisher folk organizations and improving Community Participation; assisting in the development of fishing plans; developing strategic and work plans; securing, executing and managing externally financed programs and projects; networking with regional and international organizations; and representing CARICOM or the members of the CRFM at international fora.

13. To date, the CRFM has not been involved with the management of the exploitation of regional stocks. The region is in the process of determining suitable regional cooperation agreements for managing key shared fishery resources, including considering the need for establishing a regional fisheries management organization (hereinafter "RFMO") to address active management of all shared fishery resources in the region. The CRFM is not set up as an RFMO for the Caribbean Sea.

14. By Order 2013/2, the Tribunal fixed 29 November 2013 as the time-limit within which written statements on the four questions in Case No. 21 may be presented to the Tribunal. This written statement is intended to support the SRFC's request for an advisory opinion and to assist the Tribunal in responding to the four questions addressed to it by the SRFC.

15. This written statement is arranged as follows:

Chapter 1 sets out the SRFC's request for an advisory opinion and provides a summary of the CRFM's views on the questions submitted by the SRFC.

Chapter 2 then briefly considers the Tribunal's jurisdiction to give the opinion, possible questions of admissibility and the applicable law.

Chapter 3 then addresses in turn each of the four questions put to the Tribunal in the light of the relevant legal provisions and other rules of international law.

Finally, **Chapter 4** sets out the Conclusions which the CRFM invites the Tribunal to reach.

II. The request for an advisory opinion

16. At its Fourteenth Extraordinary Session, held in Dakar, Republic of Senegal, from 25 to 29 March 2013, the seven-member Conference of Ministers of the SRFC, acting pursuant to Article 33 of the 2012 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 SRFC (hereinafter "the MCA

Convention"),[9] unanimously authorized the Permanent Secretary of the SRFC to submit a request for advisory opinion to the Tribunal. The MCA Convention deals with IUU fishing in Part IV comprising articles 25-30.

17. The English text of the decision of the Conference of Ministers authorizing the Permanent Secretary of the SRFC to request the Tribunal to render an advisory opinion reads as follows:

> ***Decides***, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:
>
> 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?
>
> 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

18. By letter dated 27 March 2013 and received in the Registry of the Tribunal the following day, the Permanent Secretary of the SRFC submitted a request asking the Tribunal to render an advisory opinion on the above questions (in French and based on the French text of the Conference of Ministers' resolution).[10]

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[9] The MCA Convention repeals and replaces the Convention of 14 July 1993 on the Determination of Conditions for Access and Exploitation of Marine Resources Off the Coasts of SRFC Member States, which also regulated fishing activities within the maritime areas of SRFC Member States.

[10] See ITLOS Order 2013/2 of 24 May 2013, p. 2, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

19. The CRFM will discuss in connection with Question 3 in Chapter 3 below how the discrepancy in the English and French texts of the Tribunal's Order 2013/2, which appears to have its origin in the ITLOS Registry's mistaken translation of the Permanent Secretary's letter, affects the reply to be given to Question 3.

20. As the March 2013 Technical Note from the Permanent Secretariat of the SRFC explains, the Member States of the SRFC are seeking to find out from the Tribunal exactly what their rights and obligations are in connection with IUU fishing with a view to "supporting the SRFC Member States to enable them, thanks to sensible and perceptive advice, to derive the greatest benefit from the effective implementation of the relevant international legal instruments and [to] ensuring that the challenges that they are facing from IUU fishing are better met."[11] Indeed, all similarly placed intergovernmental organizations for fisheries cooperation, including the CRFM, as well as all flag and coastal States stand to gain from the Tribunal's authoritative statements in response to the questions submitted by the SRFC.

21. The scale of the problem underlying the request of the SRFC is highlighted in a recent report of a ministerially-led task force on IUU fishing:

> Illegal, unreported and unregulated (IUU) fishing is a serious global problem. It is increasingly seen as one of the main obstacles to the achievement of sustainable world fisheries. Recent studies put the worldwide value of IUU catches at between USD 4 billion and USD 9 billion a year. While USD 1.25 billion of this comes from the high seas, the remainder is taken from the exclusive economic zones (EEZs) of coastal states.[12]

22. The Tribunal has been confronted with the problem of IUU fishing within the exclusive economic zone (hereinafter "the EEZ") or exclusive fishing zone of third party States in prior cases involving applications for prompt release. The aforementioned report singles out the case of the *Camouco*,[13] which was the subject of a 2000 decision of the Tribunal[14] before being re-named, re-flagged and re-arrested for IUU fishing, as "a

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11 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

12 *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, p.3, text available at <http://www.oecd.org/sd-roundtable/aboutus/stoppingillegalfishingonthehighseas.htm>, accessed 7 November 2013.

13 Id., p. 33.

14 *The "Camouco" Case (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 10.

graphic illustration of what can happen" when vessels engaged in IUU fishing activities game the prevailing system and take advantage of the inability or unwillingness of the responsible States to prevent, deter and eliminate IUU fishing.

III. Summary of argument

23. The Caribbean Regional Fisheries Mechanism appreciates the opportunity to submit this written statement, and to present its position in respect of the four questions to be considered by the Tribunal. Before addressing those questions, the CRFM wishes to make the following general observations.

A. The ecosystem-based approach

24. In responding to the four questions submitted to it by the SRFC, the CRFM invites the Tribunal to affirm the link between all States' "sovereign right to exploit their natural resources" with "their duty to protect and preserve the marine environment,"[15] to acknowledge the economic, social and environmental impacts of IUU fishing, and to apply the ecosystem-based approach to fisheries for a sustainable management of living marine resources and their ecosystems, as recognized in the Preamble to the MCA Convention[16] and other relevant regional and international instruments and documents. At its Seventh Meeting held in May 2013, the Ministerial Council of the CRFM "**[r]eaffirmed and declared** the ecosystem approach to fisheries and aquaculture as a key guiding principle for the CRFM, … , to ensure the long-term conservation and sustainable use of aquaculture and marine living resources."[17] The key features of this

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15 UNCLOS, article 193. See also R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 820; Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the International Law Commission, Geneva, 31 July 2008, p. 10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013 ("Article 192 places upon all States a duty to protect and preserve the marine environment and article 193 provides for a sovereign right to exploit natural resources only in accordance with such duty.").

16 The preamble to the MCA Convention reads, in relevant part: "taking into account the ecosystem-based approach to fisheries for a sustainable management of resources, and the fight against illegal, unreported and unregulated fishing, in accordance with international law." It has been pointed out that "[t]he living resources (i.e., fish, shellfish, sea turtles, and marine mammals) provisions of the LOS Convention recognize international interdependence on these resources" and "attention to ocean ecosystems would reflect the highly complex web of biological relationships where food chain and commensal associations create intricate interdependencies." See Eugene H. Buck, "U.N. Convention on the Law of the Sea: Living Resources Provisions," pp. 2, 4, CRS Report for Congress, Order Code RL32185 (Feb. 2008).

17 See text in Annex 4 to this written statement.

approach are maintaining ecosystem integrity[18] while improving human well-being and equity and promoting an enabling governance.

25. The MCA Convention defines the term "Ecosystem Approach" as follows:

> The ecosystem-based approach to fisheries is a means of ensuring the sustainable development of the fisheries sector. It is based on current fisheries management practices and explicitly acknowledges the interdependence between human well-being and that of the ecosystem. This approach places particular emphasis on the need to maintain the ecosystem in a good state and improve its productivity so that the level of fisheries production is maintained or improved for the benefit of current and future generations.[19]

26. This definition affirms the link between the ecosystem-based approach and the principle of sustainable development (see paras 32 to 35 below). Similarly, in adopting resolution 65/155 of 25 February 2011 entitled "Towards the sustainable development of the Caribbean Sea for present and future generations," the United Nations General Assembly reaffirmed "that the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach."[20] In this context, IUU fishing issues should be addressed in a holistic manner and against the background of the principle of sustainable development.

27. The same resolution noted "the heavy reliance of most of the Caribbean economies on their coastal areas, as well as on the marine environment in general, to achieve their

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[18] See also ILC Draft Articles on the Law of Transboundary Aquifers and Commentaries, UNGA Official Records, *Report of the ILC*, 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p. 55 ("An external impact affecting one component of an ecosystem may cause reactions among other components and may disturb the equilibrium of the entire ecosystem, resulting in impairing or destroying the ability of an ecosystem to function as a life-support system.").

[19] MCA Convention, article 2.1. See also article 2 of the Convention on Biological Diversity (1760 UNTS 79), which defines "ecosystem" as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unti." See also <http://www.cbd.int/ecosystem/default.shtml>, accessed 7 November 2013,

[20] UN Doc. A/RES/65/155 (25 February 2011). The UN General Assembly's recognition of the importance of the Caribbean region is underscored by a series of resolutions promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development. See, e.g., UN Doc. A/RES/59/230 (22 December 2004); UN Doc. A/RES/61/197 (20 December 2006); UN Doc. A/RES/63/214 (19 December 2008); UN Doc. A/RES/65/155 (20 December 2010); and UN Doc. A/RES/67/205 (21 December 2012).

sustainable development needs and goals."[21] IUU fishing activities constitute a direct threat to those needs and goals both within and without the Caribbean region.

28. In the preamble to the Draft Agreement establishing the Caribbean Community Common Fisheries Policy, which has been approved by the competent ministers of CARICOM and is accepted as a policy statement pending final signature and ratification, the Participating Parties express their commitment to "fostering cooperation and collaboration among Participating Parties in the conservation, management and sustainable utilization of fisheries resources and related ecosystems for the welfare and well-being of the peoples of the Caribbean."[22] This regional instrument defines the "ecosystem approach to fisheries management" as follows in article 1(g):

> the balancing of diverse societal objectives, by taking account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.[23]

29. Similarly, the preamble to the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, while recognizing "the interdependence of living resources, between them and with other natural resources, within ecosystems of which they are part," states that "the inter-relationship between conservation and socioeconomic development implies both that conservation is necessary to ensure sustainability of development, and that socioeconomic development is necessary for the achievement of conservation on a lasting basis."[24]

30. Several provisions of the UNCLOS reflect the ecosystem-based approach. For example, article 194, paragraph 5, of the Convention provides that the measures taken in accordance with Part XII of the Convention must include those "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or

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21 Id.

22 See text in Annex 5 to this written statement.

23 According to article 1(f), "ecosystem" means "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit."

24 Agreement on the Conservation of Nature and Natural Resources, adopted by the Foreign Ministers at the 18th ASEAN Ministerial Meeting in Kuala Lumpur, Malaysia, on 9 July 1985, text available at <http://cil.nus.edu.sg/rp/pdf/1985%20Agreement%20on%20the%20Conservation%20of%20Nature%20and%20Natural%20Resources-pdf.pdf>, accessed 7 November 2013.

endangered species or other forms of marine life." Article 234 of the Convention, dealing with vessel-based marine pollution in ice-covered areas, refers to "irreversible disturbance of the ecological balance."

31. Finally, as Judge Dolliver Nelson has pointed out in respect of the maritime zones featured in the instant case:

> there exists a biological unity among most species to be found in both the EEZ and in the high seas. As a result the fisheries management regime for the EEZ and that for the high seas should necessarily be concordant.[25]

B. The principle of sustainable development

32. The principle of sustainable development was referenced in the preceding paragraphs. The status and content of this concept has been considered extensively by three committees of the International Law Association (hereinafter "the ILA"):

- the Committee on the Legal Aspects of Sustainable Development (1992 - 2002);[26]
- the Committee on International Law on Sustainable Development (2003 - 2012);[27] and
- the Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present).[28]

33. Of the various committees' work, the CRFM refers particularly to the Committee on the Legal Aspects of Sustainable Development's New Delhi Declaration[29] in addition to

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[25] Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012) p. 1035, 1046.

[26] For the Web site of the ILA's Committee on the Legal Aspects of Sustainable Development (1992 - 2002), see <http://www.ila-hq.org/en/committees/index.cfm/cid/25>, accessed 7 November 2013.

[27] For the Web site of the ILA's Committee on International Law on Sustainable Development (2003 - 2012), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>, accessed 7 November 2013.

[28] For the Web site of the ILA's Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1044>, accessed 7 November 2013.

[29] ILA, *Committee on the Legal Aspects of Sustainable Development: New Delhi Declaration* (2002) Resolution No. 3/2002, available at <http://www.ila-hq.org/download.cfm/docid/65DD8DEF-E74D-4ED5-925EBC6D73F19C97>, accessed 7 November 2013.

the latest resolution[30] of the Committee on International Law on Sustainable Development, which was adopted at the 75th Conference of the ILA in 2012, and the report of that Conference.[31]

34. The CRFM agrees with the New Delhi Declaration's preambular statement that:

> the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.[32]

35. The CRFM regards the principle of sustainable development so formulated, in addition to the precautionary approach[33] and the ecosystem-based approach,[34] as guiding the exercise of the rights and compliance with the obligations of both flag States and coastal States in ensuring the sustainable management of shared resources,[35] including straddling fish stocks and highly migratory fish stocks.

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30 ILA, *Committee on International Law on Sustainable Development: Sofia Guiding Statement* (2012) Resolution No. 7/2012, available at <http://www.ila-hq.org/download.cfm/docid/BE9EAAD7-1C34-431E-BE5C21DE11021910>, accessed 7 November 2013.

31 ILA, *Committee on International Law on Sustainable Development: Final Report of the Sofia Conference* (2012), available at <http://www.ila-hq.org/download.cfm/docid/7C2F958B-C576-4C55-94F79F50A87AE74D>, accessed 7 November 2013.

32 See *supra* note 29.

33 See section V.A.1 under Question 1 below.

34 See section A. above.

35 The CRFM adopts the definition of "shared resources" in article 19, paragraph 3(b), of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (see *supra* note 24). According to that provision, species may constitute shared resources "by virtue of their migratory character" or "because they inhabit shared habitats." Accordingly, this term covers both straddling fish stocks and highly migratory fish stocks. This Agreement, which has not yet entered into force but is nevertheless of relevance for definitional purposes.

C. Applicable rules

36. As a matter of general principle, it is the CRFM's view that there should be no lacunae in the obligations and responsibility of States for IUU fishing activities conducted by entities within their jurisdiction or control. Under international law, the responsibility of States can be engaged in situations where there is no damage. If damage is caused by IUU fishing activities, particularly to the living resources of the marine environment, there should always be an entity which bears responsibility and liability for that damage.

37. The obligations of flag States and coastal States are complementary. In the EEZ, the primary jurisdiction and responsibility to prevent, deter and eliminate IUU fishing rest with the coastal State. When fishing takes place on the high seas, the primary, and in many respects exclusive, jurisdiction and responsibility lie with the flag State based on its responsibility to exercise effective jurisdiction and control over vessels entitled to fly its flag in accordance with international law, with certain general obligations applying to all States and subject to the possibility of concurrent jurisdiction existing in certain circumstances.[36]

38. The rights enjoyed by flag States and coastal States under the Convention and other law of the sea sources are coupled with obligations. The Convention reflects a balancing of rights and obligations of States and the same applies to the legal regime governing IUU fishing activities.

39. The principal sources of international obligations and rules of international law are treaties, customary international law and general principles of law. In the context of IUU fishing, the rules emanating from those sources include:

40. ***(1)* The obligation to protect and preserve the marine environment**, which is expressed as a general responsibility of all States under article 192 of the Convention. The Tribunal has recognized that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[37] This general obligation is accompanied by a number of more specific obligations in relation to the EEZ and high seas.

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[36] The primacy of the flag State is recognized in a number of provisions in the Convention, notably articles 91-92, 94, 209, paragraph 2, 211, paragraphs 2 and 3, 212, 216, 218, 222, 223, 228, 231, and 292. See also M. Nordquist, S. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982* (Brill, 2011), Vols. I-VII, , Part XII, p. 255, para. 217.8(a) (hereinafter the "Virginia Commentary").

[37] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70. See also Virginia Commentary, Part XII, p. 43, para. 192.11(a).

41. (*2*) **The principle of *prevention***, which is a customary rule having its origins in the due diligence that is required of a State in its territory and imposes on States the duty to adopt preventative measures in its sphere of exclusive control when international law is breached by private actors. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[38] Thus, States are under a general obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control."[39] The International Court of Justice (hereinafter "the ICJ") has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[40] Accordingly, flag States are bound to make the best possible effort to secure compliance by vessels flying their flag. This requires the implementation and enforcement[41] of appropriate measures within the flag State's legal system for the prevention, reduction and control of IUU fishing so as to ensure the sustainable development of the shared living resources of the oceans and the coastal State's exclusive sovereign right over the living resources in areas within its jurisdiction.

42. (*3*) **The duty of *cooperation***, which is especially required where the nationals of multiple States fish from the same shared stocks, being stocks comprising highly migratory species of fish and stocks that straddle EEZs or the divide between an EEZ and the high seas (UNCLOS, articles 63 and 64). The duty to cooperate also applies in

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38 *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

39 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29. See also article 3 of the 1992 Convention on Biological Diversity, 1760 UNTS 142, pursuant to which States have "the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;" and Principle 2 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992), pursuant to which "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction."

40 Id.

41 It has been held that the obligation to prevent pollution of the marine environment, which is analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans, "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:" *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, p. 14, para. 197. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 140 ("The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."). The CRFM considers that the same requirement of vigilance in enforcement is required in respect of measures adopted to prevent and combat IUU fishing activities.

respect of all fishing on the high seas so as to properly conserve and manage the living resources available (UNCLOS, article 118).[42] The duty to cooperate in good faith requires more than mere membership of relevant regional fisheries organizations; actual, good-faith cooperation within such mechanisms is required.[43]

43. **(*4*) The obligation to apply a *precautionary approach***, as reflected in Principle 15 of the 1992 Rio Declaration on Environment and Development and expressed in a number of treaty and other instruments. Principle 15 reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[44]

44. **(*5*) The coastal State's duty to *manage fishing in the EEZ***. Under article 56 of the Convention, coastal States have sovereign rights for the exploitation of fish stocks within their EEZ and jurisdiction over the protection and preservation of the marine environment. The Convention obliges coastal States to ensure that fish stocks within the EEZ are preserved while enabling the fishing of the "maximum sustainable yield." The coastal State's duty to manage fish stocks extends to shared stocks (i.e., those that straddle EEZs or the EEZ and the high seas, and highly migratory fish stocks), which requires actual good-faith cooperation between the States whose nationals and vessels fish from such stocks.

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[42] See also the second preambular paragraph of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas: "Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned." Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958, entered into force on 20 March 1966, 559 UNTS 285.

[43] See the discussion of the *Southern Bluefin Tuna* cases in section V.A.2 of Question 1 below. Further, the CRFM notes the Tribunal's statement that "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," which the CRFM regards as analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans: see *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 92.

[44] Rio Declaration on Environment and Development, 31 ILM 874 (1992), Principle 15. See also Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012), p. 400.

45. **(*6*) The coastal State's *rights to prevent IUU fishing of its resources***, which are extensive and exist concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. In particular, coastal States may:

(a) legislate and enforce such laws as required to ensure the sustainable development of fish stocks within their EEZ, in accordance with Part V of the Convention.

(b) take all necessary steps to prevent IUU fishing activities (including at-sea transhipment and transporting of IUU fish hauls) within their territorial seas;

(c) make effective use of port State jurisdiction over vessels voluntarily within their ports which have engaged in IUU fishing activities affecting them. The CRFM notes that article 23, paragraph 1, of the 1995 UN Fish Stocks Agreement confirms that port States have the right "and the duty" to take such measures where international rules for the conservation and management of fish stocks have been breached.

(d) enter into regional and bilateral agreements with flag States to permit the exercise of coastal State jurisdiction on the high seas in respect of vessels flying the flags of other States.

CHAPTER 2

JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

46. As this is the first occasion on which the Tribunal has been requested to render an advisory opinion under article 138 of its Rules,[45] the Tribunal is called upon to examine questions of jurisdiction and admissibility that may arise in the exercise of this important function. The present chapter deals first with the jurisdiction of the Tribunal to give the advisory opinion requested (section I), second with possible issues of admissibility (section II), and third with the applicable law (section III).

I. Jurisdiction

47. The Tribunal should first determine whether it has jurisdiction to give the advisory opinion requested by the SRFC. Based on the *Kompetenz-Kompetenz* principle recognized in article 288, paragraph 4, of the Convention, it is for the Tribunal alone to decide the question of its jurisdiction.

48. In contrast to the Sea-Bed Disputes Chamber, the jurisdiction of the Tribunal to give advisory opinions is not explicitly addressed in Annex VI of the Convention ("Statute of the International Tribunal for the Law of the Sea"), except that article 21 of the Statute states that "[t]he 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*."[46] (Emphasis added). The CRFM notes the generic reference to "jurisdiction" in article 21, which can be said to include both contentious and advisory jurisdiction. Moreover, article 20 of the Statute, which has to be read with article 21,[47] confirms that

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[45] The Sea-Bed Disputes Chamber of the Tribunal issued an advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area* (Case No. 17) on 1 February 2011 based on article 191 of the Convention. *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 (hereinafter "the Deep Seabed Mining Advisory Opinion").

[46] All references to the Convention are taken from the United Nations, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference, U.N. Pub. Sales No. E.83.V.5 (1983). See also the Virginia Commentary.

