# Written Statement of the Republic of Chile

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**SEABED DISPUTE CHAMBER**

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUBREGIONAL FISHERIES COMISSION (SRFC)**

**CASE No. 21**

**WRITTEN STATEMENT OF THE REPUBLIC OF CHILE**

**29 NOVEMBER 2013**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 21 – Request for and advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)

STATEMENT OF THE REPUBLIC OF CHILE

21 November 2013

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**INTRODUCTION**

**1. PRESENTATION**

Chile submits its presentation before the International Tribunal for the Law of the Sea within the framework of principles and regulations that we will be explained before discussing substantive matters. Chile is a State party to the Convention and, according to its regulations, has maintained a strict position on illegal, unreported, unregulated (IUU) fishing. These matters are of concern to Chile in its triple capacity as coastal, port and flag State.

By submitting its presentation, Chile intends to contribute to a harmonious enforcement of law by these various categories of States. As for the Advisory Opinion request and the powers of the International Tribunal for the Law of the Sea to issue it, Chile has taken due note of the fact that the Tribunal's powers are grounded on a specific sub-regional Convention. Therefore, this presentation has considered that the Parties to that Convention are certainly responsible for the interpretation and implementation of their agreements and that efforts by the Tribunal on the matter or the position by third States shall not be deemed as an intervention in legal affairs that are proper to said Parties only. Chile appears before the Tribunal within the framework of this proceeding, as a way to cooperate with the strengthening of international law; however, it notes that it is not a party to the Convention under which cooperation between requesting States is provided.

In Chilean opinion, ITLOS can take a stand on this matter in the light of the regulations

governing its sphere of competence.

## 2. INTERNATIONAL AND DOMESTIC LAW ON ILLEGAL, UNREPORTED UNREGULATED (IUU) FISHING.

The UN Convention on the Law of the Sea, to which Chile is a Party, regulates the Exclusive Economic Zone and develops fundamental principles on the conservation of living resources in its Article 61. According thereto, Coastal States have the powers to ensure through proper conservation and management that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. The Convention's regulations in this respect are rooted in the status of the EEZ where coastal States possess sovereign rights for the exploitation, conservation and management of living and non-living natural resources. The EEZ also comprises regulatory powers of costal States to preserve living resources, matters that fall within the sphere of exclusive competence of the coastal State. According to international law, powers of the coastal State regulated by Articles 61 and 62 of the UN Convention, are emanations of the its sovereign rights.

The term "illegal, unreported, unregulated (IUU) fishing" is not included in the Convention; however. Nevertheless, it is inferred from its regulations and purpose. Indeed, the coastal State has the rights described in Article 61 on living resources conservation matters and, according to Article 73 of the Convention, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, the power 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.

Again, although the term illegal, unreported, unregulated (IUU) fishing is not incorporated in the 1995 New York Agreement[1] on Populations of Straddling Fish Stocks and Highly Migratory Fish Stocks, the concept underlies its guiding principles on fishing and conservation. Its Preamble refers to unregulated fishing and the issues deriving therefrom. Additionally, the Agreement highlights overcapitalization, excessive

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1 1995 Agreement on the Populations of Straddling Fish Stocks and Highly Migratory Fish Stocks

size of fleets, flag hopping by vessels to evade controls, use of less than selective gears and lack of reliability of databases and of adequate cooperation between the States.

These issues have been identified within the framework of the so called IUU fishing. The Agreement makes reference to the management of species, long-term conservation and sustainable exploitation of fish stocks concepts. Additionally, it urges Flag, Port and Coastal States to enforce conservation and management measures adopted for such stocks in a more effective way.

The FAO Code of Conduct for Responsible Fisheries[2] of 1995 followed this approach and embraced the responsible fishing term, setting principles accordingly. Although the Code is voluntary in nature, it is highly recognized at an international level, as successive resolutions on sustainable fishing issued by the UN General Assembly recall.

On the other hand, Parties to the Commission for the Conservation of Antarctic Marine Living Resources, aware of the issues that were being detected at the time, adopted the use of the term IUU fishing already in 1997.

Since then, the illegal, unreported, unregulated (IUU) fishing concept has been used since 1999 in annual Resolutions of the United Nations General Assembly on Sustainable Fisheries.[3] IUU fishing is one of the main issues affecting fish populations, including straddling fish stocks and highly migratory fish stocks, which are subject to overexploitation or intensive, barely regulated fishing efforts.