[47] See Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 15; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 24 October 2005, p. 10. Texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

"[t]he Tribunal shall be open to entities other than States Parties ... in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

49. The jurisdiction of the Tribunal to give advisory opinions is mentioned in the Rules of the Tribunal, the legal foundation for which is set forth in article 16 of the Statute of the Tribunal.[48] Article 138, paragraph 1, placed in Section H ("Advisory proceedings") of the Rules, reads: "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." The latter words are clearly linked to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" in article 21 of the Statute.[49] Article 138 of the Rules of the Tribunal clearly frames "rules for carrying out its functions," namely, the Tribunal's advisory function. Paragraph 2 of article 138 stipulates that "[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." Finally, paragraph 3 provides that the Tribunal "shall apply *mutatis mutandis* articles 130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber.

50. The ITLOS Web site confirms the advisory function and jurisdiction of the Tribunal, where it is stated under the tab "The Tribunal:"

> The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21). The Tribunal is open to States Parties to the Convention (i.e. States and international organisations which are parties to the Convention). It is also open to entities other than States Parties, i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement

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[48] Article 16 of the Statute reads: "The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."

[49] See also Speech by Judge Hugo Caminos, Representative of the International Tribunal for the Law of the Sea, at the First Meeting of International and Regional Courts of the World on the One-Hundredth Anniversary of the Central American Court of Justice, Managua, Nicaragua, 4-5 October 2007, p. 6 ("On the basis of that provision [i.e., article 21 of the Statute], article 138 of the Tribunal's Rules authorizes it to give an advisory opinion concerning the purposes of the Convention, if that is stipulated in an international agreement."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

> conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" (Statute, article 20).
>
> (...)
>
> The Seabed Disputes Chamber is competent to give advisory opinions on legal questions arising within the scope of the activities of the International Seabed Authority. The Tribunal may also give advisory opinions in certain cases under international agreements related to the purposes of the Convention.

51. The above statement confirms that intergovernmental organizations which are not parties to the Convention may have access to the Tribunal pursuant to article 20, paragraph 2, of the Statute.

52. Under the tab "Jurisdiction" on the ITLOS Web site, the following is stated under the heading "Advisory jurisdiction:" "The Tribunal may also give an advisory opinion on a legal question if this is provided for by 'an international agreement related to the purposes of the Convention' (Rules of the Tribunal, article 138)." This language is in line with the words "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" employed in article 21 of the Statute.

53. It has been pointed out in the literature that:

> The jurisdiction of ITLOS to issue advisory opinions has been raised on several occasions at meetings of LOSC States Parties and during debates in the UN General Assembly. However, no strong objection appears to have been raised, and a number of States have expressed support for Rule 138. Authoritative commentators, including several judges on the Tribunal, have also affirmed the existence of a sound legal basis for Rule 138 in the LOSC.[50]

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[50] Michael B. Gerrard and Gregory E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), pp. 524-525 (footnotes within cite deliberately omitted). See also Michael A. Becker, "Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion," *American Society of International Law Insights*, Vol. 17, Issue 19 (23 August 2013); P. Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), pp. 393-394.

54. Indeed, consecutive Presidents of the Tribunal have confirmed the full Tribunal's advisory jurisdiction through a series of official statements.[51]

55. In sum, in the view of the CRFM there can be no doubt that the Tribunal is vested with advisory jurisdiction on the basis of its constituent instruments, in addition to contentious jurisdiction. Such a jurisdiction also accords with the judicial function entrusted to the Tribunal as an independent judicial body under the Convention.[52] In order to exercise its judicial functions properly in accordance with the Convention and implementing instruments, including the Rules of the Tribunal, the Tribunal must be vested with advisory jurisdiction. These instruments must be interpreted to ensure the effectiveness of their terms. To conclude otherwise would contravene the rule of *effet utile*. As the ICJ has stated, "[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot

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[51] See, e.g., Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 24 October 2005, p. 11; Statement of Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, on the occasion of the ceremony to commemorate the Tenth Anniversary of the Tribunal, 29 September 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, p. 9; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, pp. 18-19 (describing the Tribunal's advisory function as "a significant innovation in the international judicial system"); Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, pp. 4, 6-10 (pointing out that the full Tribunal's advisory jurisdiction is "based on a procedure which has no parallel in previous adjudication practice" and represents a "procedural novelty"); Statement by Judge S. Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 76(a) "Oceans and the Law of the Sea", at the Sixty-sixth Session of the United Nations General Assembly, 6 December 2011, p. 4, para. 9; Statement by Shunji Yanai, President of ITLOS, given at the International Conference at Yeosu, Republic of Korea, 12 August 2012, p. 7; and Statement made by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 75(a) "Oceans and the Law of the Sea", at the Plenary of the Sixty-seventh Session of the United Nations General Assembly, 11 December 2012, p.3, para. 7 (all texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=49&L=1%2527%2560%2528>, accessed 7 November 2013).

[52] See, e.g., Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea," 9(3) *Chinese Journal of International Law* 565-587 (2010); Doo-young Kim, "Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea," *Issues in Legal Scholarship 2010*; Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited," 39 *Ocean Dev. & Int'l L.* 360 (2008).

justify [an interpretation of a treaty] contrary to [its] letter and spirit."[53] Thus, the CRFM invites the Tribunal to conclude that it has advisory jurisdiction.

56. The CRFM will briefly consider four issues arising from article 138 of the Rules of the Tribunal and the SRFC's request, namely:

(a) Whether there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion;

(b) Whether there was a valid request of the requesting organization;

(c) Whether the questions asked are "legal questions;" and

(d) Whether the request was transmitted to the Tribunal by a body "authorized by or in accordance with the agreement to make the request to the Tribunal."

57. In the view of the CRFM, these are the only conditions to be met for the Tribunal to have jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

58. As regards the first issue, the conditions to be met under article 138 of the Rules are: (a) that there is an international agreement; (b) that the agreement is related to the purposes of the Convention; and (c) that it provides specifically for the submission of a request for an advisory opinion to the ITLOS. Under article 33 ("Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion") of the MCA Convention, "[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 for the Law of the Sea for advisory opinion." In other words, the MCA Convention provides specifically for the submission to the Tribunal of a request for advisory opinion and confers on the Conference of Ministers, acting through the Permanent Secretary, the power to make such requests. The MCA Convention, a multilateral treaty which regulates 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 SRFC, is evidently an international agreement related to the

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[53] *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), p. 428; R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 1280 ("The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless ... . [A]n interpretation is not admissible which would make a provision meaningless, or ineffective") (referring to international decisions and literature in footnote 26); Deep Seabed Mining Advisory Opinion, para. 57.

purposes of the Convention, which also addresses the conservation and management of living resources within the EEZ and on the high seas.[54] The MCA Convention deals with IUU fishing in Part IV. It is submitted therefore that the Tribunal should conclude that there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion.

59. As to the second issue, the information provided by the requesting organization shows that the decision of the competent body of that organization—namely, the Conference of Ministers comprising representatives of each of the Member States of the SRFC[55]—was taken unanimously and is otherwise in accordance with the constituent instrument and internal rules of procedure of the organization. Article 8 of the SRFC Agreement provides that "[d]ecisions taken at the Conference of Ministers shall be unanimously agreed upon by representatives of Member Countries which shall undertake to ensure their application;" this is therefore the key stipulation applicable to the validity of decisions made by the Conference of Ministers. The "Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory Opinion," adopted on 28 March 2013 during the Fourteenth Extraordinary Session of the Conference of Ministers of the SRFC held in Dakar from 25 to 29 March, received a unanimous vote and appears otherwise to have been validly adopted on the basis of article 8 of the constituent instrument of the SRFC and article 33 of the MCA Convention. It is submitted therefore that the Tribunal should conclude that there is in this case a valid request by the requesting organization.

60. With respect to the third issue, the Tribunal must satisfy itself that the advisory opinion requested by the SRFC concerns "legal questions" within the meaning of article 138 of the Rules of the Tribunal. According to article 131, paragraph 1, of the Rules, which applies *mutatis mutandis* to advisory opinions under article 138 by operation of article 138, paragraph 3, of the Rules, "[a] request for an advisory opinion on a legal question ... shall contain a precise statement of the question." In examining this requirement, the CRFM invites the Tribunal to observe that the four questions put to the Tribunal

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[54] The MCA Convention is a "treaty" as defined in article 2, paragraph 1(a), of the 1969 Vienna Convention on the Law of Treaties ("'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

[55] Article 4 of the Convention of 29 March 1985 on the establishment of a Sub Regional Fisheries Commission as amended in 1993 (hereinafter "the SRFC Agreement"), lists "the Conference of Ministers" as one of three organs of the SRFC. Article 5 further describes the Conference of Ministers as "the supreme organ of the Commission" with a mandate "to decide on any matter relating to the preservation, conservation and management of fishery resources in the sub-region."

relate, *inter alia*, to "the obligations" of the flag State; the extent to which the flag State shall "be held liable;" and "the rights and obligations of the coastal State." The questions put to the Tribunal in this case concern the interpretation of provisions of the Convention and raise issues of general international law. As the ICJ has stated, "questions 'framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law'(*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, para. 15)."[56] It is submitted therefore that the Tribunal should conclude that the questions raised by the SRFC are of a legal nature.

61. Finally, as regards the fourth issue, Judge José Luis Jesus, speaking in his capacity as President of the Tribunal, has stated that "any organ, entity, institution, organization or State that is indicated in ... an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a body within the meaning of article 138, paragraph 2, of the Rules."[57] Pursuant to the aforementioned Resolution of the Conference of Ministers of the SRFC, the Permanent Secretary of the SRFC, who heads the Permanent Secretariat of the SRFC and is charged with "implementing decisions of the Conference of Ministers,"[58] transmitted the request for an advisory opinion by letter dated 27 March 2013 addressed to the President of the Tribunal, and received by the Registry on 28 March 2013.[59] According to the text of that Resolution, the Conference of the Ministers "**[d]ecides**, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion" on the four questions submitted to the Tribunal (emphasis in original).[60] The resolution was signed by the representatives of all seven Member States of the SRFC. The Nineteenth Session of the Conference of Ministers of the SRFC had instructed the Permanent Secretary of the

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56 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, 415, para. 25 (22 July 2010). See also Deep Seabed Mining Advisory Opinion, para. 39.

57 Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, pp. 9-10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

58 SRFC Agreement, article 12.

59 See ITLOS Order 2013/2 of 24 May 2013, p. 2.

60 Id.

SRFC to refer the four questions to the Tribunal for an advisory opinion. It is submitted therefore that the Tribunal should answer the fourth issue in the affirmative.

62. For the aforementioned reasons, the CRFM invites the Tribunal to find that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

II. Admissibility

63. In the view of the CRFM, there are no grounds on which the Tribunal should decline to provide the advisory opinion requested by the SRFC. Being an independent and impartial judicial body, the Tribunal's answers to the questions submitted to it by the SRFC will assist all subjects of international law to which the Convention is addressed in the performance of their rights and obligations under the Convention as well as general international law.

64. The Tribunal has a high responsibility to ensure that the provisions of the Convention are interpreted and implemented properly and the regime for fisheries in the EEZ and on the high seas is properly interpreted and applied.[62] Through its authoritative statements in reply to the SRFC's questions, the Tribunal will contribute to the implementation of the Convention's pertinent provisions and, indeed, sound governance of the seas and oceans and the Rule of Law in general.[63] By answering the questions submitted by the SRFC the Tribunal will assist the SRFC, as well as all similarly placed entities, in the performance of their activities. The SRFC and its Member States as well as States Parties to the Convention may take guidance from the interpretation in the Tribunal's advisory opinion of the pertinent rules on the obligations and liability of States in the Convention and under general international

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62 In resolution 56/12 of 28 November 2001, the UN General Assembly underlined what it referred to as the Tribunal's "important role and authority concerning the interpretation or application of the Convention." UN Doc. A/RES/56/12. As a former President of the Tribunal has stated, "interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention." Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 9, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013. See also Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, pp. 9-10 ("Advisory proceedings could also be advantageous for those seeking an indication as to how a specific sea-related matter could be interpreted under the Convention or which would be the applicable law when there is no specific provision governing the matter."); Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 19, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

63 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252&L=0>, accessed 7 November 2013.

law.[64] Accordingly, the CRFM invites the Tribunal to conclude that it is appropriate to render the advisory opinion requested by the SRFC and to proceed accordingly.

III. Applicable Law

65. The Tribunal should also indicate the applicable law. Article 23 of the Statute of the Tribunal reads: "The Tribunal shall decide all disputes and applications in accordance with article 293." In the view of the CRFM, there is no reason not to apply article 23 of the Statute to matters specifically provided for in any agreement which confers jurisdiction on the Tribunal.

66. Article 293, paragraph 1, of the Convention, reads: "A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention." In the view of the CRFM, "other rules of international law" must be interpreted to refer to the sources of international law listed in article 38 of the Statute of the International Court of Justice.[65] Article 38, paragraph 1, reads:

> The Court, …. , shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> (b) international custom, as evidence of a general practice accepted as law;
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> (c) the general principles of law recognized by civilized nations;

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[64] See also Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, pp. 7-8 ("Through an advisory opinion, the requesting body may obtain legal guidance from the Tribunal on a specific question … ."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

[65] The preamble to the Charter of the United Nations refers to the need to respect "the obligations arising from treaties and other sources of international law." As a former President of the Tribunal has stated, the "reference [in article 293] to 'other rules of international law' should be understood to include rules of customary international law, general principles that are common to the major legal systems of the world transposed into the international legal system, and rules of a conventional nature." Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, pp. 7-8, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

67. As Judge Rüdiger Wolfrum has repeatedly stated in his capacity as President of the Tribunal:

> I should underline that the law of the sea should not be seen as an autonomous regime but as part of general international law. In effect, numerous provisions in the Convention are today considered part of general international law, and the obligations of States Parties under the Convention entail international legal obligations.[66]

68. The "other rules of international law" referred to in article 293, paragraph 1, of the Convention also include those concerning the interpretation of treaties contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[67] Articles 31 and 32 reflect customary international law[68] and should be applied by the Tribunal in its interpretation of the relevant provisions of the Convention and other conventional law sources.[69]

69. The procedural rules applicable during advisory proceedings before the Tribunal are set out in section H ("Advisory proceedings") of the Rules of the Tribunal, article 138, paragraph 3 of which provides that the Tribunal "shall apply *mutatis mutandis* articles

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66 Statement by H.E. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, p. 7; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 18 (texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013). See also Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, p. 7 ("By applying the Convention in a specific case, the Tribunal applies not only the new treaty provisions that it contains, but also the general international law that it codifies."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

67 155 UNTS 331.

68 See *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), I.C.J. Reports 2007*, p. 60, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. U.S.A.), I.C.J. Reports 2004*, p. 48, para. 43; *Japan – Taxes on Alcoholic Beverage*, Report of the Appellate Body, WT/DS8/AB/R, 1996, p. 10.

69 The CRFM invites the Tribunal to apply the approach to treaty interpretation laid out in paragraphs 57-63 of the Deep Seabed Mining Advisory Opinion.

130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber. Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

CHAPTER 3

RESPONSE TO THE QUESTIONS IN THE REQUEST FOR AN ADVISORY OPINION

QUESTION I: 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?

I. The scope of the first question

70. This question concerns the obligations or duties of flag States, and not those of other States or of entities or persons having the nationality of the flag State and/or being under its jurisdiction or control. However, the obligations which Question 1 asks the Tribunal to identify and, as necessary, interpret are intertwined with IUU fishing activities, i.e., activities that are presumably carried out by private vessels registered in the flag State, and not by the flag State itself. In other words, the central issue in relation to Question 1 concerns obligations of "due diligence" on the part of the flag State.

71. In Question 1, the expression "obligations" refers to primary obligations, that is, to what flag States are obliged to do under the Convention and other sources or rules of international law not incompatible with the Convention. A violation of these obligations entails "liability," which is addressed in Question 2.

72. Question 1 is not limited to the obligations of the 166 States Parties to the Convention, but refers generally to "the flag State." Thus, the answer to the first question requires the identification and, as necessary, interpretation of the obligations of the flag State with respect to IUU fishing activities that result from the Convention, relevant instruments that have been adopted in accordance with the Convention, and other sources and rules of international law not incompatible with the Convention.

73. In the response to the first question, the identification and, as necessary, interpretation of the obligations of the flag State with respect to IUU fishing activities is limited to such activities that "are conducted within the Exclusive Economic Zone of third party States." Therefore, the question is addressed to IUU fishing activities and flag State obligations in the exclusive economic zone (hereinafter "the EEZ") only, and not on the high seas or in other maritime zones addressed in the Convention. Since these activities in the EEZ take place under the primary jurisdiction and control of the coastal State, legal obligations under the Convention that generally apply to activities under the jurisdiction and control of States Parties to the Convention are applicable to activities in the EEZ as well.

74. Since the purpose of the first question is to identify and, as necessary, interpret the *obligations* of the flag State in cases where IUU fishing activities are conducted by vessels flying its flag within the EEZ of third States, the Tribunal is not called upon to identify and interpret the *rights* of flag States under the Convention or general international law, although it may be useful in this context for the Tribunal briefly to address the basic rights of flag States as well. In this context, the CRFM notes that the Convention represents a balancing of rights and obligations of States.

75. Activities in the EEZ must be carried out in accordance with the Convention and otherwise must comply with international law. Within the EEZ, such activities are subject to a special, resource-oriented legal regime in order to protect the interests of the coastal State.[70] Exploration and exploitation of fish stocks in the EEZ are subject to the approval of the coastal State, which enjoys exclusive sovereign rights in the EEZ based on article 56, paragraph 1, of the Convention.

76. The owners, operators and crew of private vessels flying the flag of a certain State are not parties to the Convention and other treaty instruments, and hence the obligations set out in the Convention are not addressed to them directly, even though article 62, paragraph 4, provides 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." Private actors are not, as such, bound by the provisions of treaty instruments. The rules of the Convention concerning activities in the EEZ are treaty law and thus binding only on the subjects of international law that have accepted them. Obligations under the Convention can nevertheless be imposed on non-State entities through the implementation of the Convention by the flag State in its domestic law, including in fulfilment of any "due diligence" obligations on the part of the flag State. Upon implementation, the rules applicable to non-State entities having the nationality, or being under the jurisdiction or control, of the flag State find their legal basis in domestic law.

77. The CRFM's observations regarding Question 1 begin by setting out the various relevant definitions, including the classification of "IUU" fishing and what constitutes the territorial limitation of a State's EEZ. The CRFM will then set out the obligations of the flag State in relation to IUU fishing activities conducted in the EEZ of another State pursuant to conventional law, namely, multilateral treaties (universal and regional), and under customary international law and general principles of law.

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[70] See *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, para. 61, available at <http://www.itlos.org/index.php?id=264&L=0>, accessed 25 November 2013.

II. IUU Fishing

78. In the Draft Agreement Establishing the Caribbean Community Common Fisheries Policy, adopted in 2011,[71] the term "fishing" is defined as meaning:

> the actual or attempted searching for, catching, taking or harvesting of fisheries resources;
>
> i. engaging in an activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fisheries resources, for any purpose;
>
> ii. placing, searching for or recovering fish aggregating devices or associated electronic equipment, such as radio beacons;
>
> iii. any other operations at sea, on a lake, in a river or within any other water body in connection with or in preparation form, any activity described in paragraphs (i) to (iii), including transhipment; and
>
> iv. use of any other vessel, vehicle, aircraft or hovercraft, for any activity described in paragraphs (i) to (iv),
>
> v. but does not include any operation related to emergencies involving the health or safety of crew members or the safety of a vessel.

79. Question 1 is concerned with fishing which is *illegal, unreported and unregulated*. In the MCA Convention, the SRFC Member States have defined IUU fishing as follows:

> Article 4:
>
> 4.1 "Illegal fishing": fishing activities:
>
> - Conducted by national or foreign vessels in water under the jurisdiction of a State without the permission of that State, or in contravention of its laws and regulations;
>
> - Conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

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[71] See Annex 5 to this written statement.

- In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant fisheries management organization.

4.2 "Unreported fishing": fishing activities

- Which have not been reported or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

- Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported in contravention of the reporting procedures of that organization.

4.3 "Unregulated fishing": fishing activities

- In the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

- In areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for conservation of living marine resources under international law.

80. The CRFM refers also to the "High Seas Task Force (2006), Closing the Net: Stopping illegal fishing on the high seas, Final report of the Ministerially-led Task Force on IUU Fishing on the High Seas,"[72] and the "Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing" (2010), first preambular paragraph,[73] for further definitions.

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[72] See *supra* note 12, pp. 14 and 16.

[73] See *supra* note 1.

III. The Exclusive Economic Zone

81. Part V of the UNCLOS comprises rules concerning the EEZ of a coastal State. The definition of what constitutes an EEZ is set forth in articles 55 and 57 of the Convention as follows:

> *Article 55*: The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.
>
> *Article 57*: The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

82. Question 1 is therefore limited to identifying the obligations of the flag State in relation to vessels conducting IUU fishing activities within a territorial limitation of 200 nautical miles from the baselines from which the territorial sea of the coastal State is measured.[74]

IV. Due diligence obligations of flag States

83. As the Sea-Bed Disputes Chamber remarked with regard to obligations of "due diligence" in *Case No. 17*:

> 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).
>
> An example may be found in article 194, paragraph 2, of the Convention which reads: "States shall take all measures necessary to ensure that

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[74] Article 3 of the Convention reads: "Every State has the right to establish the breadth of its 'territorial sea' up to a limit not exceeding 12 nautical miles, measured from baselines." See also Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012) p. 1035.

> activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment ... ."[75]

84. With regard to IUU fishing activities conducted by vessels sailing under the flag of one State within the EEZ of another State, the flag State's obligation "to ensure" is "not an obligation to achieve, in each and every case, the result that the [vessel flying its flag] complies with" the aforementioned obligation. Rather, "it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result." Thus, the obligation in article 194, paragraph 2, of the Convention "may be characterized as an obligation 'of conduct' and not 'of result', and as an obligation of 'due diligence'."[76]

85. As the Chamber explained in the Deep Seabed Mining Advisory Opinion:

> 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).[77]

86. The ICJ has described "an obligation to act with due diligence" as follows:

> 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 ... ..[78] (Emphasis added)

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[75] Deep Seabed Mining Advisory Opinion, paras. 112-113.

[76] Id., para. 110.

[77] Id., para. 111.

[78] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, p. 14, para. 197. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 140 ("The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.").

87. As one of the States participating in *Case No. 17* pointed out in its written statement:

> Whether an obligation is a due diligence obligation can usually be inferred from its content, context, and object and purpose. In general, obligations which focus on the action to be taken rather than the result of such action, such as obligations which require States to take measures – and irrespective whether such measures must be 'appropriate,' 'necessary' or 'effective' – can be characterized as due diligence obligations. The ultimate objective of such an obligation may be to achieve a certain result, e.g., the prevention of damage, but the obligation itself is oriented towards the action to be taken, i.e., the adoption of measures. This is also the view of the International Law Commission. For example, the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities provide that "[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." (Art. 3). In the commentary, it is explained that this obligation is "one of due diligence" (*Yearbook of the International Law Commission*, vol. II, Part Two, at 154 (para. 7); See also commentary on Article 6 of the Draft Articles on the Law of Acquifers, UN Doc. A/63/10, para. 1).[79]

88. The Deep Seabed Mining Advisory Opinion briefly addressed the content of the "due diligence" obligation to ensure in *Case No. 17*, noting as follows:

> 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 risks involved in the activity. ... The standard of due diligence has to be more severe for the riskier activities.[80]

89. In *Case No. 17*, the Chamber could find indications concerning the content of the due diligence obligation in article 153, paragraph 4, last sentence, and Annex III, article 4, paragraph 4, of the Convention, which apply to activities in the Area. While a corresponding provision is missing outside the Convention's provisions concerning the

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[79] Written statement of the Kingdom of The Netherlands of 11 August 2010, p. 8, para. 3.8.

[80] Deep Seabed Mining Advisory Opinion, para. 117. The CRFM notes that a Study Group on Due Diligence in International Law was recently established by the International Law Association.

Area, articles 61 ("*Conservation of the living resources*") and 62 ("*Utilization of the living resources*") in Part V of the Convention provide certain guidance in this respect and article 217 ("*Enforcement by flag State*") resembles the provisions which the Chamber had occasion to consider in *Case No. 17*.[81] Thus, in respect of article 217 of the Convention, necessary measures are required and these must be adopted by the flag State within its legal system.[82]

V. Direct obligations of flag States

90. The obligations of flag States are not limited to obligations of due diligence. As subjects of international law, States Parties to the Convention that allow vessels to fly their flags are directly bound by the obligations set out therein. Under the Convention and related instruments, flag States have obligations with which they have to comply independently of their obligation to ensure a certain behavior by vessels flying their flag. These obligations, which derive from the UNCLOS as well as other conventional law sources and general international law, may be characterized as "direct obligations." Among the most important of these direct obligations are the obligation to adopt the precautionary approach and the obligation to protect and preserve the marine environment, including the living resources of the water column.

A. Flag State obligations under conventional law

1. The Precautionary Approach as a conventional duty

91. Various treaty instruments contain provisions that establish a direct obligation for flag States. This includes the duty to apply the precautionary approach or principle, of which there is no unique formulation but which has been aptly described as follows:

> Basically, the precautionary principle is the idea that activities which may endanger the environment should be avoided, and precautionary measures taken, even in situations where there is potential hazard but scientific uncertainty as to the impact of the potentially hazardous activity.[83]

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81 Id., paras. 118-120.

82 Cf. Deep Seabed Mining Advisory Opinion, para. 118 ("Necessary measures are required and these must be adopted within the legal system of the sponsoring State.").

83 Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012) p. 400. According to the Virginia Commentary, "[e]ssentially, the precautionary principle requires that exploitation of a fish stock not be undertaken unless adequate information exists about that stock, based on the best scientific evidence available, to

92. The precautionary approach has become an essential feature of modern fisheries management, particularly since the adoption of "Agenda 21" and the FAO Global Code of Conduct for Responsible Fisheries in 1995 (described in section D below), which enshrined the precautionary approach as a basic approach for sustainable fisheries management and development. This approach is of great relevance to regional fisheries organizations such as the SRFC and the CRFM, especially in light of the number of countries involved in regional fisheries and transboundary stocks issues.

93. The 1992 Rio Declaration on Environment and Development (hereinafter "the Rio Declaration") incorporates the precautionary approach in Principle 15, which reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[84]

94. In this respect, the Sea-Bed Disputes Chamber observed as follows in *Case No. 17*:

> The precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.[85]

95. Thus, article 5(c) of the Fish Stocks Agreement provides that coastal States and States fishing on the high seas shall "apply the precautionary approach in accordance with article 6." According to article 6, paragraph 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." It is recalled that article 192 of the Convention provides that all "States have the obligation to protect and preserve the marine environment." Similarly, in article 14, paragraph 1, of the 1985 ASEAN Agreement on

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enable implementation of a comprehensive management scheme and to ensure the optimal sustainable utilization of that stock." Virginia Commentary, Part VIII, p. 288, n.14.

84 Rio Declaration on Environment and Development, 31 ILM 874 (1992), Principle 15.

85 Deep Seabed Mining Advisory Opinion, para. 135. The Chamber also referred to "the following statement in paragraph 164 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute' (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties)." Id.

the Conservation of Nature and Natural Resources the "Contracting Parties undertake that proposals for any activity which may significantly affect the natural environment shall as far as possible be subjected to an assessment of their consequences before they are adopted, and they shall take into consideration the results of this assessment in their decision-making process."

96. The provisions of the aforementioned treaty instruments, and many other treaties and instruments that incorporate the precautionary approach, transform the non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation for the States parties to such treaties. The implementation of the precautionary approach as defined in these treaties is one of the obligations of flag States parties to such treaties. However, as the Chamber pointed out in the Deep Seabed Mining Advisory Opinion:

> It should be noted that while the first sentence of Principle 15 seems to refer in general terms to the "precautionary approach", the second sentence limits its scope to threats of "serious or irreversible damage" and to "cost-effective" measures adopted in order to prevent "environmental degradation."[86]

97. The CRFM notes that IUU fishing activities in some parts of the oceans are of such a scale as to pose threats of serious or irreversible damage to the living resources of the marine environment, or of significant and harmful changes to that environment or the ecological balance. In this context, while being mindful of the fact that the precautionary principle "covers a wide range of possible obligations and actions,"[87] the CRFM invites the Tribunal to clarify which concrete measures are to be taken by States, especially flag States, in order to comply with their duty to apply the precautionary approach.

98. Similar to what the Chamber said with regard to sponsoring States in the Area in the Deep Seabed Mining Advisory Opinion,[88] it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of flag States, which is applicable even outside the scope of the aforementioned treaties. The due diligence obligation of flag States requires them to take all appropriate measures to prevent damage that might result from the activities of vessels flying their

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86 Id., para. 128.

87 Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012), p. 400, 402.

88 Deep Seabed Mining Advisory Opinion, para. 131.

flag, wherever they may be. As the Chamber has said, "[t]his obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks."[89] A flag State would not meet its obligation of due diligence if it disregarded those risks.[90] Article 206 of the Convention makes clear that the assessment of potentially harmful activities under a State's jurisdiction or control is not limited to pollution, but includes also "significant and harmful changes to the marine environment."[91]

99. As the Chamber stated in the Deep Seabed Mining Advisory Opinion with regard to the nexus between a due diligence obligation and the precautionary approach:

> The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal's Order of 27 August in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*. This emerges from the declaration of the Tribunal that the parties "should in the circumstances act with prudence and caution to ensure that conservation measures are taken ..." (*ITLOS Reports 1999*, p. 274, at paragraph 77), and is confirmed by the further statements that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna" (paragraph 79) and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency" (paragraph 80).[93]

100. Another direct obligation that gives substance to the flag State's obligation under article 217 of the Convention ("*Enforcement by flag States*") to adopt laws and regulations within the framework of its legal system is set out in article 235, paragraph 2, of the Convention. This provision reads as follows:

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in

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89 Id.

90 To quote the Chamber's words, "[s]uch disregard on the part of the State concerned would amount to a failure to comply with the precautionary approach." Deep Seabed Mining Advisory Opinion, para. 131.

91 It has been pointed out that "the protection and preservation of the marine environment, and pollution from vessels and by dumping, are different concepts." Virginia Commentary, Part XII, p. 42, para. 192.10.

93 Deep Seabed Mining Advisory Opinion, para. 132.

respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

101. This provision applies to the flag State as the State with jurisdiction over the vessel that caused the damage, to the extent that such damage was caused by pollution of the marine environment. With regard to IUU fishing activities, the CRFM submits that dumping of fish and other waste or matter during such activities falls within the Convention's definition. The Convention contains a broad definition of "pollution,"[94] and dumping is defined as "any deliberate disposal of wastes or other matter from vessels."[95] The CRFM also refers to the intentional or accidental introduction of non-indigenous species to the wild through IUU fishing activities, which is causing especially devastating effects on fisheries and related ecosystems in the Caribbean region. Article 200 of the Convention is of particular importance in the prevention of pollution insofar as it requires the cooperation of States through the exchange of information and data about pollution to the marine environment.

102. By requiring the flag State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, article 235, paragraph 2, of the Convention serves the purpose of ensuring that the "[n]ationals of other States fishing in the exclusive economic zone ... of the coastal State" referred to in article 62, paragraph 4, of the Convention comply with "the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

2. The UNCLOS

(a) *Key provisions*

103. The Convention's provisions are part of a complex network of international laws, rules and regulations, but, in addition to setting forth specific rules, the UNCLOS also represents the general rules which serve as basic principles for the entire network of international public law of the sea.[96]

104. The Convention has received 166 ratifications, including from the European Union, and is in force for all members of the SRFC and the CRFM.

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94 UNCLOS, article 1, paragraph 1 sub (4).

95 UNCLOS, article 1, paragraph 1 sub (5)(a)(i).

96 See *The Flag State's Obligations for Merchant Vessels*, Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea.

105. As detailed above, the articles forming Part V of the UNCLOS lay down a specific legal regime in relation to the EEZ. While the coastal State's prior and preferential interests are recognized as sovereign rights by the Convention, the EEZ does not equate to State territory because the regime also specifies and protects important interests which all States must enjoy in the same waters.[97] Although the coastal State has extensive rights, the exclusivity is confined to the economic interests specified in the UNCLOS.[98]

106. Pursuant to article 58, paragraph 2, of the Convention, articles 88 to 115 apply, along with other pertinent rules of international law, to the EEZ in so far as they are not incompatible with Part V. These articles 88 to 115 deal with rights and duties of States in relation to the high seas.

107. Article 91 of the Convention (*"Nationality of ships"*) prescribes that each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Pursuant to article 91, paragraph 1, ships have the nationality of the State whose flag they are entitled to fly and that provision further prescribes that there must be a *genuine link* between the State and the ship.

108. The *"Duties of the flag State"* in relation to those ships which fly its flag are laid down in article 94 of the Convention but these duties principally concern ensuring seaworthiness of vessels, safe navigation and acceptable working conditions. They do not deal specifically with duties of a flag State when a vessel flying its flag is conducting IUU fishing activities within the EEZ of another State.

109. Other key provisions include articles 62, paragraph 4, 64, paragraph 1, 116-119, 192 and 217 of the Convention.

(b) *Conservation and management of living resources within the EEZ*

110. The CRFM refers to article 192 (*"General obligation"*) of the Convention which expresses the general duty of States, including flag States, to protect and preserve the marine environment. It is recalled that:

> 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

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97 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), para. 332, pp. 792-793. Article 55 of the Convention specifies that the relevant provisions of the Convention govern "the rights and jurisdiction of the coastal State and the rights and freedoms of other States."

98 Id.

> superjacent to the seabed and of the seabed and its subsoil ... and (b) *jurisdiction* as provided for in the relevant provisions of this Convention with regard to: ... the protection and preservation of the marine environment.[99]

111. The specific obligations regarding the conservation and management of marine living resources within the EEZ are detailed within articles 61 to 64 of the Convention. With one or two exceptions (discussed below), these are all addressed to the coastal State. The CRFM submits, therefore, that the main competence for establishing legislative measures for the conservation and management of marine living resources in the EEZ falls on the coastal State.[100]

112. By virtue of article 61 of the Convention, the coastal State must "determine the allowable catch of the living resources in its exclusive economic zone" and it has a duty to ensure that the living resources do not become endangered by over-exploitation. The same provision specifies that the coastal State and the competent international organizations, whether sub-regional, regional or global, have a duty to cooperate to this end. Furthermore, coastal States are to give due notice of conservation and management laws and regulations.[101]

113. The duty of the flag State as the State with the genuine link to the vessel is engaged by paragraph 4 of article 62 of the Convention in the sense that this paragraph imposes a duty on the "nationals of other States fishing in the exclusive economic zone"[102] to "comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State." These laws and regulations may relate to aspects regulating fishing licences, the species which may be caught, fixing quotas of catch, regulating seasons and areas of fishing, the information

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99 UNCLOS, article 56, paragraph 1 (emphasis added).

100 See also "The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources," Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York, 21 June 2007, p. 3, text available from the ITLOS Web Site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013, and reproduced as Annex 6 to this written statement (hereinafter "President's 2007 Presentation (Annex 6)").

101 UNCLOS, article 62, paragraph 5.

102 The UNCLOS does not define the term "nationals." However, the CRFM notes that according to article 14 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, "the term 'nationals' means fishing boats or craft or any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews."

required of fishing vessels, etc.[103] In this regard, Judge Wolfrum, speaking in his capacity as President of the Tribunal, has stated generally that the flag State "is under the obligation to ensure that vessels flying its flag abide by the rules of the coastal State by exercising its competencies as a flag State."[104] Further, Judges Wolfrum and Kelly have recently affirmed that "[i]t is for the flag State to take the enforcement actions not entrusted to the coastal State by the Convention".[105]

114. Pursuant to article 64, paragraph 1, of the Convention (in conjunction with article 118), flag States have a duty to cooperate with the coastal State directly or through appropriate international organizations when nationals engage in fishing for highly migratory species that occur both within the EEZ and beyond. If there is no regional organization, the flag State whose nationals harvest such species and the coastal State must cooperate to establish an organization in the region and participate in its work. While States are negotiating to establish such an organization, the duty to act in good faith (see section V.C below) requires that the negotiating States "pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations,"[107] which is in line with the precautionary approach discussed above.

115. The flag State's duty to cooperate with the coastal State directly or through appropriate international organizations under these articles of the Convention was the subject of the *Southern Bluefin Tuna* cases.[108]

116. The effect of Japan's argument in response to the contention by Australia and New Zealand that Japan had failed to cooperate as required by the Convention was to say that becoming a State party to a regional agreement fulfilled and discharged its obligations regarding cooperation in the conservation of the relevant high seas resource.[109]

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103 For the full, non-exhaustive, list see article 62, paragraph 4, sub (a)-(k), of the Convention.

104 President's 2007 Presentation (Annex 6), p. 4.

105 *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, Joint Separate Opinion of Judge Wolfrum and Judge Kelly*, para. 12, available at <http://www.itlos.org/index.php?id=264&L=0>, accessed 25 November 2013.

107 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, p. 202, para. 70 (describing this principle as "self-evident").

108 The CRFM notes that the Tribunal issued an Order for provisional measures while an arbitral tribunal was being constituted to hear the main dispute. Ultimately, that arbitral tribunal found that it had no jurisdiction.

109 *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility of 4 August 1999, 39 ILM 1359 (2000), pp. 70-71.

117. Australia and New Zealand rejected this position entirely, contending that it was "the old anarchy returned in procedural guise."[110] Moreover, while the Arbitral Tribunal declined jurisdiction, its analysis of Japan's jurisdictional case makes it clear that the mere existence of a regional regime for cooperation does not override or discharge the more general obligation under the Convention.[111] In its Order on Provisional Measures, the Tribunal observed that "under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species,"[112] before ordering the following provisional measures:

> Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;[113]
>
> Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.[114]

118. In the view of the CRFM, the duty to cooperate under the pertinent provisions of the Convention is not discharged by the act of joining relevant regional fisheries organizations alone. Rather, actual good-faith cooperation within such mechanisms is required.[115] Anything less is both a failure to cooperate in the manner required, and amounts to bad faith conduct. The meaning of the duty to cooperate is further discussed in section V.B below.

119. Further, in accordance with the established international law rule of "exclusive flag State jurisdiction," the flag State is responsible for the implementation of conventions

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110 Id.

111 Id., pp. 51-52.

112 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 248.

113 Id., para. 90(1)(e).

114 Id., para. 90(1)(f).

115 See Virginia Commentary, Part V, p. 646, para. 63.12(a) (the duty to cooperate "is a *pactum de negotiando*, implying the obligation to negotiate in good faith"). See also section V.C below.

and their enforcement vis-à-vis the vessels which have their nationality.[117] Ships themselves cannot incur responsibilities by international law as they are not subjects of international law and so it follows that ships derive their rights and obligations from the States whose nationality they have.[118] This is confirmed by the Convention as follows.

120. Pursuant to article 91 of the Convention, "every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag ... [and]... there must exist a genuine link between the State and the ship." The term "genuine link" is not defined by the Convention but it is said to be interpreted as a strong economic tie between nationals of the flag State and the vessel with regard to ownership, management and manning of the ship.[120]

121. Article 94 of the Convention provides that "every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." The flag State's initial obligation is to maintain a register of ships flying its flag, it is to assume jurisdiction under its internal law over each ship flying its flag (along with its master and crew) in respect of administrative, technical and social matters concerning the ship.[121] A summary of the flag State duties in this respect can be found at Annex 7.[122]

122. The CRFM submits that these conventional duties affirm the principle of exclusive flag State jurisdiction and it follows that when conducting fishing activities within the EEZ of a third State, flag State vessels and nationals must respect and comply with any such laws enacted by the coastal State in relation to fishing in its EEZ and the flag State has the responsibility to ensure that its vessels and nationals do comply with these laws, at least in so far as they constitute "conservation measures and ... other terms and

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117 See Jörn-Ahrend Witt, *Obligations and Control of Flag States, Developments and Perspectives in International Law and EU Law* (LIT, 2007), p. 4.

118 Tamo Zwinge, "Duties of Flag States to Implement and Enforce International Standards and Regulations – and Measures to Counter their Failure to do so," *Journal of International Business and Law*, Vol. 10, Issue 2 (2010), article 5, p. 298.

120 See *The Flag State's Obligations for Merchant Vessels*, Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea. See also George K. Walker, "Report of the Law of the Sea Committee—Defining Terms in the 1982 Law of the Convention III: Analysis of Selected IHO *ECDIS Glossary* and Other Terms (Dec. 12, 2003 Initial Draft, Revision 1)," *Proceedings of the American Branch of the International Law Association (2003-2004)*, p. 187, 197-201.

121 UNCLOS, article 94, paragraph 2, sub (a)-(b).

122 Annex 7, table taken from *The Flag State's Obligations for Merchant Vessels*, Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea.

conditions established in the laws and regulations of the coastal State" and provided such laws and regulations are consistent with the Convention.[123]

123. The CRFM notes that it has also been said that the "obligation to ensure" reflected in article 62 of the Convention extends further than merely a "due diligence" obligation[124] and that such an obligation might also be characterized as a "direct obligation" on a State. Article 94, paragraph 6, of the Convention might be said to bring in this concept of a direct obligation of the flag State in the sense that in circumstances where a coastal State has clear grounds to believe that proper jurisdiction and control have not been exercised with respect to a vessel, it may report the facts to the flag State and upon receiving such a report, the flag State is obliged to investigate the matter and to take any action necessary to remedy the situation.

124. The CRFM notes that, ultimately, it is primarily for the coastal State to take requisite enforcement action against a vessel which is carrying out IUU fishing activities in its EEZ. This is because the Convention gives the coastal State specific rights in this respect. These rights are found in article 73, paragraph 1, which entitles the coastal State to 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 this Convention" in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its EEZ. The fact that these powers are given to the coastal State and not the flag State flows from the rule, expressed in article 56, paragraph 1, of the Convention, that the coastal State has exclusive rights and jurisdiction over the living resources in its EEZ.

125. The CRFM submits that these articles demonstrate that pursuant to the Convention, it is primarily the coastal State which has the competence to regulate fishing in the EEZ and to take enforcement action against those that violate the laws and regulations it has adopted in conformity with its duties to conserve and manage living resources under the Convention. The flag State's duties under the Convention are limited to a more general "responsibility to ensure" compliance with these laws and regulations and to assist and cooperate with the coastal State, to investigate where necessary and, if appropriate, take any action necessary to remedy the situation.[125]

126. Moreover, the CRFM highlights the importance of article 217 of the Convention. Paragraph 1 of article 217 requires flag States to "ensure compliance by vessels flying

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123 UNCLOS, article 62, paragraph 4.