In line with the foregoing, the General Assembly has invariably adopted Resolutions reflecting its concern about illegal, unreported, unregulated fishing and the serious threat it poses to fish stocks and marine habitats and ecosystems – to the detriment of sustainable fishing – as well as food safety and the economy of many States, particularly developing States. Chile has always adhered to the consensus on these Resolutions. Evidently, the concept of illegal, unreported, unregulated (IUU) fishing

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2 Code of Conduct for Responsible Fisheries of October 31, 1995, adopted by the FAO Conference.

3 A/RES/54/32 of January 19, 2000.

enjoys the status of substantive law and as such, it is reflected in successive resolutions adopted by the United Nations General Assembly. Said resolutions also make reference to the duties proper to the several States involved.

The IUU fishing concept was clearly expressed in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, Unregulated Fishing approved by the UN Nations for Food and Agriculture in 2001[4]. Although this Plan of Action was voluntary, it called for domestic laws to effectively handle all the aspects related to IUU fishing. Additionally, it enunciated a number of measures to be adopted by the coastal, port and flag States.

This Plan of Action provides States, agencies and fishing interests with tools to implement more effective, transparent and far-reaching measures - which implementation contributes to preventing, deterring and eliminating illegal, unreported, unregulated fishing. Following these guidelines, Chile promulgated Decree No. 267 of 2005, issued by the Ministry of Economy, Fisheries Undersecretariat.

Said Decree approved the domestic Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, Unregulated Fishing and systematized all domestic measures adopted to prevent, deter and eliminate IUU fishing in view of Chile's triple capacity as coastal, flag and port State. The United Nations General Assembly, in its last resolution on sustainable fishing (A/RES/67/79)[5], emphasized, once again, its serious concern for the illegal, unreported, unregulated fishing, which continues to be one of the main threats to fish stocks and marine ecosystems and to have a serious negative impact on the conservation and management of sea resources, as well as on food safety and economics in several States, particularly developing States. Accordingly, the General Assembly has reiterated that States should faithfully discharge their duties

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4 FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, Unregulated Fishing. htpp://www.fao.org/docrep/003/y1224s/1224s00.HTM

5 UN General Assembly Resolution No. A/RES/67/79 on sustainable fishing, even by 1995 Agreement on the implementation of the provisions of the UN Convention on the Law of the Sea of December 10, 1982 on Conservation and Management of Populations of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments.

to combat this kind of fishing and urgently adopt any measures necessary to perform the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

Resolution No. A/RES/66/288[6] "The Future We Want", paragraph 170, approved by UN General Assembly on July 27, 2012, as a result of Rio+20 Conference, is of particular importance to this regard. Heads of State and of Government and high level representatives have stated that: "*170. We acknowledge that illegal, unreported and unregulated fishing deprive many countries of a crucial natural resource and remain a persistent threat to their sustainable development. We recommit to eliminate illegal, unreported and unregulated fishing as advanced in the Johannesburg Plan of Implementation, and to prevent and combat these practices*". Once again, effective and coordinated measures by coastal States, flag States, port States, chartering nations and the States of nationality of the beneficial owners and others who support or engage in illegal, unreported and unregulated fishing were called to act upon this matter.

Monitoring, control, surveillance, compliance and enforcement system have been identified as tools to achieve said goals. To this respect, special reference to the Food and Agriculture Organization of the United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted in 2009, is to be made. Chile ratified this Agreement in 2012.

FAO document entitled The State of World Fisheries and Aquaculture 2012[7] summarizes issues of concern to be addressed by flag, port and coastal States, in their respective roles. , In practice, illegal, unreported, unregulated fishing and related activities threaten efforts to secure long-term sustainable fisheries and promote healthier and more robust ecosystems. The legal consequences of these issues are posed by this Advisory Opinion.

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6 Resolution No. A/RES/66/288 approved by the General Assembly on July 27, 2012, The Future We Want.

7 The State of World Fisheries and Aquaculture 2012, FAO. http://www.fao.org/docrep/016/i2727s/i2727s.pdf

In the light of the foregoing, the illegal, unreported, unregulated (UII) fishing concept is sufficiently rooted in the law, and that there is an opinion juris which has been modeled through a series of international agreements, resolutions and domestic laws.