124 Deep Seabed Mining Advisory Opinion, para. 121.

125 See also the President's 2007 Presentation (Annex 6), p. 4.

their flag or of their registry with "applicable international rules and standards, established through the competent international organization or general diplomatic conference." This includes rules adopted by RFMOs pursuant to Part V (concerning the EEZ) and Part VII, section 2 (dealing with conservation and management of the living resources on the high seas) of the Convention. Article 217, paragraph 1, further provides that "[f]lag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs," while paragraph 8 provides that "[p]enalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur." Although article 217 falls within Part XII on the "Protection and Preservation of the Marine Environment," which primarily addresses the prevention of pollution, Part XII is not restricted to pollution and article 217 is one of a number of examples of more general provisions aimed at conservation of the marine environment. Other such examples include articles 192 and 193 of the Convention.

127. The CRFM's position is that article 217, paragraph 1, contains the aforementioned general obligation, and also a distinct pollution-specific obligation (namely, to ensure compliance with a State's "laws and regulations adopted in accordance with [the] Convention for the prevention, reduction and control of pollution of the marine environment from vessels"). This view is consistent with the position in a leading treatise that "[s]ome of the provisions in Section 6 [i.e. including article 217] are interesting not only for pollution problems, but also in relation to the general question of jurisdiction."[126]

128. A summary of the relevant articles in the Convention is provided in Annex 12:

3. The Fish Stocks Agreement

129. The United Nations 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 of 1995 (hereinafter "the Fish Stocks Agreement") has received 81 ratifications,[127] including by the European Union, compared to 166 for the UNCLOS.

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126 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 821 (observing that "the eight paragraphs of Article 217 ... is in essence a list of situations in which the flag state is required to exercise its undoubted jurisdiction over flag vessels").

127 Including six CRFM Member States, namely, the Bahamas, Barbados, Belize, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Of the seven SRFC Member States, only Guinea and Senegal have ratified the Fish Stocks Agreement.

130. The CRFM notes that while the Fish Stocks Agreement sets out principles for the conservation and management of straddling and highly migratory fish stocks only, its principles have been accepted to be applicable more broadly.[129] The CRFM also notes that the special interest of coastal States in the conservation of those stocks is underlined once again by this multilateral instrument. The Fish Stocks Agreement also elaborates on the inherent duties contained in the UNCLOS such as the duty to cooperate,[130] the duties of the flag State and the concept of "responsibility to ensure." Further, it prescribes that conservation and management measures should be established on the basis of the precautionary approach[131] by setting limit reference points for maximum sustainable yield.

131. The collection and exchange of data[132] and the creation and use of regional fisheries management organizations are promoted by the Fish Stocks Agreement as a means of fulfilling the duty of States to cooperate in this way and are an essential element in the management procedures.[133]

132. The CRFM submits that ensuring compliance with conservation and management measures is the collective responsibility of all States concerned in a particular stock. As Judge Rüdiger Wolfrum has pointed out in his capacity as President of the Tribunal, "the responsibility for the proper management of living resources is a shared one; it places not only coastal States but also flag States and – more recently – port States under an obligation."[134] In a coastal State's area of territorial sovereignty or sovereign rights, the competent and accountable authority is of course the coastal State and the provisions relating to responsibilities of the coastal State in its EEZ contained in Part V of the Convention are elaborated upon in the Fish Stocks Agreement.

133. The Fish Stocks Agreement provides an elaborate list of measures which the flag State is obligated to take in relation to the fishing of straddling and highly migratory fish stocks. While the majority of the obligations are in relation to fishing of these stocks

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129 See Tamo Zwinge, "Duties of Flag States to Implement and Enforce International Standards and Regulations – and Measures to Counter their Failure to do so," *Journal of International Business and Law*, Vol. 10, Issue 2 (2010), article 5, p. 309.

130 Fish Stocks Agreement, articles 7, paragraph (1)(b), 8, paragraph 3, and 19, paragraph c.

131 Id., article 6.

132 Id., article 14, paragraph 1, article 17, paragraph 4, and article 7 of Annex 1.

133 Id., article 8.

134 President's 2007 Presentation (Annex 6), p. 11.

on the high seas, the following relate to obligations of flag States when fishing these stocks in areas of national jurisdiction:

Article 6	As alluded to above, this is a general approach underpinning the agreement that States shall apply the *precautionary approach* widely to conservation, management and exploitation of straddling fish and highly migratory fish stocks in order to protect the marine living resources and preserve the marine environment.
Article 7(1)(b)	The *duty to cooperate* with the relevant coastal State 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.*
Article 14	States have a general duty to ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under the agreement.
Article 17(2)	The obligation of flag States which are not members of a sub-regional or regional fisheries management arrangement not to authorize vessels flying their flag to engage in fishing operations for the straddling of fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.
Article 17(4)	The obligation of flag States who are members of a sub-regional or regional fisheries management arrangement to exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organisation nor participants in the arrangement and which are engaged in the fishing operations for relevant stocks to take measures consistent with the agreement and international law to deter activities of such vessels [non-members] which undermine the effectiveness of sub-regional or regional conservation and management measures.
Article 18	This article lists *"Duties of the flag State"* and article18(3)(a)(iv) specifically obliges flag States to "ensure that vessels flying its flag do not conduct unauthorised fishing within areas under the national jurisdiction of other States" and article 18(3)(g) requires the "monitoring, control and surveillance of such vessels, their fishing operations and related activities..." by flag States.
Article 19	The obligation of the flag State to ensure compliance by vessels flying its flag with sub-regional and regional conservation and management measures and in particular to (a) enforce such measures irrespective of where violations occur; (b) investigate any alleged violations; (c) require any vessel flying its flag to give

	information to the investigating authority regarding and related to the vessel's fishing operations; (d) refer a case to its own authorities if there is sufficient evidence of a violation and where appropriate to detain the vessel.
Article 20	Obligation to cooperate and assist either directly or through sub-regional or regional fisheries management organizations or arrangements to ensure compliance with the conservation and management measures for straddling and highly migratory fish stocks. States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of sub-regional regional or global conservation management measures.
Article 20(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." (Emphasis added)

134. The CRFM submits that the Fish Stocks Agreement therefore goes further than the Convention and imposes on flag States parties to that Agreement more specific obligations to cooperate with the coastal State as well as to investigate allegations by the coastal State of unauthorized fishing of straddling or highly migratory fish stocks in waters under its jurisdiction, and therefore in its own EEZ. However, as demonstrated by these provisions, the coastal State is nevertheless the accountable authority and through this Agreement, flag States are obliged to assist the coastal State in its investigation and any subsequent enforcement should they be called upon.

4. The FAO Compliance Agreement

135. The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993 (hereinafter "the FAO Compliance Agreement") has been ratified by only 39 States. Many flag States with open registries are not parties. This agreement is broader than the Fish Stocks Agreement because it applies to all high seas fishing rather than just straddling or highly migratory fish stocks. The CRFM notes that it does not appear to apply to fishing in the EEZ of a third State.

136. Nevertheless, for completeness, the CRFM summarizes below some of the FAO Compliance Agreement's provisions relating to flag State duties:

Article III(1)(a)	"Each Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures."
Article IV	Obligation to maintain a record of fishing vessels.
Article V	Duty to cooperate.
Article VI	Obligation to provide information to FAO.

5. FAO Agreement on Port Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009

137. The CRFM refers to this agreement, adopted in 2009 but not yet in force, to highlight measures adopted by the FAO in relation to IUU fishing.

138. The primary purpose of this agreement is to prevent, deter and eliminate IUU fishing through the implementation of robust port State measures.[135] The agreement envisages that parties, in their capacities as port States, will apply the agreement in an effective manner to foreign vessels when seeking entry to ports or while they are in port.[136]

139. The CRFM notes that this agreement is aimed at strengthening the international framework for combating IUU fishing by addressing port State responsibility. As such, it complements flag State responsibilities.

6. Draft Agreement establishing the Caribbean Community Common Fisheries Policy

140. The Draft Agreement establishing the Caribbean Community Common Fisheries Policy (hereinafter "the Draft CCCFP Agreement")[138] reflects the CRFM Member States'

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135 See:<http://www.fao.org/fishery/topic/166283/en>, accessed 7 November 2013.

136 See: <http://www.fao.org/fishery/topic/166283/en>, accessed 7 November 2013.

138 See Annex 5 to this written statement. Regional economic cooperation is based on the 2001 Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market Economy (revising the Treaty Establishing the Caribbean Community and Common Market signed at Chaguaramas on 4 July 1973), text available at <http://www.caricom.org/jsp/community/revised_treaty-text.pdf>, accessed 25 November 2013.

current and intended practice in relation to responsible fishing within the territory and beyond of the CRFM members. The agreement, as indicated in the title, is not yet in force.

141. The CRFM's "vision" is that there be effective cooperation and collaboration among participating parties in the conservation, management and sustainable utilization of the fisheries resources and related ecosystems in the Caribbean region. This is reflected at article 4.1 of the Draft CCCFP Agreement.

142. The CRFM refers in particular to the following specific objectives which it is hoped will be achieved through the implementation of the Draft CCCFP Agreement: "prevent, deter and eliminate illegal, unreported and unregulated fishing, including by promoting the establishment and maintenance of effective monitoring, control and surveillance systems."[139]

143. It is intended that the Draft CCCFP Agreement, once in force, will apply "within areas under the jurisdiction of Participating Parties, on board fishing vessels flying the flag of a Participating Party and, subject to the primary jurisdiction of the flag State when fishing takes place on the high seas or the coastal State when fishing takes place in the waters of a Third State, to nationals of Participating Parties."[140]

144. The Draft CCCFP Agreement therefore mirrors the principle canvassed in the Convention that the coastal State has primary jurisdiction over activities conducted in its EEZ and, hence, that efforts to control and combat IUU fishing are subject to that jurisdiction.

145. It is envisaged that each "Participating Party" will designate an organization to support that party in achieving the objectives of the agreement.

146. An important provision in the Draft CCCFP Agreement in relation to the obligations of the flag State is found at article 14, which reads in relevant part:

> 14.1 Each Participating Party, to the extent of its capabilities, shall develop, either directly or through cooperation with other Participating Parties or the Competent Agency, as appropriate, such inspection and enforcement measures as are necessary to ensure compliance with:
>
> (a) the rules contained in and adopted pursuant to this Agreement;

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[139] Draft CCCFP Agreement, article 4.3, paragraph (g).

[140] Id., article 6.2.

(b) national regulations relating to fisheries; and

(c) rules of international law, binding on the Participating Party concerned.

14.2 The inspection and enforcement measures referred to in Article 14.1 shall apply to rules applicable in the territory of the Participating Party, in waters under its jurisdiction, on fishing vessels flying its flag and, where appropriate, and subject to the primary jurisdiction of the flag State when fishing takes place on the high seas or the coastal State when fishing takes place in the waters of a Third State, to its nationals, wherever they may be. (Emphasis added).

147. In other words, in circumstances when IUU fishing activities are taking place in the EEZ of a third State, this agreement requires the flag State to have developed, either directly or through cooperation with other Participating Parties or the Competent Agency, as appropriate, inspection and enforcement measures as are necessary to ensure its vessels do not carry out IUU fishing and to enforce against them if they do. These measures, again, are always subject to the coastal State's primary jurisdiction over matters in its EEZ. The flag State is therefore expected to work with the coastal State to prevent, deter and eliminate IUU fishing through appropriate agreed inspection and enforcement measures.

148. In implementing this regime, the participating States shall, *inter alia*, adopt measures to:

> monitor, control and undertake surveillance of their maritime space and co-operate in monitoring, controlling and undertaking surveillance of areas contiguous to their maritime space in order to prevent, deter and eliminate illegal, unreported and unregulated fishing as appropriate.[141]

149. In this way, it is for the coastal State to monitor that State's area of territorial sovereignty or sovereign rights for IUU fishing activities and the flag State should assist it in this task and take any other agreed measures if called upon to achieve the objective to prevent, deter and eliminate IUU fishing.

150. Much like the Fish Stocks Agreement, there is an obligation among the States parties to share information between them[142] and the agreement also requires that the Competent

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[141] Id., article 14.3(a).

[142] Id., article 16.

Agency submit annual reports to the Council for Trade and Economic Development and the Council for Foreign and Community Relations on the implementation of the agreement.[143]

7. ASEAN Agreement on the Conservation of Nature and Natural Resources

151. The CRFM notes that article 19 on "Shared resources" of the ASEAN Agreement on the Conservation of Nature and Natural Resources of 1985 contains similar principles of cooperation of States, subject to their sovereign rights to promote the conservation and harmonious utilization of shared natural resources which have already been discussed above in relation to the Fish Stocks Agreement and the Draft Agreement establishing the Caribbean Community Common Fisheries Policy.

8. European Union IUU Regulation

152. The CRFM notes that the European Union's IUU Regulation, Council Regulation 10005/2008, 2008 O.J. (L. 286) 1(EC), establishes a system to prevent, deter and eliminate IUU fishing for the Member States of the European Union, a supranational organization. Obligations of the flag State under this regulation, which is binding on all EU Member States, appear to be limited to validating a "catch certificate" for the vessel flying its flag from which catches of fishery products have been made.[145] Moreover, flag States must have in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by their vessels.[146] This catch certificate is used to certify that catches made by the vessel have been made in accordance with applicable laws, regulations and international conservation and management measures.

153. Pursuant to article 17, paragraph 6, of the IUU Regulation, the flag State may be required to assist a Member State in order to help with verification. Verification of the catch certificate may be required, *inter alia*, when vessels have been reported in connection with IUU fishing.[147] Further, if "presumed IUU fishing" has taken place, the European Commission may: (a) warrant an official enquiry with the flag State requesting it to investigate; (b) share the results of the investigation; (c) request the flag State to take immediate enforcement action should the allegation formulated against the

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143 Id., article 21.

145 Articles 12, paragraphs 4-5, and 15, IUU Regulation, Council Regulation 10005/2008, 2008 O.J. (L. 286) 1(EC).

146 Id., article 20.

147 Id., article 17, paragraph 4.

fishing vessel be proven to be founded; and (d) possibly also provide information to the Commission as to the vessel's owners.[148]

9. Bilateral treaties

154. The CRFM invites the Tribunal to take notice of the Maritime delimitation treaty between Jamaica and the Republic of Colombia (1993) (Jamaica being one of the CRFM's members) and the Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados (2003) (both States being members of the CRFM), which contain similar provisions for a joint regime area where the parties have joint jurisdiction over specific agreed areas, including with respect to the protection and preservation of the marine environment and living natural resources.[149]

B. Flag State obligations under customary international law

155. Within the context of article 293, paragraph 1, of the Convention, a former President of the Tribunal has pointed out that:

> [t]he application of the norms of customary law and of general principles of law becomes relevant, as evidenced in the Tribunal's jurisprudence, in situations where, to use the terminology of a working group of the International Law Commission, the provisions of the Convention are "unclear or open textured"; where "the terms or concepts used in the [Convention] have an established meaning in customary law or under general principles of law"; or where the Convention does not provide sufficient guidance.[150]

156. The CRFM first notes that States are obliged, as a matter of "well-recognised" international legal principle, "not to allow knowingly [their] territory to be used for acts contrary to the rights of other States,"[151] which is a logical consequence of the grounding of international law in the sovereign equality of States, as expressed in

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148 Id., article 26.

149 Articles 3(2), 3(4) and 3(6), Maritime delimitation treaty between Jamaica and the Republic of Colombia (1993), and articles 4, 5 and 8 of Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados (2003): see Annexes 8 and 9 respectively.

150 Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, p. 8, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

151 *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, 22.

article 2, paragraph 1, of the UN Charter, and the principle of mutual respect.[152] Accordingly, as a matter of customary international law, flag States must make every effort to ensure that no activities are carried out under their jurisdiction that are contrary to the rights, or that undermine compliance with the obligations, of coastal States. In fact, the CRFM's view is that in ensuring the preservation and protection of the marine environment, including its living resources, there is a mutual obligation incumbent upon States "to reinforce each other's efforts to manage and conserve the marine environment."[153]

157. As mentioned above, States are under a general obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control."[154] The ICJ has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[155]

158. The CRFM also refers to its observations on "due diligence" obligations in section IV above.

159. The CRFM observes that flag States are also obliged under customary international law to apply the precautionary approach, as reflected in Principle 15 of the Rio Declaration on Environment and Development[156] and expressed in a series of treaty and other instruments.

160. A further customary international law obligation of great importance is the duty to cooperate. In its Judgment in *Pulp Mills on the River Uruguay*, the ICJ observed that shared resources[158] "can only be protected through close and continuous cooperation

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152 See also the President's 2007 Presentation (Annex 6), p. 4.

153 Id., p. 5.

154 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29.

155 Id.

156 Rio Declaration on Environment and Development, 31 ILM 874 (1992), Principle 15. See also Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012) p. 400.

158 The CRFM adopts the definition of "shared resources" in article 19, paragraph 3(b), of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, which provides that species may constitute shared resources "by virtue of their migratory character" or "because they inhabit shared habitats. Accordingly, this term covers both straddling fish stocks and highly migratory fish stocks. See *supra* note 24.

between the [sharing] States."[159] This customary obligation is also reflected in the UNCLOS and the other conventional sources discussed in section V.A(2)-(8) above. The importance of this obligation is further indicated in Principle 24 of the Stockholm Declaration on the Human Environment.[160]

161. The CRFM's position is that cooperation between States having jurisdiction over fishing from shared stocks and stocks of common interest, particularly straddling fish stocks and highly migratory fish stocks, lies at the core of their international obligations.[162] This duty requires actual engagement[163] and colors the interpretation of all other obligations and rights with respect to the utilization of shared resources.

162. One aspect of the duty to cooperate is a requirement that States exchange data and information in relation to conservation and IUU activities on a regular basis. The ILC has described such exchange as "the first step for cooperation,"[164] and one that requires "effective monitoring" by the relevant States.[165] The ILC has further stated that this aspect of the duty to cooperate is "designed to ensure that ... States will have the facts necessary to enable them to comply with their obligations."[166]

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159 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, p. 14, para. 81.

160 See text in 11 ILM 1416 (1972) ("International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.").

162 This view is supported by the ILC's commentary to article 7 of the Draft Articles on the Law of Transboundary Aquifers, where it is said that cooperation "is a prerequisitie for shared natural resources:" see UNGA Official Records, *Report of the ILC*, 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p 48. While the Draft Articles and commentaries are in respect of transboundary acquifers, the underlying general principles are equally applicable to the present discussion.

163 See discussion of the *Southern Bluefin Tuna* cases in section V.A(2)(b) above.

164 ILC Draft Articles on the Law of Transboundary Aquifers and Commentaries, UNGA Official Records, *Report of the ILC*, 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p. 50.

165 ILC Draft Articles on the Law of Transboundary Aquifers and Commentaries, UNGA Official Records, *Report of the ILC*, 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p. 62.

166 ILC Draft Articles on the Law of Transboundary Aquifers and Commentaries, UNGA Official Records, *Report of the ILC*, 60th session (5 May-6 June and 7 July-8 August 2008), UN Doc. A/63/10, p. 51. See also, id., p. 53 ("For data and information to be of practical value to ... States, they must be in a form which allows them to be easily usable.").

163. For adjacent States or States belonging to a group of States that constitute a region, the need to cooperate is reinforced by "the customary law of neighbourliness [which] establishes a balance by imposing on States the obligation to take all necessary measures—preventive and precautionary—in order to avoid or reduce damage, as well as an obligation of notification."[167] The essence of the law of neighbourliness in international law has been aptly summarized as follows:

> *a)* The prohibition to use or permit the use of the frontier zone in such a manner as to cause damage to the territory of the neighbour State. The preamble of the resolution on Utilisation of Non-Maritime International Waters (Except for Navigation) of the Institute de Droit International of 1961 affirms in this regard that "the obligation not to cause unlawful harm to others is one of the basic general principles governing neighborly relations".
>
> *b)* The obligation for States to take into consideration the legitimate interests of their neighbours. As a result, States must adopt all necessary measures in order to avoid or reduce damage beyond their territory—eg in the case of epidemic sicknesses, burning of transfrontier forests, and pollution stemming from industrial activities situated close to the border.
>
> *c)* The obligation to inform, notify, and consult neighbours on any situation likely to cause damage beyond the border.
>
> *d)* The obligation for States to tolerate the consequences for activities not prohibited under international law, that take place in the territory of a neighbour State, so long as these consequences do not exceed an acceptable threshold in their gravity.[168]

C. Flag State obligations derived from general principles of law

164. The duty of flag States to carry out their obligations under the relevant fisheries agreements in good faith stems from a general principle of law. While it is true that this duty does not create obligations where none otherwise exist, it is a fundamental principle cohering the system of international law by governing the creation and performance of legal obligations.[169] Indeed, in the landmark "Declaration on Principles

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167 Laurence Boisson de Chazournes and Danio Campanelli, "Neighbour States," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VII, OUP 2012), p. 600, 602.