The concept of illegal, unreported, unregulated fishing (IUU), along the terms used by the FAO Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, forms integral part of international customary law. So it was incorporated in the definition contained in Article 1, letter e, of the 2009 Agreement on Port State Measures inspired on the FAO's 2001 International Plan of Action

This assertion is confirmed by the Agreement on the Establishment of the South Pacific Regional Fisheries Management Organization.[8] Its Preamble expressly refers to illegal, unreported, unregulated fishing and the need to effectively cooperate to eliminate it. Its articles also contain a definition remitting to the Plan of Action on this matter.

**QUESTION No. 1**

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 Zones of third party States?**

The UN Convention regulates the maritime spaces, including the Exclusive Economic Zone over which coastal States have sovereign rights for exploration and exploitation, natural resources conservation and management, as well as jurisdiction for the protection and preservation of the marine environment.

In this regard, both the UN Convention on the Law of the Sea and the 1995 New York Agreement establish that foreign flagged ships are bound not to conduct fishing activities in a foreign EEZ, unless they are granted consent thereto and, in such a case, always observing the internal regulations of the coastal State.

This obligation entails the flag State seeing to its flag vessels – the vessels which have

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8 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted in Auckland on November 14, 2009.

been granted its nationality – not to perform fishing activities within the Economic Exclusive Zone of third party States, unless having the relevant consent (Article 58.3 and 62, Convention on the Law of the Sea.

Article 62 of the Convention provides that where the coastal State does not have the capacity to harvest the entire allowable catch determined by it, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch. It also prescribes that nationals of the States that have been given said rights shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.

Therefore, flag States must ensure that every vessel flying its flag conducting operations on the exclusive economic zone of third parties has been granted consent thereto, as prescribed in article 62 of the UN Convention.

Without prejudice to the voluntary nature of FAO's Code of Conduct for Responsible Fisheries, it is worth recalling that Article 6.11 provides, as a matter of principle, the duty of the flag State to exercise effective control over those vessels so as to ensure the proper application of this Code. Said State should ensure that the activities of such vessels 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 flags fulfill their obligations on the collection and provision of data relating to their fishing activities.

Article 8.2 of the Code delves into the duties of a flag State. In general terms, the following can be mentioned:

(a) Flag States should maintain records of fishing vessels entitled to fly their flag and authorized to be used for fishing and should indicate in such records details of the vessels, their ownership and authorization to fish.

(b) Flag States should ensure that no fishing vessels entitled to fly their flag fish on the high seas or in other State's exclusive economic zones unless such vessels have been issued with a Certificate of Registry and have been authorized to fish by the competent authorities.

(c) Fishing vessels authorized to fish should be marked in accordance with

uniform and internationally recognizable vessel marking systems.

(d) Fishing gear should be marked in accordance with national legislation in order that the owner of the gear can be identified. Gear marking requirements should take into account uniform and internationally recognizable gear marking systems.

(e) Flag States should ensure compliance with appropriate safety requirements for fishing vessels and fishers in accordance with international conventions, internationally agreed codes of practice and voluntary guidelines. States should adopt appropriate safety requirements for all small vessels not covered by such international conventions, codes of practice or voluntary guidelines.

(f) Flag States should take enforcement measures in respect of fishing vessels entitled to fly their flag which have been found by them to have contravened applicable conservation and management measures, including, where appropriate, making the contravention of such measures an offence under national legislation. Sanctions applicable in respect of violations should be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and should deprive offenders of the benefits accruing from their illegal activities. Such sanctions may, for serious violations, include provisions for the refusal, withdrawal or suspension of the authorization to fish.

(g) Flag States should promote access to insurance coverage by owners and charterers of fishing vessels. Owners or charterers of fishing vessels should carry sufficient insurance cover to protect the crew of such vessels and their interests, to indemnify third parties against loss or damage and to protect their own interests.

(h) Flag States should ensure that crew members are entitled to repatriation, taking account of the principles laid down in the "Repatriation of Seafarers Convention (Revised), 1987".

(i) In the event of an accident to a fishing vessel or persons on board a fishing vessel, the flag State of the fishing vessel concerned should

provide details of the accident to the State of any foreign national on board the vessel involved in the accident. Such information should also, where practicable, be communicated to the International Maritime Organization.

In the line of the above, mention should be made to the 1995 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter, "Agreement on Compliance"), which sets out legally binding principles and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter, PAI_INDNR), of a non-binding nature.