168 Id., pp. 601-602.

169 See, e.g., *Nuclear Tests (Australia v. France; New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 253 & 457, p. 268, para. 46 & p. 473, para. 49, where it was held that "[o]ne of the basic principles

of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations," the UN General Assembly declared as follows:

> Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.[170]

165. This duty is expressed in article 26 of the Vienna Convention on the Law of Treaties,[171] which is generally regarded as being reflective of customary international law binding on all States that have not consistently objected to it. Moreover, States Parties to the UNCLOS[172] and the Fish Stocks Agreement[173] are expressly obliged to fulfil their obligations in good faith. The CRFM notes the statement of the Sea-Bed Disputes Chamber in *Case No. 17* to the effect that the duty to act in good faith is especially important when a State's action "is likely to affect prejudicially the interests of mankind as a whole,"[174] as is the case in relation to IUU fishing of shared resources. Further, the CRFM takes the view that the general obligation of good faith includes the obligation incumbent on States having signed and/or ratified international agreements,

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governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential:" *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 69, 105, where it was held that "[t]he principle of good faith is ... 'one of the basic principles governing the creation and performance of legal obligations' [citing the *Nuclear Tests* case]; it is not in itself a source of obligation where none would otherwise exist;" *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 142, where the ICJ stated, in the context of article 26 of the Vienna Convention, that "[t]he principle of good faith obliges the Parties to apply [their Treaty] in a reasonable way and in such a manner that its purpose can be realized;" and R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 38, n.8.

170 UNGA Res. 2625 (1970), UN Doc. A/8082. See also article 2, paragraph 2, of the UN Charter ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.").

171 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331. The duty of good faith is also reflected in article 31, which governs the interpretation of treaties and reflects customary international law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, 174, para. 94.

172 UNCLOS, article 300. Moreover, it has been pointed out with regard to article 94 of the Convention that "[t]he application of paragraph 6 calls for good faith on the part of the other States and on the part of the flag States (cf. article 300)." Virginia Commentary, Part VII, p. 150, para. 94.8(j).

173 Fish Stocks Agreement, articles 16, paragraph 2, and 34.

174 Deep Seabed Mining Advisory Opinion, para. 230.

including the UNCLOS and Fish Stocks Agreement, to abstain from all acts that frustrate the object and purpose of the treaty, whether by design or otherwise.[175]

166. The Tribunal has repeatedly stated that "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 ... ."[176] (Emphasis added).

167. Finally, the CRFM notes that, pursuant to article 74 of the UN Charter and as expressed in that instrument's preamble, all UN Member States (currently numbering 193) have undertaken to abide by "the general principle of good-neighborliness, due account being taken of the interests, and well-being of the rest of the world, in social, economic, and commercial matters."

D. Subsidiary means: "Soft law" instruments

168. The CRFM refers to the FAO Code of Conduct for Responsible Fisheries of 1 November 1995[177] as an example of a "soft law" instrument providing guidance for flag States, which may be of relevance to the Tribunal's response to the first question submitted by the SRFC.

169. The CRFM refers in particular to article 8 of the FAO Code of Conduct which sets out a number of flag State duties that have the aim of promoting the "principles" of the code of conduct. These principles include "fishing in a responsible manner" as well as the general principle that a flag State should exercise effective control over vessels flying its flag so as to ensure the proper application of the Code of Conduct.

170. The CRFM notes in particular that, in accordance with the FAO Code of Conduct, flag States should ensure that the activities of vessels flying their flag do not undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, sub-regional, regional or global levels. States should also ensure that vessels flying their flag fulfil their obligations concerning the collection and provision of data relating to their fishing activities.[179]

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175 See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), pp. 242-253 (commenting on article 18 of the Vienna Convention on the Law of Treaties).

176 *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 92.

177 Available at <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf>, accessed 7 November 2013.

179 See article 8 of the FAO Code of Conduct for a full list of duties.

171. The CRFM also refers to the Castries Declaration.[180] In its preamble, the Castries Declaration notes "the responsibility of flag States under international law to effectively control and manage vessels flying their flags, as well as the responsibilities of port and coastal States in controlling IUU fishing in waters under their jurisdictions and on the High Seas." The CRFM's view is therefore that controlling IUU fishing within third States' EEZ is the collective responsibility of the flag States with the port and coastal States concerned.[181]

172. The Castries Declaration also refers in paragraph 6(v) to the need for further international action "to require that a 'genuine link' be established between states and fishing vessels flying their flags in the Region and on the high seas."

173. he CRFM further refers to the following other soft law instruments as examples of non-legally binding guidelines as being demonstrative of other institutional/regional practice:

(a) Rome Declaration on Implementation of the Code of Conduct (1999);[182]

(b) FAO 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing ("IPOA-IUU");[183]

(c) FAO technical guidelines;[184]

(d) FAO Voluntary Guidelines for Flag State Performance (February 2013),[185] in particular see list of flag State responsibilities relating to IUU fishing;

(e) International Conference on Responsible Fishing, Declaration of Cancun;[186]

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180 See Annex 1 to this written statement.

181 See also the President's 2007 Presentation (Annex 6), p. 11.

182 Available at <http://www.fao.org/docrep/005/x2220e/x2220e00.htm>, accessed 7 November 2013.

183 Available at <http://www.fao.org/docrep/003/y1224E/Y1224E00.HTM>, accessed 7 November 2013.

184 Available at <http://www.fao.org/fishery/publications/technical-guidelines/en>, accessed 7 November 2013.

185 Available at <ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf>, accessed 7 November 2013.

186 Available at <http://legal.icsf.net/icsflegal/uploads/pdf/instruments/res0201.pdf>, accessed 7 November 2013.

(f) Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (2001);[187]

(g) Johannesburg Declaration on Sustainable Development (2002);[188]

(h) Kyoto Declaration and Preface (9 December 1995);[189]

(i) UNCED, Rio Declaration on Environment and Development (1992);[190]

(j) UN General Assembly resolution 62/177 (2008) (UN Doc. A/RES/62/177) (28 February 2008) which urges States to exercise "effective control" over vessels flying their flag "to prevent and deter" IUU fishing;

(k) UN General Assembly resolution 65/155 (2011) (UN Doc. A/RES/65/155) (25 February 2011) in which it is recognized "that the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach;" and

(l) Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston 1990 (SPAW Protocol).[191]

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[187] Available at <ftp://ftp.fao.org/fi/DOCUMENT/reykjavik/y2198t00_dec.pdf>, accessed 7 November 2013.

[188] Available at <http://www.unescap.org/esd/environment/rio20/pages/Download/johannesburgdeclaration.pdf>, accessed 7 November 2013.

[189] Available at <http://www.fao.org/docrep/012/ac442e/ac442e.pdf>, accessed 7 November 2013.

[190] Rio Declaration on Environment and Development, 31 ILM 874 (1992). See also Stockholm Declaration on the Human Environment (1972), especially Principles 7, 21, 22 and 24. Declaration of the United Nations Conference on the Human Environment, UN Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, 3.

[191] See Annex 11 to this written statement.

QUESTION II: TO WHAT EXTENT SHALL THE FLAG STATE BE HELD LIABLE FOR IUU FISHING ACTIVITIES CONDUCTED BY VESSELS SAILING UNDER ITS FLAG?

I. The scope of the second question

174. This question concerns the liability of the flag State in respect of "IUU fishing activities conducted by vessels sailing under its flag" and the extent of such liability. In other words, Question 2 concerns the liability of a State arising from a vessel's illegal conduct (breach), and not the State's conduct as a legal entity. The main issue raised by Question 2 is the liability of the flag State for private actors within their jurisdiction or control committing violations when the private acts cannot be directly attributed to the State. As the response to Question 1 showed, flag States can be liable for violations of their "due diligence" obligations as well as for violations of direct obligations, including the obligation to apply a precautionary approach and the obligation to protect and preserve the marine environment, including the living resources of the water column.

175. The answer to the second question requires the identification and, as necessary, interpretation of international law rules on the liability of a flag State for IUU fishing activities conducted by vessels flying its flag. These rules are not only found in the responsibility and liability provisions set out in articles 232, 235, paragraph 1, and 304 of the Convention,[192] including any relevant instruments that have been adopted in accordance with the Convention, but also in other sources and rules of international law to the extent that they are not incompatible with the Convention and related instruments.

176. In Question 2, the term "liable" refers to the consequences of a breach of the flag State's obligations.[193] Unlike Question 1, which concerns the flag State's obligations in the EEZ, the territorial scope of Question 2 is not limited to the EEZ of other States. Thus, in reply to Question 2, the Tribunal is called upon to identify and, as necessary, interpret the flag State's obligations on the high seas before answering the question of the liability of the flag State for IUU fishing activities conducted by vessels flying its flag under international law. As an international tribunal, the ITLOS can only opine on questions of *international* law in the exercise of its advisory function. In other words,

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192 At para. 168 of the Deep Seabed Mining Advisory Opinion, the Chamber took into account articles 235 and 304 as well as other relevant provisions of the Convention applicable to activities in the Area.

193 At para. 66 of the Deep Seabed Mining Advisory Opinion, the Chamber pointed out that "the term 'liability' refers to the secondary obligation, namely, the consequences of a breach of the primary obligation."

questions of liability under domestic law, including the law of coastal States, are outside of its jurisdiction.

177. The CRFM notes that the Convention does not address expressly whether the responsibility of the flag State is engaged, or whether the flag State may incur liability, if private vessels flying its flag do not comply with the laws and regulations of coastal States and engage in IUU fishing activities within the EEZ of other States or on the high seas. The Convention does, however, contain certain provisions which are of relevance in addressing this question, and general international law is of relevance as well in this context.

178. The CRFM's observations on Question 2 begin by setting out the primary obligations of flag States, particularly in relation to IUU fishing activities conducted on the high seas given that there is no territorial limitation within the question, before considering State liability/responsibility for IUU fishing activities conducted by flag State vessels.

II. Flag State obligations regarding IUU fishing within the EEZ

179. The obligations of flag States in cases where IUU fishing activities are conducted by their nationals and vessels flying their flag within the EEZ of another State are set out in the CRFM's response to Question 1.

III. Flag State obligations regarding IUU fishing on the high seas

A. Flag State obligations under conventional law

180. In addition to obligations within the EEZ of another State, Question 2 raises the question of the obligations of flag States in respect of IUU fishing activities conducted by vessels flying their flag on the high seas.

181. The CRFM refers to the articles comprising Part VII of the UNCLOS, which set forth rules concerning the high seas. While the Convention does not define the term "high seas" itself, article 86 provides that the provisions governing the high seas "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[194]

182. It has been pointed out that "[t]he legal regime of the high seas has traditionally been characterised by the dominance of the principles of free use and the exclusivity of flag

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[194] UNCLOS, article 86.

state jurisdiction."[195] In principle a flag State enjoys exclusive jurisdiction over vessels flying its flag on the high seas, as no State may purport to subject the high seas to its own sovereignty.[196] With exclusive jurisdiction over its vessels on the high seas comes a "general requirement for a flag state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[197] Question 2, as it pertains to the high seas, therefore relates to identifying and, as necessary, interpreting the obligations of a flag State in relation to vessels conducting IUU fishing activities and which do not fall under the jurisdiction of any State other than the flag State.

183. While the high seas are not within the sovereign territory of any State, this zone is nevertheless subject to the law of nations.[198] Legal order on the high seas is created "through the cooperation of the law of nations and the municipal laws of such states as possess a maritime flag."[199] With regard to IUU fishing in the EEZ, the flag State carries obligations *vis-à-vis* the coastal State, which bears the primary responsibility for the conservation and management of living resources within the EEZ. On the high seas, RFMOs increasingly play that role.[200]

184. The CRFM suggests that the obligations of flag States regarding IUU fishing activities on the high seas can be grouped primarily into three different categories:[201]

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195 R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP 1999), p. 203. See also Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., 2010), p. 665 ("The key to regulating activities within the high seas is the concept of flag state jurisdiction").

196 Id. See also *The Flag State's Obligations for Merchant Vessels,* Bernaerts' Guide To The 1982 United Nations Convention On The Law Of The Sea ("As there is no sovereign authority of a state or other agency to maintain law and order on the high seas, there must be some tie to the jurisdiction of a state. According to common international law, which is confirmed by the Convention, the flag state in general exercises exclusive jurisdiction over a vessel on the high seas.")

197 *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas, supra* note 12, p. 5 ("Boats on the high seas are thus best regarded as mobile pockets of sovereignty, governed by the rules and regulations of the state whose flag they fly.")

198 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 727.

199 Id.

200 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

201 See also the conventional and soft law instruments discussed elsewhere in this written statement.

(a) Flag States owe certain obligations to coastal States with regard to activities not occurring within the EEZ but occurring in areas beyond or adjacent to the EEZ.

(b) The UNCLOS imposes upon all States, including flag States, an obligation to protect and preserve the marine environment. Within the high seas specifically, States are bound by a general duty to take all measures necessary for the conservation of the living resources of the high seas and to cooperate in the conservation and management of high seas living resources.[202]

(c) The UN Fish Stocks agreement, together with other agreements following a similar model, recognizes specific obligations of flag States to regulate vessels and provides a mechanism for improved compliance with and enforcement of conservation measures on the high seas within a framework which delegates management of the relevant stocks to regional fisheries organizations or bilateral agreements. Within this framework, numerous bilateral and regional instruments bind flag States to uphold certain obligations to monitor and investigate vessels flying their flag.

1. The UNCLOS

185. Part VII of the UNCLOS sets out the legal regime applying to the high seas. Articles 88 to 115 of the Convention deal with rights and duties of States in relation to the high seas.

186. Article 89 of the Convention preserves the general principle that States may not purport to subject any part of the high seas to their own sovereignty. Moreover, every State, whether coastal or land-locked, has the right to have ships flying its flag sail on the high seas based on article 90 of the Convention.

187. The freedom of navigation is one of several non-exhaustive freedoms listed in the 1958 Convention on the High Seas, which claimed to be declaratory of established principles of international law.[203] The freedom to fish on the high seas is another such freedom. States exercise the freedoms of the high seas primarily through vessels flying their flags.[204]

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202 See David Freestone "Fisheries, High Seas," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012) p. 66, para. 7.

203 Both the 1958 High Seas Convention and the UNCLOS proclaim the high seas to be free and open to vessels of all States and indicate that any list of freedoms in the high seas is non-exhaustive. See Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., 2010), p. 665.

204 See the President's 2007 Presentation (Annex 6), p. 2.

188. Article 87 of the UNCLOS sets out the principal freedoms which all States enjoy on the high seas. Paragraph 2 of article 87 provides that in the exercise of the freedoms of the high seas, all States must have "due regard for the interests of other states."

189. The UNCLOS preserves the right of all States for their nationals to engage in fishing on the high seas.[205] However, this freedom of fishing is not absolute;[206] rather, article 116 of the UNCLOS identifies three limitations on States' freedoms to fish on the high seas:

(a) Restrictions grounded in treaty obligations;

(b) Rights, duties and interests of coastal States provided for, *inter alia*, in article 63, paragraphs 1 and 2 (for 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) and articles 64 to 67 (highly migratory species, marine mammals, anadromous stocks, catadromous species); and

(c) The provisions of Section 2 of Part VII of the Convention, regarding the conservation and management of the living resources of the high seas (articles 117-120).[207]

190. Neither article 87 nor articles 116-120 of the Convention specifically references flag States. However, as noted above, the activities of fishing vessels on the high seas are subject to the jurisdiction and control of their flag State.[208] Any limitation on the freedom to fish within the high seas arising out of the UNCLOS can be construed as imposing a corresponding obligation on the flag State, namely, to exercise effective jurisdiction over vessels flying its flag and conducting IUU fishing activities on the high seas.

191. Fishing restrictions grounded in treaty obligations include those grounded in the Convention itself, as well as any restriction to fishing on the high seas grounded in a regional or bilateral treaty to which the States parties have consented to be bound. As discussed further below, following the Convention's entry into force, States have concluded a number of legal instruments obligating flag States to exercise effective control over their vessels as a condition of participation in a RFMO.

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205 UNCLOS, articles 86, 116.

206 See the President's 2007 Presentation (Annex 6), p. 5.

207 Id.

208 See also Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., OUP 2010), p. 680.

192. With regard to restrictions grounded in the rights, duties and interests of coastal States, articles 63 and 64 of the Convention regulate the fishing of shared stocks and stocks of common interest within the EEZ, as well as in the area beyond and adjacent to the EEZ. Articles 63 and 64 provide that the coastal State and the State whose nationals fish in the region (i.e., the flag State) shall cooperate directly or through appropriate international, regional, or sub-regional organizations to ensure the conservation of the living resources.

193. Section 2 of Part VII of the Convention ("Conservation and Management of the Living Resources of the High Seas") includes relevant obligations set forth in articles 117-119. Pursuant to article 117 of the Convention, all States have the obligation "to take, or to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."

194. The duty of the flag State in particular is engaged by article 118 of the Convention, which addresses "States whose nationals exploit identical living resources, or different living resources in the same area." In that situation, article 118 prescribes that those States "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned" and that they "shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."[209]

195. Article 119 of the Convention indicates that the principle upon which conservation and management measures should be based is that of the best scientific evidence available. The measures should be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

196. While article 116 of the Convention references articles 63 and 64-67, Part VII of the Convention does not otherwise refer to certain fisheries stocks in describing the States Parties' obligations toward the conservation and management of the living resources of the high seas. Some commentators have critiqued the UNCLOS provisions with regard to fishing on the high seas as "rather vague."[210] For example, while Part V of the Convention describes specific measures to be taken by the coastal State with regard to the conservation of living resources in the EEZ, Part VII of the Convention prescribes only the duty to "take such measures ... as may be necessary." Some commentators have speculated that the high seas fisheries regime was "neglected" during the drafting

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209 See David Freestone, "Fisheries, High Seas," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012) p. 66, para. 7 ("This recognizes that states fishing on the high seas must do this within the framework of existing relevant regional or species-related fisheries management organizations.").

210 Id., para. 8.

of the UNCLOS.[211] However, since the Convention's entry into force, several additional instruments have been developed that elaborate on the obligations of States, including flag States, with regard to conserving the living resources of shared stocks and highly migratory stocks.

197. As described above, with regard to obligations of flag States in the EEZ, articles 91 and 94 of the Convention contain specific provisions governing the obligations of flag States. Pursuant to article 94, "every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Yet the enumerated duties of flag States do not expressly address conservation of the marine living resources.

198. While Part VII of the Convention does not explicitly describe the duties of a flag State on the high seas,[212] all obligations with regard to exercising the freedom to fish on the high seas necessarily attach to the flag State, as a result of the exclusivity of the flag State's jurisdiction.[213] Article 92 of the Convention provides that ships shall sail under the flag of one State only, and shall be subject to its exclusive jurisdiction.

199. In addition to the provisions of Part VII ("Conservation and Management of the Living Resources of the High Seas"), article 192 of the Convention provides that all States have the general obligation to protect and preserve the marine environment. Article 194 further requires States to "take all measures necessary to ensure that activities under their jurisdiction and control do not cause damage to other States and their marine environment." Finally, as noted in response to Question 1, article 217, paragraph 1, of the Convention requires flag States to "ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference."

200. A summary of the relevant articles in the Convention is provided in Annex 13.

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211 Kaare Bangert, "Fish Stocks," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 29, para. 11.

212 See *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas, supra* note 12 ("The extent to which the Law of the Sea itself elaborates the responsibilities of flag states is limited, and largely general in nature.").

213 See Jörn-Ahrend Witt, *Obligations and Control of Flag States, Developments and Perspectives in International Law and EU Law*, (LIT, 2007), p. 4 (in accordance with the established international law rule of "exclusive flag state jurisdiction," the flag State is responsible for the implementation of conventions and their enforcement vis-à-vis the ships which have their nationality.)

2. The Fish Stocks Agreement

201. The high seas conservation regime set forth in the UNCLOS was further developed in the UN Fish Stocks Agreement, which entered into force in 2001.[215] The Fish Stocks Agreement sets out principles for the conservation and management of certain fish stocks, as noted above. The Agreement sets out the legal regime for the conservation and management of straddling and highly migratory fish stocks with a view to ensuring their long-term conservation and sustainable use.

202. The Fish Stocks Agreement provides a framework for cooperation on conservation and management. Under the Agreement, RFMOs are the primary vehicle for cooperation between coastal States and high seas fishing States in the conservation and management of straddling fish stocks and highly migratory fish stocks. A number of States have incorporated the Agreement's provisions into their fisheries laws and regulations.[216]

203. Article 8 of the Fish Stocks Agreement encourages States to cooperate through establishing regional and sub-regional fisheries regimes including only States with a "real interest" in the stocks.[217] Management of the relevant stocks is delegated to these RFMOs. This framework provides that only flag States willing to cooperate in the conservation regime can participate in fishing the stock.

204. Unlike the UNCLOS, the Fish Stocks Agreement provides a list of flag State obligations.[218] Pursuant to article 18 of the Fish Stocks Agreement, the flag State must ensure that vessels flying its flag do not undermine the effectiveness of conservation and management measures on the high seas. Moreover, the flag State shall authorize fishing on the high seas only when it can exercise its responsibilities effectively. The Fish Stocks Agreement provides a further list of flag State obligations in relation to record-keeping, investigation, ensuring compliance, and enforcement measures against vessels engaged in illegal fishing.

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215 Kaare Bangert, "Fish Stocks," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 29, para. 12.

216 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

217 Id.

218 See also the President's 2007 Presentation (Annex 6), pp. 5-6 (pointing out that "[t]he listing of the duties of the flag State does not mean that the Fish Stocks Agreement does not conform to or goes beyond the Convention. On the contrary, it confirms and strengthens the well-established law on nationality of ships and the principle of exclusive flag-State jurisdiction on the high seas as set forth in article 91 of the Convention and elaborated in article 94.").

205. The Fish Stocks Agreement establishes in article 6 that conservation and management must be based on the precautionary approach, discussed above in connection with the response to Question 1, and on the best available scientific information.[219]

206. The general principles of the Fish Stocks Agreement are also key principles in the 2008 FAO International Guidelines for the management of deep-sea fisheries in the high seas and the protection of vulnerable marine ecosystems.[220]

3. The FAO Compliance Agreement

207. As a former President of the Tribunal has stated:

> [The FAO Compliance Agreement] is the first global instrument that details the duties of the flag State with respect to vessels fishing on the high seas in the context of conservation and management of fisheries. These duties concern not only ship registration and fishing licenses but now also include the obligation to exchange and provide information.
>
> (...)
>
> Article III of the Compliance Agreement sets out the responsibilities of the flag State concerning conservation and management measures in areas of the high seas. Each party is obliged to take the necessary steps to ensure that fishing vessels flying its flag do not engage in activities that undermine the effectiveness of international conservation and management measures. In particular, no party should allow any fishing vessel entitled to fly its flag to fish in the seas or to be used for fishing on the high seas without the authorization of that party (Compliance Agreement, article III, paragraph 2. When granting authorization to carry out fishing, the party must be satisfied that it is able to exercise effectively its responsibilities over the vessel pursuant to the Compliance Agreement (article III, paragraph 3). Parties also have a duty not to authorize fishing vessels previously registered in another territory that undermined international conservation and management measures to be

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219 See also UNCLOS, article 119.

220 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

used for fishing on the high seas unless certain conditions are met (Compliance Agreement, article III, paragraph 5).[221]

208. The FAO Compliance Agreement also requires flag States to take enforcement measures where appropriate. Paragraph 8 of article III stipulates that such measures could include making the contravention of the provisions of the Agreement an offense under national legislation. The Agreement also requires that sanctions "be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement."

209. The CRFM notes that the FAO Compliance Agreement was designed in part to close a loophole in fisheries management: that of the circumvention of fisheries regulations by re-flagging vessels under the flags of States that are unable or unwilling to enforce conservation measures. In order to combat the contravention of fisheries regulations through reflagging, States are obligated to refuse their flags to vessels known to have violated the Agreement.[222]

4. Regional Treaty Practice

210. Where flag States have willingly joined regional and sub-regional fisheries management organizations, the States typically enter into binding agreements within the framework of the RFMO by which they acknowledge and undertake certain obligations with regard to vessels sailing under their flag that engage in fishing on the high seas. As noted above, the Draft CCCFP Agreement reflects the CRFM Member States' current and intended practice in relation to responsible fishing within the territory and beyond of the CRFM members. The Draft CCCFP Agreement is typical of the practice of regional fisheries management organizations in that it is intended to apply "within areas under the jurisdiction of Participating Parties, on board fishing vessels flying the flag of a Participating Party and, subject to the primary jurisdiction of the flag State when fishing takes place on the high seas or the coastal State when

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221 President's 2007 Presentation (Annex 6), p. 8.

222 See also International Commission for the Conservation of Atlantic Tunas (ICCAT), *Compendium Management Recommendations and Resolutions Adopted by ICCAT for the Conservation of Atlantic Tunas and Tune-like Species* (2013), p. 140, "Resolution by ICCAT concerning the Change in the Registry and Flagging of Vessels" (Transmitted to Contracting Parties: December 14, 2005) ("Prior to the registry of any vessel, the CPC should investigate the history of compliance of the subject vessel in ICCAT and other regional management organizations, in order to determine if such vessel is on the negative lists and/or is currently registered in the sanctioned CPCs or non-Contracting Parties."). ICCAT maintains an "IUU Vessel List" on its Web site, <http://www.iccat.int/en/IUU.asp>, accessed 7 November 2013.

fishing takes place in the waters of a Third State, to nationals of Participating Parties."[223]

211. Other examples of regional treaties referenced above reflect a growing pattern of States consenting to be bound by regional fisheries treaties for the conservation of shared resources, where flag States willingly incur obligations that restrict the otherwise freedom of fishing on the high seas in order to cooperate in the management of shared resources.

212. The CRFM notes that some States have expressed concern that when a State refuses to join an RFMO, international law does not purport to bind the flag State to any affirmative obligations with regard to the high seas. Some have referred to this concern as the "free rider" problem.[224] The concern is that, where conservation measures for a particular stock on the high seas have been agreed by a community of States, often through a regional organization, vessels from States not parties to the agreement could fish for the stock at issue, undermining the conservation efforts. The possibility of reflagging a fishing vessel is one potential way to avoid compliance with international fisheries conservation. A growing body of soft law instruments, referenced above, aim to strengthen the fisheries conservation regime with regard to the high seas by encouraging States to voluntarily agree to adopt a code of conduct governing flag State behaviour.

213. Some treaties establishing flag State obligations themselves seek to apply the obligations set forth therein to non-parties. For example, articles 192 and 235 of the UNCLOS refer to "States," as opposed to "States Parties," and article 17, paragraph 1, of the Fish Stocks Agreement provides that all measures established by the RMFO be enforced against all States. With regard to non-parties, "multilateral treaty practice is moving beyond merely encouraging states to participate in such regimes and is increasingly requiring them to do so in order to have access to them."[225] The fisheries agreements incorporate a series of incentives to discourage the "free rider" problem. According to article 33, paragraph 1, of the Fish Stocks Agreement, States parties shall, on the one hand, encourage non-parties to become parties to that agreement, which could be achieved by diplomatic efforts or through economic incentives. On the other hand, paragraph 2 of article 33 of the Fish Stocks Agreement provides that States

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223 Draft CCCFP Agreement, article 6.2.

224 R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP, 1999), p. 301.

225 Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., OUP 2010), p. 680.

parties shall take measures to deter the activities of non-party vessels which undermine the effectiveness of international conservation and management measures.

B. Flag State obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to this aspect of Question 2

214. The CRFM submits that the duties to act in good faith, to cooperate, and to apply the precautionary principle as discussed in relation to the obligations of flag States regarding IUU fishing activities within the EEZ of other States in connection with the response to Question 1 above are equally applicable to IUU fishing activities on the high seas. Similarly, the references to the various subsidiary sources previously noted are repeated.

215. The CRFM notes that the provision set forth in article 192 of the Convention has been described as "explicitly proclaiming in positive terms, as a general principle of law, that all States have the obligation to protect and preserve the marine environment, and implicitly (in negative terms) the obligation not to degrade it deliberately (or perhaps even carelessly)."[226]

IV. Responsibility and Liability

A. Applicable UNCLOS provisions on liability

216. With regard to activities in the EEZ or on the high seas, article 235 of the Convention states in general terms the responsibility and liability of States in the matter of the protection and preservation of the marine environment, which all States have the "duty to protect and preserve" pursuant to article 193 of the Convention. Paragraph 1 of article 235 ("*Responsibility and liability*")[227] reads:

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226 Virginia Commentary, Part XII, pp. 39-40, para. 192.8.

227 Whereas the title of article 235, in the English authentic text, uses the words "responsibility and liability," in the other authentic texts a single word, generally translated as "responsibility," covers both aspects. According to the Virginia Commentary, "'[r]esponsibility' relates to the discharge of the obligations imposed by customary or conventional international law; 'liability' relates to the reparation or other compensation due for damage that might result from failure to observe the applicable international laws and regulatious, or from violations of those laws and regulations." Virginia Commentary, Part XII, p. 412, para. 235.10(a). See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 77, para. (1) ("The term 'international responsibility' covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State.").

> States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.[228]

217. Unlike paragraph 2 of article 235, the above statement in paragraph 1 states in general terms the responsibility and liability of States and is not limited to pollution of the marine environment. In other words, it is reasonable to assume that other harmful effects on the marine environment, such as "harmful changes to the marine environment"[229] or "irreversible disturbance of the ecological balance,"[230] including through the accidental or intentional introduction of non-indigenous species to the wild or overfishing/stock depletion, are covered by the general statement of liability in article 235 of the Convention.

218. Similar to the duty to protect and preserve the marine environment, including its living resources, which article 192 imposes on all States, article 235 imposes direct obligations on States. These are obligations of result. It has been explained that:

> [T]hese provisions of Article 235 seem also to assume that even in so far as this part of the Convention may create general obligations, this can only be obligations for states, and not for individuals.[231]

219. With regard to enforcement measures taken pursuant to section 6 ("Enforcement") of Part XII ("Protection and Preservation of the Marine Environment") of the Convention, article 232 provides as follows:

> States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of the available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.

220. Article 232 concerns the liability of flag States, coastal States and port States alike, whose enforcement rights and obligations are addressed in Section 6 of Part XII of the

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228 It has been pointed out that "[t]he phrase 'in accordance with international law' leaves open, for the purposes of article 235, the question of liability without fault, whether of a State or of an international organization, as part of general international law." Virginia Commentary, Part XII, p. 412, para. 235.10(c).

229 UNCLOS, article 206.

230 UNCLOS, article 234.

231 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 825.

Convention. The conditions for the liability of the flag State to arise under article 232 are: (a) failure to carry out its responsibilities in accordance with the Convention; and (b) occurrence of damage.[232] In connection with article 232, the existence of a causal link between the flag State's failure and the damage is required and cannot be presumed.

221. A reference to the international law rules on liability is contained in article 304 ("*Responsibility and liability for damage*")[233] in Part XVI ("General Provisions") of the Convention. Article 304 reads:

> The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

222. These rules supplement the rules concerning the liability of States set out in the Convention. Since article 304 of the Convention refers to "the application of existing rules and the development of further rules regarding responsibility and liability under international law," the Tribunal will have to take such rules under customary law into account, especially in light of the ILC Articles on State Responsibility.[234] As the Chamber observed in *Case No. 17*:

> Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked by the Tribunal (*The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at paragraph 160).[235]

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232 According to the Virginia Commentary, "[t]erms such as 'liable,' 'damage or loss,' and 'attributable' are to be understood in light of the general international law governing State responsibility." Virginia Commentary, Part XII, p. 380, para. 232.6(a).

233 It has been pointed out that "[a]lthough the English text [of the Convention] uses the words 'responsibility and liability,' reflecting common law usages, the other languages employ a single term." Virginia Commentary, Part XVI, p. 163, para. 304.2. According to the same source, "[n]o interpretative material appears on the record" for this provision. Id., para. 304.1.

234 Deep Seabed Mining Advisory Opinion, para. 169. According to the Chamber, at para. 211, "[t]he regime of international law on responsibility and liability is not considered to be static."

235 Id.

223. The failure of a flag State to carry out its responsibilities and obligations under international law may consist in an act or omission that is contrary to that State's responsibilities under international law.[237] Whether a flag State has carried out its obligations depends primarily on the requirements of the obligations which the flag State is said to have breached, which were described in connection with Question 1 above. As stated above, flag States have both direct obligations of their own and obligations in relation to the activities carried out by entities under their jurisdiction or control, including vessels flying their flag.

224. As mentioned above, article 232 of the Convention makes clear that the failure of a State to carry out its responsibilities addressed by that provision entails liability only if there is damage or loss. This provision covers neither the situation in which the flag State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the flag State has met its obligation. As the Chamber observed in the Deep Seabed Mining Advisory Opinion:

> This constitutes an exception to the customary international law rule on liability since, as stated in the *Rainbow Warrior Arbitration* (*Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX*, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.[238]

225. As one of the States participating in *Case No. 17* explained in its written statement:

> There is an internationally wrongful act of a State when conduct is attributable to that State and such conduct constitutes a breach of an international obligation of that State (Art. 2 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83, Annex). Such internationally wrongful act involves legal consequences

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237 See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 82, para. (4).

238 Deep Seabed Mining Advisory Opinion, para. 178. See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 203, para. (7). (pointing out that "there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation.").

> even in the absence of damage (Part Two Articles on Responsibility of States for Internationally Wrongful Acts). In the event of damage, the responsible State is required to compensate for the damage caused by the internationally wrongful act, insofar such damage has not been made good by restitution (Art. 36 Articles on Responsibility of States for Internationally Wrongful Acts). However, a responsible State is only required to compensate if there is a causal connection between the internationally wrongful act of that State and the damage (Art. 31.2 Articles on Responsibility of States for Internationally Wrongful Acts).[239]

226. The failure by a flag State "to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States."[240] It has been pointed out that:

> [w]hether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[241]

227. The Convention does not specify what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage resulting from IUU fishing activities would include damage to the marine environment, including in the form of pollution, harmful changes to the marine environment and/or irreversible disturbance of the ecological balance, including through overfishing or stock depletion. Subjects entitled to claim compensation may include other users of the sea and coastal States.[242] As the Chamber stated in the Deep Seabed Mining Advisory Opinion, "[e]ach State Party [to the Convention] may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas … ."[243] The CRFM invites the Tribunal to clarify the Chamber's statement in the instant case concerning IUU fishing activities.

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239 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 8, para. 3.9.

240 Deep Seabed Mining Advisory Opinion, para. 210.

241 James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 84, para. (9).

242 Deep Seabed Mining Advisory Opinion, para. 179.

243 Id., para. 180 (referring in support to article 48 of the ILC Articles on State Responsibility).

228. From the wording of the responsibility and liability provisions of the Convention and related instruments, it is evident that liability arises from the failure of the flag State to carry out its own responsibilities.[244] Thus, the flag State is in principle not responsible or liable from the failure of vessels flying its flag to meet their obligations. The rules on the liability of States set out in the Convention are in line with the rules of customary international law. As the Chamber stated in *Case No. 17*:

> Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[245]

229. As one of the States participating in *Case No. 17* observed in its written statement:

> Under the general rules of international law related to responsibility of States for internationally wrongful acts, conduct is only attributable to a State under specific circumstances. In principle, conduct of natural or juridical persons under the jurisdiction of a State is as such not attributable to that State (See commentary of the International Law Commission on Chapter 11 of the Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, vol. II, Part Two, at 38 (para. 3)); This also applies to conduct of state enterprises unless they are exercising elements of governmental authority (*ibid.*, at 48 (para. 6)).[246]

230. The CRFM notes that the liability regime established in the Convention does not provide for the attribution of activities of registered vessels to flag States.

231. While "private conduct cannot be attributed to a State, the Commentary to Chapter II of the [ILC] Articles on State Responsibility clarifies that in some cases this is nevertheless possible:"[247]

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244 See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 80, para. (6) (pointing out that "the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.").

245 Deep Seabed Mining Advisory Opinion, para. 180.

246 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 10, para. 3.14.

247 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 238.

> But the different rules of attribution stated in chapter II have a cumulative effect, such that a *State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects*. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[248]

232. In respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction, article 235, paragraph 2, of the Convention imposes on States Parties to the Convention the obligation to "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief."[249] Paragraph 3 of article 235 imposes on States a duty to cooperate in the context of paragraph 2.[250] The absence of effective remedies or actual, good-faith cooperation would engage the flag State's international responsibility.

233. In the event that no causal link pertaining to the failure of the flag State to carry out its responsibilities and any damage caused thereby can be established, the question arises whether it may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with below.

B. Extent of liability under the Convention

234. As stated above in the reply to Question 1, flag States have both direct obligations of their own and obligations in relation to the activities carried out by entities under their jurisdiction or control, including vessels flying their flag. The nature of these obligations also determines the scope, or extent, of liability.

235. As the Tribunal stated in *Case No. 2*:

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248 Commentary to the ILC Articles on State Responsibility, p. 81 (emphasis added).

249 A similar provision is found in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena de Indias on 24 March 1983, article 14 of which reads: "The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area."). See text in Annex 10 to this written statement.

250 It has been pointed out that "Paragraphs 2 and 3 of Article 235 are drafted in ecumenical terms, and make the link between international obligations and municipal law 'recourse' thereby ensuring 'prompt and adequate compensation' for all damage, 'caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.'" R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 824.

> It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed' (*Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47).[251]

236. With regard to reparation, the Tribunal has noted:

> Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.[253]

237. As far as the form of the reparation is concerned, article 34 of the ILC Articles on State Responsibility reads:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.[254]

238. As regards the amount and form of compensation, the Chamber stated as follows in the Deep Seabed Mining Advisory Opinion:

> The obligation for a State to provide for a full compensation or *restitutio in integrum* is currently part of customary international law. This

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251 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 170.

253 Id., para. 171.

254 Deep Seabed Mining Advisory Opinion, para. 196.

> conclusion was first reached by the Permanent Court of International Justice in the *Factory of Chorzów* case (*P.C.I.J. Series A, No. 17*, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[255]

239. According to the Chamber, "the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*."[256]

240. In situations where the existence of a causal link between the flag State's breach and the damage is required, as in article 232 of the Convention, "it is only '[i]njury ... caused by the internationally wrongful act of a State' for which full reparation must be made."[257]

241. In *Case No. 17*, the Chamber was faced with key provisions concerning the obligations of States Parties sponsoring entities that are allowed to carry out activities in the Area, namely, article 139, paragraph 1, article 153, paragraph 4, and Annex II, article 4, paragraph 4, of the Convention. There are no corresponding provisions concerning the obligations of flag States in cases of illegal conduct by vessels flying their flag within the EEZ of other States or on the high seas.

242. The Convention and related instruments contain specific provisions absolving States sponsoring activities in the Area that have taken certain measures from liability for damage. No such provisions are included with respect to maritime zones other than the Area. As a consequence, any exonerations from liability or responsibility arising from activities in maritime zones other than the Area are derived from, and are governed by, general international law.[260]

C. General rules of international law related to liability of States

243. As stated above, the liability of the flag State is without prejudice to the rules of international law. The relevant rules of international law are those related to the

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255 Id., para. 194.

256 Id., para. 197.

257 James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 203, para. (9).

260 See ILC Articles on State Responsibility, Chapter V ("Circumstances Precluding Wrongfulness").

responsibility of States for internationally wrongful acts and the liability of States for acts not prohibited by international law. Since the adoption of the Convention, international law regarding responsibility and liability has been codified and further developed. Article 304 of the Convention anticipates the application of contemporary rules regarding responsibility and liability as they emerge. Thus, the purpose of the "without prejudice" provision in article 304 does not include a potential reduction of responsibilities and liabilities under the Convention itself. It has been pointed out that there is a "growing scholarly consensus that responsibility in the context of transboundary harm is well handled by the customary rules of State responsibility and that therefore no special general rules of State liability exist ... ."[261]

244. Accordingly, under general international law, a flag State in principle cannot be held responsible for the conduct of a private vessel flying its flag. However, it has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to (the marine environment of) other States or areas beyond the limits of national jurisdiction.[262] This obligation is a due diligence obligation and its breach engages the State's international responsibility.[263]

245. It was pointed out above that a State is under an obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control"[264] and that the ICJ has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[265] The "environment" also consists of the marine environment, including the living and non-living resources of the marine environment. It has been explained in the literature that "although the no harm principle does not state so explicitly, a State can only breach the principle if it fails to act with due diligence" and that "a consensus is building that breach by a State of its due diligence obligations, and the consequent significant damage caused to the environment of other States or of areas beyond national

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261 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 238.

262 See also the President's 2007 Presentation (Annex 6), p. 4.

263 See James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 125, para. (1).

264 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29.

265 Id.

jurisdiction, engages the origin State's legal responsibility."[266] As mentioned above in response to Question 1, Judge Wolfrum, speaking in his capacity as President of the Tribunal, has stated generally that the flag State "is under the obligation to ensure that vessels flying its flag abide by the rules of the coastal State by exercising its competencies as a flag State,"[267] suggesting that this obligation rests either on the fact that "international law, based as it is upon the sovereign equality of States and mutual respect, requires States to make every effort to ensure that no activities are carried out under their jurisdiction that might undermine activities which are performed by others covered by their jurisdiction and which are in conformity with international law" or "as far as the protection of the marine environment is concerned" on the argument that "there is a mutual obligation to reinforce each other's efforts to manage and conserve the marine environment."[268]

246. In *Case No. 17*, the requesting organization asked what the necessary and appropriate measures are that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement relating to the Implementation of Part XI of the Convention. The answer to that question envisaged the identification of the necessary measures that a sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement. This is tantamount to identifying the standard of due diligence that a State must observe with respect to activities in the Area sponsored by it. By contrast, the SRFC has not asked a similar question in the instant case relating to the EEZ and the high seas. Nonetheless, in the view of the CRFM it would be helpful, in the light of the liability question raised by Question 2, if the Tribunal were to clarify the standard of due diligence that a flag State must observe with respect to IUU fishing activities conducted by vessels sailing under its flag within the EEZ of other States or areas beyond national jurisdiction.

247. The CRFM submits that compliance with a "due diligence" obligation requires the adoption, implementation, supervision and enforcement of measures by the State on which the due diligence obligation rests. It has been explained in the literature that a "breach of [obligations that require States to exercise due diligence] consists not of failing to achieve the desired result but failing to take the necessary, diligent steps

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266 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 239.