2.1 The Agreement on Compliance, Article III, on Flag State Responsibility, reiterates and delves into the responsibilities described in the Code of Conduct for Responsible Fisheries, adding legal content to the Code's criteria.

Without prejudice to the foregoing, some additional aspects regulated by the Agreement on Compliance must be mentioned:

(a) No Party shall authorize any fishing vessel previously registered in the territory of another Party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas, unless it is satisfied that:

(i) Any period of suspension by another Party of an authorization for such fishing vessel to be used for fishing on the high seas has expired; and

(ii) No authorization for such fishing vessel to be used for fishing on the high seas has been withdrawn by another Party within the last three years.

This regulation shall also apply to fishing vessels previously registered in the territory of a State that is not Party to the Agreement, provided that the interested Party has sufficient information available on the circumstances surrounding the suspension or withdrawal of the authorization.

Notwithstanding the provisions of the above subparagraphs, a Party may authorize a fishing vessel, to which those subparagraphs would otherwise apply, to be used for

fishing on the high seas, where the Party concerned, after having taken into account all relevant facts, including the circumstances in which the fishing authorization has been withdrawn by the other Party or State, has determined that to grant an authorization to use the vessel for fishing on the high seas would not undermine the object and purpose of this Agreement.

(b) The flag State shall ensure that data collection and delivery shall contain information pertaining to the area of its fishing operations and to its catches and landings.

2.2 The PAI-INDNR, as well as the Code of Conduct, reiterates the above responsibilities, but adds some others that are mentioned in this chapter.

(a) States should ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.

(b) Flag States should avoid flagging vessels with a history of non-compliance, except where:

(i) the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel; or

(ii) Having taken into account all relevant facts, the flag State determines that flagging the vessel would not result in IUU fishing.

(c) All Flag States involved in a chartering arrangement should, within the limits of their respective jurisdictions, take measures to ensure that chartered vessels do not engage in IUU fishing.

(d) Flag States should deter any initiative intended for vessels from reflagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level. To the extent practicable, the actions and standards flag States adopt should be uniform to avoid creating incentives for vessel owners to reflag their vessels to other States.

(e) States should take all practicable steps, including denial to a vessel of an authorization to fish and the entitlement to fly that State's flag, to prevent "flag

hopping"; that is to say, the practice of repeated and rapid changes of a vessel's flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.

(f) Although the functions of registration of a vessel and issuing of an authorization to fish are separate, flag States should consider conducting these functions in a manner which ensures each gives appropriate consideration to the other. Flag States should ensure appropriate links between the operation of their vessel registers and the record those States keep of their fishing vessels. Where such functions are not undertaken by one agency, States should ensure sufficient cooperation and information sharing between the agencies responsible for those functions.

(g) A Flag State should consider making its decision to register a fishing vessel conditional upon its being prepared to provide to the vessel an authorization to fish in waters under its jurisdiction, or on the high seas, or conditional upon an authorization to fish being issued by a coastal State to the vessel when it is under the control of that flag State.

(h) Flag States should ensure that their fishing, transport and support vessels do not support or engage in IUU fishing, and, to this end, flag States should refrain from re-supplying fishing vessels engaged in such activities and inform of any transshipment performed at the high seas.

(i) Flag States should ensure that, to the greatest extent possible, all of their fishing, transport and support vessels involved in transshipment at sea have a prior authorization to transship issued by the flag State, and report certain data to the national fisheries administration or other designated institution.

The description provided by PAI_INDNR regarding illegal, unreported, unregulated fishing is well established in international law, as it has been supported and incorporated into several binding instruments, as, for instance, FAO Agreement on the Port State and the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, and confirmed by UN Assembly

resolutions. This is a demonstration of the customary law status of the concept and of its derived principles.

3. Therefore, it is the duty of the flag State to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal States powers to enforce sanctions and measures which cannot be undermined by the flag State.

4. On the other hand, the Voluntary Guidelines for Flag State Performance, recently agreed upon at the Food and Agriculture Organization of the United Nations, enshrine a number of minimal principles and rules on performance to be kept by a responsible flag State, non-observance of which may entail international consequences.

Those Guidelines reiterate the duties of any flag State, especially respecting national sovereignty and the sovereign rights of coastal States, as well as preventing, deterring and eliminating IUU fishing and fishing-related activities in support of IUU fishing. A flag State has to effectively exercise its jurisdiction and control over ships flying its flag, taking effective action against failure to comply with the relevant obligations by said ships, among others.