267 President's 2007 Presentation (Annex 6), p. 4.

268 Id., pp. 4-5.

towards that end."[269] As one of the States participating in *Case No. 17* observed in its written statement:

> A due diligence obligation requires States to adopt, implement, supervise and enforce measures of a legislative, administrative, or juridical nature to prevent legally protected interests from being harmed by the acts of state and non-state actors. In order to establish a breach of a due diligence obligation, it is necessary to determine the degree of diligence which must be observed by States. The case concerning British Claims in the Spanish Zone of Morocco provides some general guidance in this respect: States should act with *diligentia quam in suis*, i.e. the degree of diligence with which national interests are protected, and the degree actually exercised may not be significantly less than the degree other States may reasonably expect to be exercised (*United Nations Reports of International Arbitral Awards*, vol. II, 615 at 644).[270]

248. However, "[d]ue diligence does not require similar measures from all States, as lack of economic and technological capacity may mitigate the attendant obligations for developing countries" subject to any international agreements in force for those countries.[271] It may be said that it "seems established that due diligence obligations are at their strictest when an activity is within a State's area of territorial sovereignty or sovereign rights, and particularly when it is within a State's actual physical control."[272] As to a State's due diligence obligations with regard to vessels flying its flag, it must be kept in mind that "a State cannot fully exercise due diligence in supervising such vessels when they are sailing outside its territorial waters."[273]

249. Where a State is under an obligation to cooperate in cases of transboundary harm situations, failure to comply with that obligation "may result in that State being deemed not to have acted diligently."[274] It has been explained in the literature that the "Alabama" arbitration of 1872 made clear that "a government could not justify its

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269 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236.

270 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 8, para. 3.7.

271 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 240.

272 Id.

273 Id.

274 Id.

failure to exercise due diligence by pleading insufficiency of the legal means of action which it possessed."[275] In addition, where a State's due diligence obligation is enshrined in a treaty instrument to which it has consented to be bound, the law of treaties prevents that State from invoking its domestic law to exempt it from its international obligations.[276]

250. In the context of IUU fishing activities, articles 62, 91, 94, 192 and 217 of the Convention, when read together and in conjunction with the flag State's "due diligence" and cooperation obligations described above, may be said to impose on a flag State wishing to grant or allow the use of its flag to a certain vessel through registration (including periodic renewal thereof) an obligation to deny this right to any vessels that are known or suspected IUU fishing vessels, a duty to conduct close monitoring of such vessels,[277] and perhaps a duty to evoke a violating vessel's registration while informing all other States and competent organizations of the reason for its decision,[278] the non-compliance with which will engage the flag State's responsibility.[279] It has been pointed out that "[t]he High Seas Convention preparatory works the International Law Commission developed suggests that mere administrative formality, i.e., registry only or grant of a certificate of registry without submitting to registry state control, does not satisfy that Convention's 'genuine link' requirement."[280]

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275 Id., p. 243.

276 See ILC Articles on State Responsibility, article 32 ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."). See also Vienna Convention on the Law of Treaties, article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."), article 46, paragraph 1 ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."). See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), pp. 369-375, 583-594.

277 See Virginia Commentary, Part VII, p. 294, para. 117.9(a).

278 See Anastasia Telesetsky, "Law of the Sea Symposium: State Responsibility and Flag State Duties," Opinio Juris Blog, 30 May 2013, text available at <http://opiniojuris.org/2013/05/30/law-of-the-sea-symposium-state-responsibility-and-flag-state-duties/>, accessed 7 November 2013.

279 See also footnote 222 above and accompanying text.

280 George K. Walker, "Report of the Law of the Sea Committee—Defining Terms in the 1982 Law of the Convention III: Analysis of Selected IHO *ECDIS Glossary* and Other Terms (Dec. 12, 2003 Initial Draft, Revision 1)," *Proceedings of the American Branch of the International Law Association (2003-2004)*, p. 187, 198-199. According to the same author, "what seems the weight of recent decisional and commentator authority, it would appear that a 'genuine link' requires more than nominal registry." Id., p. 200.

Moreover, "[w]hat is appropriate exercise and control is a matter of national laws, but in any case it must be effective exercise and control."[281] Pursuant to article 217 of the Convention, flag States are "under the obligation to provide for the *effective enforcement* of the applicable international rules and standards."[282]

251. As mentioned above, Judge Rüdiger Wolfrum, speaking in his capacity as President of the Tribunal, has pointed out that the flag State "is under the obligation to ensure that vessels flying its flag abide by the rules of the coastal State by exercising its competencies as a flag State"[283] and that "flag States have an obligation to adopt conservation measures," the adoption of which "requires not only that they be implemented and appropriate legislation be adopted but also that the necessary control and monitoring measures be taken."[284]

252. Finally, the pro-active nature of the general obligation in article 192 of the Convention has been described as follows:

> The thrust of article 192 is not limited to the prevention of prospective damage to the marine environment but extends to the 'preservation of the marine environment.' Preservation would seem to *require active measures* to maintain, or improve, the present condition of the marine environment ... .[285] (Emphasis added).

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281 Id., p. 201.

282 Virginia Commentary, Part XII, p. 242, para. 217.1 (emphasis added). Article 217 and related provisions of the Convention "imply that legislation exists or *will be enacted to give effect to* article 217." Id., p. 256, para. 217.8(g) (emphasis added).

283 President's 2007 Presentation (Annex 6), p. 4.

284 Id., p. 13.

285 Virginia Commentary, Part XII, p. 40, para. 192.9.

QUESTION III: *UNE ORGANISATION INTERNATIONALE DÉTENTRICE DE LICENCES DE PÊCHE PEUT-ELLE ÊTRE TENUE POUR RESPONSABLE DES VIOLATIONS DE LA LÉGISLATION EN MATIÈRE DE PÊCHE DE L'ETAT CÔTIER PAR LES BATEAUX DE PÊCHE BÉNÉFICIANT DESDITES LICENCES?*

I. The scope of the third question

253. The CRFM first observes that the third question as it appears in the English version of the Tribunal's Order 2013/2 is not the question that was posed by the SRFC; the French version of that Order contains the correct question. The genesis of this error appears to be as follows:

(a) The draft version of the question that was considered by the SRFC's Conference of Ministers was framed in the following terms:

Lorsqu'une licence de pêche est accordée à un navire dans le cadre d'un accord international avec l'Etat du pavillon ou avec une structure internationale, cet Etat ou cette organisation peut-il être tenu pour responsable des violations de la législation en matière de pêche de l'Etat côtier par ce navire[289]

(b) Following discussion at the Conference, this language was amended. This is evident from the French version of the resolution adopted by the SRFC's Conference of Ministers, which is appended to the Permanent Secretary's letter dated 27 March 2013 to the Tribunal requesting the advisory opinion. Importantly, it is this version of the question that is contained within the text of the SRFC's letter to the Tribunal. In French, the final formulation of the question that was adopted by the SRFC's Conference of Ministers and communicated to the Tribunal in the cover letter from the SRFC's Permanent Secretary is as follows:

Une Organisation Internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l'Etat côtier par les bateaux de pêche bénéficiant desdites licences?[290]

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289 Available at <http://www.spcsrp.org/medias/csrp/comm/25cc/CSRP_web_art_25e_sess_ext_cte_coord_justif_ex-ecr.pdf>, accessed 7 November 2013.

290 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_fr_01.pdf>, accessed 7 November 2013.

(c) However, the English version of the resolution adopted by the SRFC's Conference of Ministers, which appears to have also been appended to the French-language letter from the SRFC's Permanent Secretary to the Tribunal, was presumably based mistakenly on the original *draft* question and not the *final* question.[291] The English version, which is fundamentally different to the French, reads as follows:

> "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?"

(d) When the Registry prepared the English translation[292] of the French letter from the SRFC's Permanent Secretary to the Tribunal, rather than providing a translation of the actual questions contained in the letter, it appears to have copied the questions from the English version of the SRFC resolution attached to that letter.

(e) As a result of the errors in the English version of the SRFC resolution submitted under cover of the letter from the SRFC's Permanent Secretary and the Registry's translation of the SRFC's letter, the Tribunal adopted the correct French version of the third question in the French-language version of its Order of 24 May 2013, but adopted an erroneous and overly broad formulation of that question in the English-language version.

254. Although both language versions of the Tribunal's Order of 24 May 2013 are expressed in that Order to be "equally authoritative" / "*également foi*", the CRFM's position is that the narrower, French-language version of the third question is evidently the correct formulation. This is confirmed by the drafting history, as noted above. Moreover, it would appear that the SRFC's Permanent Secretariat is primarily (if not exclusively) French-speaking.[293] Accordingly, the CRFM submits that the Tribunal's jurisdiction regarding the third question is limited to the terms of that question as framed in French.

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291 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf>, accessed 7 November 2013.

292 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf>, accessed 7 November 2013.

293 The SRFC's Web site (<http://www.spcsrp.org >) is available only in French, and it is headquartered in a French-speaking country (Senegal).

II. The CRFM's preliminary response to the third question

255. This question, as properly formulated, concerns licensing and the responsibility of an international organization in respect of "violations of the fisheries legislation of the coastal State" by vessels to which a license has been issued by that organization. Similar to Question 2, Question 3 addresses the responsibility of international organizations for the conduct (breach) of private entities, and not for acts done by those organizations themselves. Unlike Question 2, however, the question is not expressly framed in the context of IUU fishing or of international law.

256. The CRFM notes that the language used in Question 3, even in its French original version, is ambiguous and for this reason reserves the right to make statements with respect to Question 3 in a subsequent phase of the proceedings in the instant case after reviewing the part of the written statements of the requesting organization and any other participants dealing with Question 3.

257. By its terms, Question 3 at first blush does not appear to raise any question of international law. International law is not concerned with the question of liability on the part of an international organization arising from the breach by a private actor of a State's legislation – it only concerns the international responsibility of States and intergovernmental organizations arising from their own failure to comply with their responsibilities under international law. The Convention makes clear that the question of liability to which it refers must be addressed "in accordance with international law."[294] The question of liability on the part of whatever entity, domestic or foreign, arising from a private actor's violation of the fisheries legislation of a coastal State is primarily, and quintessentially, a question of domestic law and is ultimately one to be decided by domestic courts having competent jurisdiction. The answer to this question will depend upon the evidence presented to the competent court and its appreciation thereof, as well as upon the relevant legal factors. In this context, much depends on whether the fisheries or other legislation of the coastal State whose legislation was violated imposes direct obligations on the international organization concerned.

258. To the extent that an international agreement forming the basis for the issuance of fishing licenses by the international organization referred to in Question 3 addresses the question of whether the responsibility or liability of that organization is engaged, that agreement will be the primary instrument governing the question of responsibility or liability of such organization. Outside the conventional context, the CRFM notes that

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[294] UNCLOS, article 235, paragraph 1. This provision addresses only the responsibility and liability of "States." While article 263 of the Convention refers to "competent international organizations" and includes a cross-reference to article 235, that provision is limited to marine scientific research.

the International Law Commission's Draft Articles on the Responsibility of International Organizations, adopted in 2011, may provide a useful starting-point for analyzing any questions of international responsibility of international organizations, just as the International Law Commission's Articles on State Responsibility provide useful guidance in determining the responsibility of States, but only to the extent that the Tribunal deems such texts to reflect a codification of existing law, or *lex lata*.[295] The CRFM also notes that nothing in the Convention or related instruments indicates whether or not the competent international organization and the flag and coastal States shall bear joint and several liability. Finally, any primary or secondary obligations on the part of intergovernmental organizations are without prejudice to the privileges and immunities which such organizations may claim under conventional law and the rules of international law.

259. At this point, the CRFM simply notes that, in light of the fact that it is not charged with issuing fishing licenses to any vessels or entities, it is not an "international organization" within the meaning of Question 3.

260. For the aforementioned reasons, the CRFM submits that Question 3 calls for a cautious approach by the Tribunal, an international judicial body charged with applying and interpreting international law, and not domestic law (including the consequences arising from the violation of domestic legislation).

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[295] It has been pointed out that "[t]he phrase 'in accordance with international law' leaves open, for the purposes of article 235, the question of liability without fault, whether of a State or of an international organization, as part of general international law." Virginia Commentary, Part XII, p. 412, para. 235.10(c).

QUESTION IV: WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE COASTAL STATE IN ENSURING THE SUSTAINABLE MANAGEMENT OF SHARED STOCKS AND STOCKS OF COMMON INTEREST, ESPECIALLY THE SMALL PELAGIC SPECIES AND TUNA?

I. The scope of the fourth question

261. The CRFM's observations in respect of the fourth question begin with coastal States' conventional rights and obligations to ensure the sustainable management of "shared stocks" and "stocks of common interest" in relation to the maritime zones beyond their territorial waters (i.e., the EEZ and the high seas). Thereafter, this written statement will focus specifically on coastal States' rights to prevent IUU activities before identifying the CRFM Member States' relevant agreements. Chapter 1 noted the concept of sustainable development under international law by reference to the work of various committees of the International Law Association.

262. In this context, there are four preliminary matters that must be addressed:

(a) First, the CRFM's response to Question 4 is limited to coastal State rights and obligations as coastal States alone; although IUU activities can be committed by vessels that sail under a coastal State's flag, the relevant obligations of the coastal State as the flag State are set out in relation to the first question.

(b) Second, as noted above, the CRFM's response is limited to a coastal State's rights and obligations in connection with the maritime zones beyond their territorial waters.

(c) Third, the CRFM regards the two types of fish stock referred to in Question 4, namely, shared stocks and stocks of common interest, as falling within the notion of being a shared resource;[296] in particular, these concepts must include *straddling fish stocks* (UNCLOS, article 63) and *highly migratory fish stocks* (UNCLOS, article 64).

(d) Finally, the ICJ's view that shared resources "can only be protected through close and continuous cooperation between the [sharing] States" is noted once

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[296] As set out in note 35 above, the CRFM adopts the definition of "shared resources" in article 19, paragraph 3(b), of the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, *supra* note 24, which provides that species may constitute shared resources "by virtue of their migratory character" or "because they inhabit shared habitats." Accordingly, this term can be said to cover shared fish stocks and fish stocks of common interest, particularly straddling fish stocks and highly migratory fish stocks.

> again.[297] The CRFM repeats its position that cooperation between States engaged in, or having jurisdiction over, fishing from shared stocks and stocks of common interest, particularly straddling fish stocks and highly migratory fish stocks, lies at the core of their international obligations in this regard. This duty requires actual engagement and colors the interpretation of all other obligations and rights with respect to the utilization of shared natural resources.

II. Coastal States' rights and obligations under conventional law to ensure the sustainable management of fish stocks

263. Pursuant to article 192 of the UNCLOS, coastal States are under an overarching obligation to "protect and preserve the marine environment" while exercising their sovereign rights to exploit their natural resources. Since the Tribunal has held that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment,"[298] this obligation requires that coastal States ensure the sustainable management of shared stocks and stocks of common interest. This duty has a general influence on the scope of coastal States' rights and has been expanded with greater specificity in relation to living resources in the EEZ and on the high seas.

A. The Exclusive Economic Zone

264. A leading international law treatise describes Part V of the Convention, which addresses the EEZ, as a "scheme ... in which the coastal state has sovereign rights, a predominant interest, and certain crucial determinations it must make and administer."[299] Under article 56 of the Convention, coastal States enjoy sovereign rights for the purpose of exploiting fish stocks in the EEZ and have jurisdiction as regards the protection and preservation of the marine environment. Articles 61 and 62 of the Convention set out the rules for the conservation and the use of the EEZ's living resources. According to *Oppenheim's International Law*:

> Article 61 provides for conservation through proper management by the coastal state in the light of the best available scientific evidence, cooperation with appropriate international organisations, exchange of scientific information, catch and fishing effort statistics and other data

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297 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Merits, Judgment, I.C.J. Reports 2010*, p. 14, para. 81.

298 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70.

299 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 801.

> between the coastal state, international organisations and other states whose nationals are allowed to fish in the zone. The measures are aimed not merely for conservation but are to be designed 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield'. The maximum sustainable yield is, however, a somewhat flexible concept, because it is qualified by a number of considerations [set out in article 61, paragraph 3, of the Convention].[300]

265. The requirement under article 61 that coastal States determine the allowable catch of the living resources in their EEZ[301] is crucial to the global compliance with these stock management obligations. *Oppenheim's International Law* includes the following observation with respect to this requirement:

> This determination is to be made not only with a view to conservation of the resources but also with a view to their efficient exploitation; for Article 62, which deals with the "utilization of the living resources", requires the coastal state to "promote the objective of optimum utilization" of those resources,[303] though without prejudice to their conservation and proper management. So, having determined the allowable catch, the coastal state is then to determine its own capacity to harvest it, and where it does not have the capacity to harvest the entire allowable catch, it "shall", through agreements or other arrangements, and subject to laws, regulations, terms and conditions stated in the Article, "give other States access to the surplus of the allowable catch", having in mind, however, the particular needs of land-locked states, "geographically disadvantaged States", and developing states.[304]

266. Thus, by granting coastal States the right to determine the allowable catch and to determine their own capacity to harvest from that catch, while only granting other States' nationals the right to fish from the surplus within the allowable catch, the

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300 Id., p. 796. See also Virginia Commentary, Part V, p. 610, paras. 61.12(g)-(h).

301 See Virginia Commentary, Part V, p. 636, para. 62.16(d) ("State practice indicates that the duty to determine the allowable catch can be met by reference to particular species or stocks of fish, or to a particular management unit as a species group or stock.").

303 On the importance of "promote" and "optimum" in respect of article 62, see Virginia Commentary, Part V, p. 635, para. 62.16(b).

304 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 797.

Convention grants coastal States extensive control over the management and exploitation of fish stocks within their EEZ.

267. Since fish do not observe such man-made boundaries, articles 63 and 64 of the Convention further regulate the fishing of shared stocks and stocks of common interest. Article 63 provides that where fish stocks occur within the EEZs of two or more States, or partly in the EEZ and partly in the seas beyond and adjacent to an EEZ, (i.e., straddling stocks) there shall be cooperation and coordination between the EEZ States, or between the EEZ State(s) and those whose nationals fish from the same stock in the sea beyond the EEZ. Of equal importance is article 64, which provides that coastal and other States whose nationals fish for highly migratory species of fish in the same region shall cooperate directly through appropriate international organizations with a view to conservation and optimum utilization both within and beyond the EEZ.[305] This duty extends to cooperating to establish international organizations for such purposes where no appropriate international organization exists. The rights and obligations under articles 63 and 64 of the Convention are supported and supplemented by the 1995 UN Fish Stocks Agreement, which requires that States cooperate to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks while promoting their optimum utilization. The Fish Stocks Agreement requires that coastal States apply the precautionary approach in accordance with article 6.[306]

268. Since many States have declared 200-nautical-mile exclusive fishing zones rather than full EEZs,[307] it is necessary to consider the implications of this practice on coastal States' rights and obligations. The CRFM's position is that such declarations must be understood as being sufficient to engage the conventional duties set out above: coastal States that wish to benefit from exclusive fishing rights in the 200-mile zone are under an obligation to ensure the sustainable management of the living resources in that zone,

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305 See also Virginia Commentary, Part V, p. 657, para. 64.9(a) ("To the maximum extent practical, any management measures taken should be applied throughout the migratory range of the species in question.").

306 See Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012) p. 400. See also Principle 15 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992): "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." On articles 63 and 64 of the UNCLOS generally, see also Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 1035, 1044-1046, paras. 54-61.

307 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 804.

particularly in respect of shared resources, including straddling fish stocks and highly migratory fish stocks.

B. The high seas

269. Although article 116 of the Convention grants the nationals of all States the right to fish on the high seas, this is subject to various rules: first, the requirements of articles 117 to 120 of the Convention, which are discussed in greater detail below; second, the requirements of articles 63 to 67 of the UNCLOS, which were discussed in greater detail above; and third, the State's obligations under other treaties.

270. Article 118 of the Convention obliges all States to "cooperate with each other in the conservation and management of living resources in the areas of the high seas." In particular, where appropriate this includes an obligation to enter into negotiations to establish regional or sub-regional fisheries organizations with a view to the conservation of the living resources where the nationals of multiple States fish in the same area of the high seas or fish identical stocks. Additionally, article 117 of the Convention requires States to take such measures with respect to their nationals "as may be necessary for the conservation of the living resources of the high seas." The same provision calls on States to cooperate in this endeavour. Article 119 of the Convention sets out further detailed provisions for determining the allowable catches while conserving the high seas' living resources and requires the exchange of "scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks" to facilitate compliance with this duty.

C. Coastal States' rights to prevent IUU fishing activities

271. International law grants coastal States various rights (including enforcement rights[308]) to enable them to comply with their obligations to ensure the sustainable management of shared resources, including straddling fish stocks and highly migratory fish stocks. These rights are set out over the following paragraphs, organized based on the differing

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308 See *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, available at <http://www.itlos.org/index.php?id=264&L=0>, accessed 25 November 2013. In paragraph 23 of his Dissenting Opinion, Judge Golitsyn stated: "Laws and regulations enacted by the coastal State in furtherance of its exclusive jurisdiction under article 60, paragraph 2, of the Convention would be *meaningless* if the coastal State did not have the authority to ensure their enforcement. Consequently, it follows from article 60, paragraph 2, of the Convention that the coastal State has the right to enforce such laws and regulations, including by detaining and arresting persons violating laws and regulations governing activities on artificial islands, installations and structures" (emphasis added). Further, in paragraph 12 of their Joint Separate Opinion, Judge Wolfrum and Judge Kelly stated: "As far as enforcement actions in the exclusive zone in general are concerned the enforcement jurisdiction of the coastal State is limited if it is not legitimized by [*inter alia* articles 73, 110, 111, 220, 221 and 226]."

rights that can be exercised by coastal States depending on where the IUU activities took place and where the coastal State is to act.

272. In addition to those rights set out below, coastal States that are parties to the 1993 FAO Compliance Agreement are obliged by articles 5, paragraph 1, and 6, paragraph 8(b), to inform flag States of any activities that undermine the effectiveness of international conservation and management measures which they reasonably suspect have been undertaken by vessels of the flag State.

1. Rights arising when the IUU fishing activities took place on the high seas

273. When IUU fishing activities take place on the high seas, the scope of permissible actions that can be taken by coastal States depends heavily on where such actions are to be carried out.

(a) *On the high seas and in the coastal State's EEZ*

274. Coastal States cannot exercise jurisdiction over foreign vessels on the high seas in respect of IUU fishing activities that have taken place on the high seas. In *The Case of the S.S. "Lotus,"* it was held that "vessels *on the high seas* are subject to no authority except that of the State whose flag they fly" (emphasis added).[309] An exception to this rule must be that States whose nationals are on board the offending vessel may exercise their authority over such nationals (just not the vessel itself, with the exception of the flag State).[310]

275. If a vessel exercises rights of navigation in a coastal State's EEZ having engaged in IUU fishing activities on the high seas and does not commit such activities in the EEZ itself, the principle underlying *The Case of the S.S. "Lotus"* is applicable. While Part V of the Convention grants coastal States sovereign rights over fishing in the EEZ, the EEZ can effectively be classified as the high seas for the purposes of mere navigation.[311]

276. However, coastal States may enter into regional or bilateral agreements with flag States to permit the exercise of rights of visit, search and arrest on the high seas or within the EEZ over vessels flagged to the latter State to enable the proper control over fishing.[312]

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309 *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, [1927] PCIJ Series A, No. 10, 25.

310 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), pp. 734-735.

311 See UNCLOS, article 58.

312 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 737.

(b) *In the coastal State's territorial sea*

277. With respect to coastal States' rights in relation to vessels that are engaged in IUU fishing activities while on the high seas but which are in their territorial sea at the time of the proposed action, the major limitation is the vessel's right of innocent passage. Article 17 of the UNCLOS grants all vessels the right of innocent passage through the territorial sea. Article 24, paragraph 1, of the Convention obliges coastal States not to hamper this right except as permitted by the Convention. *Passage* is defined in article 17, and *innocence* is defined in article 18. In particular, article 18, paragraph 2 sub (i), of the Convention deems passage to be non-innocent if the vessel engages in "any fishing activities" *in the territorial sea.* The CRFM regards this term as sufficiently wide in scope to cover many IUU fishing-related activities.

278. For example, at-sea transhipment of fish hauls derived from IUU fishing activities (which is a major method for evading anti-IUU measures[313]) must fall within this term. As such, if a foreign vessel engages in at-sea transhipment of such fish hauls in a coastal State's territorial sea, that State may take "necessary steps" to prevent this non-innocent use of the territorial sea irrespective of where the fish was caught.[314] One option open to the coastal State in such circumstances would be to exercise criminal jurisdiction over the vessel. Since article 27, paragraph 1(a), of the Convention requires that the consequences of the criminal act must extend to the coastal State, any such criminal jurisdiction would certainly extend to transhipment of IUU fish hauls taken from shared resources (particularly, straddling fish stocks and highly migratory fish stocks).[315]

279. Similarly, the CRFM regards the mere transport through the territorial sea of fish hauls derived from IUU fishing activities (especially when taken from shared resource

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313 —, "Belize announces moratorium on transshipments at sea" (*Undercurrent News*, 26 June 2013), available at <http://www.undercurrentnews.com/2013/06/26/belize-announces-moratorium-on-transshipments-at-sea/>, accessed 7 November 2013. See also the Environmental Justice Foundation's Press Release in response to this news: A Sedgwick, "Environmental Justice Foundation Supports Ban Against 'Pirate' Transshipping at Sea" (*Amandala*, 28 June 2013), available at <http://amandala.com.bz/news/environmental-justice-foundation-supports-ban-pirate-transshipping-sea/>, accessed 7 November 2013.

314 UNCLOS, article 25, paragraph 1.

315 See also article 220, paragraph 2 of the UNCLOS which, subject to the Convention's articles on innocent passage, permits action by coastal States in circumstances where there are "clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention." Again, the CRFM observes that the proper interpretation of this article is to grant a general right in addition to a specific, pollution-centric right.

stocks) as falling with the notion of "any fishing activity." As such, coastal States may take "necessary steps" to prevent this non-innocent use of the territorial sea. The comments regarding criminal jurisdiction in the preceding paragraph are repeated.

280. The mere passage through the territorial sea of an empty fishing vessel, albeit one that is known to engage in IUU fishing activities within and without the high seas, is not sufficient to deprive the passage of its innocence.[316] However, article 21, paragraph 1 sub (d) and (e), of the Convention permits coastal States to adopt laws relating to innocent passage through the territorial sea in respect of both "the conservation of the living resources of the sea" and "the prevention of infringement of the fisheries laws and regulations of the coastal State." Such laws may not discriminate against vessels "carrying cargoes to, from or on behalf of any State," nor may they "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."[317] So long as these prohibitions are not breached, the coastal State may legislate, and may take measures, to ensure that IUU fishing activities are not carried out by the foreign vessel during its passage through the coastal State's territorial sea, and the vessel is obliged to comply with such domestic legislation.

(c) *In ports*

281. Judge Wolfrum, speaking in his capacity as President of the Tribunal, has stated that:

> the responsibility for the proper management of living resources is a shared one; it places not only coastal States but also flag States and – more recently – port States under an obligation. In particular as far as IUU fishing is concerned, port States play an increasing role in the implementation of the rules governing the elimination of IUU fishing as their purpose is to prohibit the landing of fish whose origin is clearly documented and show that it was harvested legally.[318]

282. In ports (and internal waters more generally), there is a balance between the exercise of port State jurisdiction and flag State jurisdiction. It is said that it is *usually* more

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316 It has been argued that "the reference to *activities* [in article 19, paragraph 2, of the UNCLOS] suggests that the mere presence or passage of a ship could not, under the Convention, be characterised as prejudicial to the coastal State, unless it were to engage in some activity" and therefore requires that something must have actively been done in the territorial sea to deprive the vessel's passage through the territorial sea of its innocence. See R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP 1999), p. 72.

317 UNCLOS, article 24, paragraph 1.

318 President's 2007 Presentation (Annex 6), p. 11.

appropriate to resolve this balance in favor of flag States.[319] However, flag States may have failed to exercise jurisdiction over IUU fishing matters, as may particularly occur when the vessel is registered under an open registry arrangement and "may never have occasion to visit their home port of registration"[320] thereby avoiding the exercise of flag State jurisdiction. In such circumstances, it is both appropriate and legitimate to resolve the aforementioned balance in favor of port State jurisdiction so as to allow port States to exercise sovereign authority over the vessels in their internal waters. While the decision in *The Case of the S.S. "Lotus"* was that "vessels *on the high seas* are subject to no authority except that of the State whose flag they fly" (emphasis added), the PCIJ expressly accepted that this would not prevent the exercise of jurisdiction by non-flag States over the vessel when it is within their territorial jurisdiction.[321] Accordingly, coastal States are entitled to criminalize, *inter alia,* IUU fishing activities on the high seas that affect them[322] and enforce such legislation when the offending vessel enters their internal waters. Further, it is notable that article 23, paragraph 1, of the Fish Stocks Agreement expressly provides that port States have the right "and the duty" to take measures with regard to fishing vessels that are voluntarily in its ports if the vessel has acted against rules of international law for the conservation and management of fish stocks.[323]

283. The CRFM also refers to the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing.[324] While it is not yet in force, that agreement's objective to "prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and

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319 It has been noted that there is an increasing trend to encourage the exercise of port State jurisdiction over vessels acting in breach of international standards: see Erik J. Molenaar, "Port State Jurisdiction: Towards Mandatory and Comprehensive Use," in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006).

320 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 732.

321 *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, [1927] PCIJ Series A, No. 10, 25.

322 I.e. IUU fishing of shared resources, including straddling fish stocks and highly migratory fish stocks.

323 See Erik J. Molenaar, "Port State Jurisdiction" and R Lagoni, "Ports," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012), p, 355. See also article 220, paragraph 1, of the Convention which, subject to the safeguards set out in Section 7 of Part XII, permits port States to "institute proceedings in respect of any violation of [their] laws and regulations adopted in accordance with this Convention;" again, the CRFM observes that the proper interpretation of this article is to grant a general right in addition to a specific, pollution-centric right. See further, article 5, paragraph 2, of the 1993 FAO Compliance Agreement.

324 For the text of this Agreement, see <http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf>, accessed 7 November 2013.

sustainable use of living marine resources and marine ecosystems" is noted.[325] The CRFM considers that port States are able to effect this objective through the means discussed above.

2. Rights arising when the IUU fishing activities took place in the coastal State's EEZ

284. The coastal State's jurisdiction under article 73 of the Convention to legislate[326] and enforce laws and regulations in the EEZ is a logical and perfect corollary to its exclusive sovereign rights to explore, exploit, manage and conserve living resources in the EEZ, which were discussed above. Both flag States and "[n]ationals of other States fishing in the exclusive economic zone," under articles 58, paragraph 3, and 62, paragraph 4, of the Convention respectively, must comply with the terms of such legislation.[328] Actions to enforce such legislation can be carried out in the coastal State's EEZ, territorial sea,[329] or internal waters. As regards enforcement in internal waters, the CRFM's position is that principles underlying the position set out in section C(b)-(c) above are applicable also to the exercise of port State jurisdiction over IUU fishing activities that took place within the coastal State's EEZ.

285. Where a coastal State's authorities commenced pursuit of a vessel which committed IUU fishing activities within its EEZ (or territorial sea and internal waters), the pursuing vessels are entitled to continue the pursuit after the vessel has left the EEZ and territorial waters of the State.[330] This entitlement is under the doctrine of hot pursuit, which has been described as being "essentially a temporary extension onto the high seas of the coastal state's jurisdiction."[331]

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325 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, article 2.

326 See UNCLOS, article 62, paragraph 5 ("Coastal States shall give due notice of conservation and management laws and regulations."). See also Virginia Commentary, Part V, p. 638, para. 62.16(k).

328 See also the CRFM's response to the first question in Chapter 3, section I above.

329 The corollary of article 27, paragraph 5, of the Convention is that coastal States may take any steps on board a foreign vessel passing innocently through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the vessel entered the territorial sea so long as that offence was created under and in accordance with Part V of the UNCLOS, which was discussed above.

330 UNCLOS, article 111. See also R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), pp. 739-741; Hugo Caminos, "Hot Pursuit," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 1000.

331 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 739.

D. Regional and bilateral treaties

286. The CRFM requests the Tribunal to take notice of the following agreements as examples of regional practice and which are of relevance to Question 4:

(a) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena 1983. The Convention is contained in Annex 10. The following instrument, which is contained in Annex 11, has been adopted pursuant to this Convention: Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston 1990 (SPAW Protocol).

(b) The Draft Agreement establishing the Caribbean Community Common Fisheries Policy. This instrument is contained in Annex 5.

287. The CRFM further requests the Tribunal to take notice of the following bilateral agreements as examples of regional practice and which are of relevance to Question 4:

(a) Maritime delimitation treaty between Jamaica and the Republic of Colombia (1993), particularly articles 3(2), 3(4) and 3(6). This treaty is contained in Annex 8.

(b) Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados (2003), particularly articles 4, 5 and 8. This treaty is contained in Annex 9.

III. Coastal States' rights and obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to Question 4

288. The duties to act in good faith, to cooperate and to apply the precautionary principle and the law of neighbourliness as discussed in relation to the obligations of flag States regarding IUU fishing activities conducted within the EEZ of third States (see the response to Question 1 above) are equally applicable to the rights and obligations of coastal States. Similarly, the references to the various subsidiary sources previously noted are repeated.

CHAPTER 4

CONCLUSIONS

289. On 24 May 2013, the Tribunal adopted an Order on the conduct of the proceedings in Case No. 21. According to the Order, certain intergovernmental organizations listed in the Annex to the Order were invited to participate in the advisory proceedings concerning the questions submitted to the Tribunal in Case No. 21. The Caribbean Regional Fisheries Mechanism (CRFM) was identified in that Annex as such an organization and through the Order was invited to "present written statements" on the questions submitted to the Tribunal for an advisory opinion by 29 November 2013.

290. The CRFM welcomes the opportunity it has had to provide the Tribunal with its views in Case No. 21, in its capacity as an intergovernmental organization for regional fisheries cooperation, with a membership of 17 Caribbean States, which are Small Island Developing States.

291. The CRFM's views expressed in this written statement stem from its overarching mission to promote sustainable use of the living marine and other aquatic resources in the Caribbean by the development, efficient management and conservation of such resources.

292. It is in the spirit of this mission that the Tribunal is urged in this written statement to adopt a comprehensive view to defining the obligations and liability of flag States and coastal States in respect of vessels and nationals engaged in IUU fishing activities within the EEZ of third States and on the high seas. The Tribunal should note that the problems of ocean space, including IUU fishing activities, are closely interrelated and need to be considered in a holistic manner through an integrated, interdisciplinary and intersectoral approach and addressed in the context of sustainable development. In this respect, the CRFM strongly endorses the shared or related "ecosystem" approach. The living resources provisions of the UNCLOS and other relevant instruments recognize international interdependence on these resources and provide a framework for their cooperative and sustainable management, conservation and exploitation.

293. As a matter of general principle, it is the CRFM's view that there should be no lacunae in the obligations and liability of States for IUU fishing activities conducted by entities within their jurisdiction or control.

294. In the view of the CRFM the answer to the *first* question should be as follows:

Flag States have two kinds of obligations under the Convention and related instruments as well as under general international law:

A. The obligation to ensure compliance by vessels flying their flag with the obligations set out in the Convention and related instruments and imposed by general international law.

This is an obligation of "due diligence." The flag State is bound to make best possible efforts to ensure compliance by vessels flying their flag with relevant international rules and standards and domestic laws and regulations, especially those concerning the protection and preservation of the marine environment, wherever such vessels may be.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved, including their location. Because of their nature and effects, IUU fishing activities may impose a higher standard, especially when such activities or entities engaging in them are within a State's area of territorial sovereignty or sovereign rights.

This "due diligence" obligation requires the flag State to take preventive and precautionary measures within its legal system based on its genuine link with vessels entitled to fly its flag. These measures, which may consist of laws, regulations and administrative measures, must be necessary for the implementation of international rules and standards and domestic laws and regulations for the prevention, reduction and control of pollution of, or significant and harmful changes to, the marine environment, including through irreversible disturbance of the ecological balance. What measures are "necessary" measures for the implementation of such rules, standards, laws and regulations will depend on all the circumstances, including the particular characteristics of the legal system of the State in question and the legal framework set by competent regional fisheries management organizations.

B. Direct obligations with which flag States must comply independently of their obligation to ensure a certain conduct on the part of vessels flying their flag.

Compliance with these obligations may also be seen as a relevant factor in meeting the "due diligence" obligation of the flag State.

The most important direct obligations of the flag State are:

(a) the obligation to protect and preserve the marine environment, including by promptly investigating and where appropriate instituting proceedings whenever there is a reasonable suspicion of engagement in IUU fishing activities by vessels flying its flag, wherever such vessels may be. As regards the protection of the marine environment, the laws, regulations and administrative measures of

the flag State cannot be less effective than international rules, regulations and procedures.

(b) the duty to cooperate in good faith with other States and competent international organizations in respect of fisheries conservation and management, including in preventing, deterring and eliminating IUU fishing and by notifying interested States and competent organizations whenever there is a reasonable suspicion of engagement in IUU fishing activities by vessels flying its flag, wherever such vessels may be; where there is a duty to cooperate, the duty requires actual, good-faith cooperation with other States and with relevant regional fisheries organizations; mere membership of such organizations in itself is not sufficient.

(c) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in treaty and other instruments; this obligation is also to be considered an integral part of the "due diligence" obligation of the flag State and applicable beyond the scope of treaties binding on it and includes the duty to monitor and investigate vessels flying its flag whenever there is a reasonable suspicion of such vessels' engagement in IUU fishing activities.

295. In the view of the CRFM the answer to the *second* question should be as follows:

The liability of flag States Parties to the Convention arises from their failure to fulfill their obligations under the Convention and related instruments. Such liability may arise from either direct obligations or "due diligence" obligations. Failure of the vessel flying the flag of a certain State to comply with its obligations does not in itself give rise to liability on the part of the flag State.

The conditions for the liability of the flag State to arise are found in the relevant provisions of the Convention and related instruments in respect of their States Parties, and in the rules of international law in situations where the Convention is not applicable.

Whether a flag State has carried out its obligations depends on the requirements of the obligation which the flag State is alleged to have breached.

The nature of the obligation breached determines the extent of liability.

The liability of the flag State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and any damage. The existence of a causal link between the flag State's failure and the damage is required and cannot be presumed.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the flag State has met its obligations,

damage caused by vessels flying its flag does not give rise to the flag State's liability. If the flag State has failed to fulfil its obligations and damage has occurred, the flag State shall be liable for the actual amount of the damage. If the flag State has failed to fulfil its obligations but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

A State is exonerated from liability under the Convention and related instruments if it fulfils the conditions for exoneration imposed by relevant provisions of the Convention and related instrument or, as applicable, general international law. In situations where the Convention is not applicable, the rules of international law govern the exoneration of States from liability under applicable laws.

296. In the view of the CRFM the answer to the *third* question (as formulated in the French-language version of the Tribunal's Order 2013/2) should be as follows:

International law in principle is not concerned with the question of responsibility or liability on the part of an international organization arising from the breach of a State's fisheries legislation by private actors – it only concerns the international responsibility of States and intergovernmental organizations arising from their own failure to comply with their responsibilities under international law.

The question of liability on the part of whatever entity, domestic or foreign, arising from the violation of a coastal State's fisheries legislation is primarily a question of domestic law and is ultimately one to be decided by domestic courts having competent jurisdiction.

To the extent that an international agreement forming the basis for the issuance of fishing licenses by an international organization addresses the question of whether the responsibility or liability of that organization is engaged, that agreement will be the primary instrument governing the question of responsibility or liability of such organization. Any primary or secondary obligations on the part of intergovernmental organizations are without prejudice to the privileges and immunities which such organizations may claim under conventional law and the rules of international law.

297. In the view of the CRFM the answer to the *fourth* question should be as follows:

Coastal States' direct obligations under the Convention and other rules of international law:

The most important direct obligations of the coastal State are:

(a) the obligation to protect and preserve the marine environment, including by promptly investigating and where appropriate instituting proceedings whenever

there is a reasonable suspicion of vessels engaging in IUU fishing activities within the coastal State's area of territorial sovereignty or sovereign rights.

(b) the duty to manage fishing in its EEZ so as to ensure the sustainable development of the living resources in the EEZ while enabling the maximum sustainable utilization of those resources.

(c) the duty to manage the fishing in its EEZ of shared stocks (those that straddle EEZs or the EEZ and the high seas, and stocks of highly migratory fish species), which requires cooperation between the States whose nationals fish from such stocks within and without the EEZ.

(d) the duty to cooperate with other States whose nationals or vessels fish from the same stocks as its own nationals on the high seas so as to properly manage the living resources available; where there is a duty to cooperate, the duty requires actual, good-faith cooperation within relevant regional fisheries organizations; mere membership of such organizations in itself is not sufficient.

(e) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in treaty and other instruments; this obligation is also to be considered an integral part of the "due diligence" obligation of the coastal State and applicable beyond the scope of treaties binding on it.

Coastal States' rights under the Convention and other rules of international law:

The most important rights of the coastal State relate to the right to prevent IUU fishing of its resources. This array of rights is extensive and exists concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. The most important rights, which are to be exercised in accordance with the Convention and related instruments (where applicable) and the rules of international law, are:

(a) the right to legislate and enforce such laws as required to ensure the sustainable development and management of fish stocks within the coastal State's area of territorial sovereignty or sovereign rights.

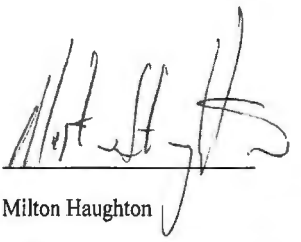
(b) the right to take all necessary steps to prevent, deter and eliminate (including by punishing) IUU fishing activities conducted within the coastal State's area of territorial sovereignty or sovereign rights.

(c) the right to exercise port State jurisdiction over vessels voluntarily within their ports which have engaged in IUU activities affecting them.

(d) the right to enter into regional and bilateral agreements with flag States to permit the exercise of coastal State jurisdiction on the high seas in respect of vessels flying the flags of other States.

298. The Tribunal's Order of 24 May 2013 indicates that "oral proceedings shall be held" in the instant case. It is the intention of the CRFM to have legal counsel involved in the preparation of this written statement present oral argument in the matter and legal counsel with Steptoe & Johnson LLP will therefore appear for the CRFM.

27 November 2013



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