In order to take domestic corrective steps, periodic assessment to be conducted by the State itself (self-assessment) or by an international organization or other State (external assessment), when so decided by the very flag State, are supporting tools for compliance with said duties.

**QUESTION NO. 2**

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

This question implies identifying the extent of the liability which, according to international law, may fall on the flag State for IUU fishing activities carried out by vessels under its flag. Do these activities entail a violation of an international obligation of the flag State? To answer this question the following points are to be taken into account.

**Duties of the Flag State according to International Law**

Article 94 of the UN Convention sets forth the duties of the flag State, which rules are applicable in the Exclusive Economic Zone under Article 58.2 to the extent that they do not derogate from, or impinge upon the sovereign right of the coastal State. By definition, a flag State is entitled to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Likewise, under article 58.3 of the UN Convention, in exercising their rights and performing their duties in the exclusive economic zone, States – including the flag State - shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UN Convention and other rules of international law.

The foregoing involves a duty of due diligence upon the flag State in that it must ensure that its vessels comply with its own laws and regulations as well as with those of the coastal State. For that purpose, it has jurisdiction and control over the vessels under its flag, through the adoption of appropriate measures.

Laws and regulations that must be respected include those relating to fishing and, quite particularly those under article 61.1 of the UN Convention related to allowable catch of the living resources of the EEZ determined by the coastal State.

Article 18 of the New York Agreement also reflects that the duties of the Flag State comprise the adoption of such measures as may be necessary to ensure that vessels on the high seas flying its flag comply with sub-regional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures. According to this, a flag State may bear responsibility and liability as a consequence of its own conduct.

Furthermore, the obligation for a State to "ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States

is clearly set out in the New York 1995 Agreement.

The International Action Plan to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, under paragraph 9.3, sheds light as to how the IUU fishing should be approached by flag States. The International Action Plan states the said States bear primary responsibility to exercise jurisdiction over the IUU fishing in accordance with international law. Likewise, paragraph 34 sets forth that States should ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.

The Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, under Article 25, on Flag State Duties, provides that each member of the Commission shall take all necessary measures to ensure that fishing vessels flying its flag comply with the provisions of this Convention and the conservation and management measures adopted by the Commission and that such vessels do not engage in any activity which undermines the effectiveness of such measures when operating in the Convention Area.

**Liability of the State under International Law**

On the basis of international law, rules and provisions quoted above lead to conclude that the flag State has obligations upon vessels holding its registration. These obligations may entail international liability in case of breach of law attributable to the flag State. So, it is not the infringement of its own legal duties by the flag-vessel which generates the flag State liability.

This conclusion follows the definition of an international wrongful act as reflected in the Draft Articles on Responsibility of States adopted by the International Law Commission, annexed to Resolution 56/83 of the United Nations General Assembly in 2001.[9] Article 2 of this Draft sets forth that there is a wrongful act of a State when conduct consisting of an action or omission is attributable to it under international law and constitutes a breach of an international obligation of said State. Article 12 of the

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9 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission. 2001 Report of the International Law Commission.

same Draft Articles states that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

These draft Articles, although not approved in the form of a Convention, has been recognized as customary law and as such they have been applied by international tribunals.

In respect of IUU fishing international law imposes obligations of conduct upon the flag State. Thus, it should observe an active conduct in order to comply with obligations of due diligence derived from the authorization to fly its flag. This principle has been reiterated by the 1995 New York Convention where a flag State is meant to take such measures as "may be necessary" to ensure that vessels flying its flag in the high seas comply with applicable conservation and management measures. Although the Agreement refers to the high seas, the relationship between a State and a vessel flying its flag can be transposed to the EEZ, with one difference. This is that it for the coastal State to dictate the conservation and management measures to which a vessel flying a third State flag will be subject.

When is this obligation breached? To answer this question, it is important to apply the due diligence concept. Thus, the international liability of any State will arise whenever it fails to take the necessary steps to regulate and control the activities of the vessel flying its flag and said vessel conducts activities against applicable conservation and management measures, established according to international law.

In the light of the foregoing, it is clear that there are flag State duties. These duties are – as transpiring from the already mentioned international conventions and treaties – reflected in the obligation of a State to take steps, particularly in its domestic sphere, and make use of the mechanisms granted by law, to control its flagged vessel.

Steps envisaged by international law relate to the adoption of laws and regulations, surveillance and control and an effective exercise of jurisdiction over the vessel in question. In the case the flagged vessel operates in the EEZ of a third State, the flag State must bear in mind the coastal State's competence in particular in respect of the enforcement jurisdiction.

Therefore, laws, regulations and measures adopted by a flag State in compliance with

its international obligations, will have to be abided by flagged vessels operating in a foreign EEZ.

Flag State duties are not to be equated with the obligations of a flagged vessel. A State obligation is not only different from that which is borne by a vessel. But it is also subject to international principles in which a flag State cannot guarantee - unless with its consent – that any vessel flying its flag does not conduct IUU fishing. But if it takes cognizance of this fact, it must act in order to prevent further illegal activities. On this matter, it is pertinent to quote what the International Commission itself expressed in the comments to the Draft articles on Liability of States that "The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation".[10] The International Law Commission added that "*the conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case.*"[11]

The conception that the State is responsible and liable for its own actions or omissions is a fundamental rule of international law. A different matter is the case in which a State fails to control activities conducted by a flagged vessel and does not discharge its duties according to international law (adoption of rules, control, sanctions). That means that there might be a case of double attribution; from one side the fishing vessel accused of IUU, and from the other side, the flag State which is bound to assume its responsibility and liability for failure to discharge its own duties in respect of that vessel.

The International Court of Justice has repeatedly expressed the existence of that liability. Thus, for example in the case concerning the Diplomatic and consular staff, the Court stated that the liability of one of the parties was the consequence of "inaction of its authorities, who "failed to take the proper steps."[12] In the case concerning the

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10 2001 Report by the International Law Commission, Page 114.

11 2001 Report by the International Law Commission, Page 117.

12 Diplomatic and Consular Staff, ICJ, Reports 1980, page 3 on pages 31 and 32, paragraphs 63

Gabčikovo–Nagymaros Project, the Court indicated that under an established principle when a State committed an internationally wrongful act, it may have an international liability regardless of the nature of obligation it failed to comply with.[13]

On the other hand, a breach attributable to the State may arise out its own failure to exercise its duties in respect of persons subject to its jurisdiction, resulting in consequences contrary to international law.[14]

This Tribunal, in its Advisory Opinion in respect of the Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, in 2011[15], stated that the sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".

Likewise, this Tribunal added, under paragraph 111[16] of its Opinion, that the notions of obligations "of due diligence" and obligations "of conduct" are connected. This conclusion also emerges 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 the applicable regulations to exercise due diligence"*.

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and 67, quoted in the 2001 Report by the International Law Commission, page 52.

13 ICJ, Reports 1997, page 7, paragraph 47.

14 James (USA v Mexico, 1925) Arbitration Award, the Claims Commission between the United States and Mexico.

15 Seabed disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Paragraph 110.

16 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Paragraph 111.

Moreover, paragraph 112 of the ITLOS Opinion[17] indicates that 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".[18]

The Tribunal added in 2011, under paragraph 115[19] of the Advisory Opinion, that in its Judgment in the Pulp Mills on the River Uruguay case, the ICJ illustrated the meaning of a specific treaty obligation that it had qualified as "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.

In the issue that has been brought to the Court, the flag State has under the various rules quoted above, certain obligations, in particular, the adoption of legislative, administrative or regulatory measures and the exercise of an actual control and jurisdiction over the vessels flying its flag, with due regard to the EEZ sovereign rights of the coastal States.

Therefore, although the specific IUU fishing activity is carried out by a private flagged vessel, if its conduct were performed as a result of the flag State having failed to pass laws or exercise its jurisdiction over said vessel in an EEZ of another State, or to exercise due control over those vessels, as prescribed by the rules above quoted, the conduct of the flag State may entail its international liability.

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17 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Paragraph 112.

18 See Articles on State Responsibility, Comment on Article 8, paragraph 1.)

19 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Year 2011, 1 February 2011, List of cases: No. 17, Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Paragraph 115.

As asserted in the previous question, both the UN Convention and the 1995 New York Agreement have established that vessels flying a third State flag, have the obligation not to enter the EEZ of a foreign coastal State to conduct fishing activities unless said flagged vessel is authorized by the coastal State. The obligation to respect regulations issued by the coastal State is primarily vested on the flagged vessel and it is for the flag State to exercise its powers of surveillance and control over a vessel flying its flag, in order to prevent the conduction of unauthorized fishing activities in foreign EEZ.

**Consequences of the Wrongful act.**

Article 28 of the Draft Articles on Responsibility of States sets out that the international responsibility of a State arising from an internationally wrongful act, involves legal consequences. Article 31 of the Draft Articles indicates that a responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act and that injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

This principle is also enshrined in Article 34 of the same Draft Articles. According to this, full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction.[20]

In case the conduct of a flagged vessel in a foreign EEZ qualifies as IUU fishing, and there is a nexus of causality between this situation and the flag State non-compliance with its own obligations, responsibility and liability may be attributed to said flag State for its own failure to abide by its obligations. In case, conservation and management rules have been established in the framework of a regional organization, acts of non-compliance by a flagged vessel of a member State may eventually raise the question as to the conduct of that member State whose flag is being flown by a reluctant foreign vessel.

**QUESTION NO. 3**

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20 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission. Report from the International Law Commission, 2001, article 34.

***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 fisheries legislation of the coastal State by the vessel in question?***

As previously indicated, according to the Law of the Sea, especially reflected in the UN Convention, supplemented by the 1995 New York Agreement, and in Agreements establishing Regional Fisheries Organizations, such as the South Pacific Regional Fisheries Management Organization, in conjunction with the Plan of Action, the flag State is subject to certain obligations, particularly to exercise effective control and jurisdiction on subjects authorized to fly its flag. This is a principle of international law.

As regards fishing regulations, article 62 of the UN Convention provides that where a coastal State has determined the total allowable catch (TAC) of its EEZ and that its capacity to harvest living resources there is not sufficient, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch. This figure means that a fishing license issued by the coastal State amounts to a permit to conduct fishing activities on the EEZ.

In this regard, whether this permit is issued in conformity with an international agreement or on the basis of a bilateral agreement, the effect should be the same as to the responsibility and liability of a flag State which is party to said agreements.

Unless otherwise specified in a bilateral or multilateral agreement – the obligation of a fisheries license holder is to respect the laws and regulations of the coastal State. This is clearly established in Article 62.4 of the UN Convention which provides that nationals of other States (other than the coastal State) 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.

The obligation to ensure compliance with these laws, as indicated in the answer to the previous question, pertains to the flag State, as further shown by Article 58.3 of the UN Convention.

As a general conclusion, a breach of the rules of the fisheries legislation of the coastal State by nationals of other State, whether or not there is an international agreement

between these States, will not constitute a violation of international law by the flag State or the international agency. Nevertheless, under international law, a flag State or an international agency may be held responsible for misconduct of a flagged vessel fishing in the EEZ of a coastal State, whenever the flag State and the international agency have failed to comply with their own duties under international law. The liability of the flag State will only arise in the event that the flag vessel of that State conducts IUU fishing operations due to the failure by the first State to observe its own obligations towards that vessel. The same conclusion applies in respect of an international agency.

**QUESTION NO. 4**

**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?**

**1. General rights and duties**

As previously stated, a coastal State has exclusive sovereign rights for the purpose of exploration, exploitation, conservation and management of natural resources in its EEZ. It has competence also to promote the objective of optimal use of living resources. The State, within its powers, will determine the maximum allowable catch thereof, and adopt the conservation and management stock measures that permit their conservation in order to avoid overexploitation. Such measures must take into account the most accurate scientific data available to it for the sake of sustainability, and be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

Thus, based on its sovereign rights and exclusive jurisdiction, the coastal State is subject to certain duties as set out in the UN Convention consisting of the passing of legislation, the enforcement of laws and regulations and the provision of dispute settlement procedures. These competences must be respected by third States, as provided for in articles 58.3 and 62.4 of the UNCLOS. To that end, and in the exercise of its sovereign rights, the coastal State may take such steps as may be necessary to ensure compliance with the laws and regulations passed in conformity with the UN

Convention, including boarding, inspection, arrest and judicial proceedings referred to in article 73 of the Convention.

**2. Specific rights and duties.**

Under articles 63 and 64, the UN Convention regulates the situation of straddling species present in the EEZ of two or more coastal States or in the high seas and of highly migratory species. In the first case, coastal States, directly or through proper regional or sub-regional organizations, shall agree on the necessary measures to coordinate and ensure the conservation and development of such stocks. In case, said species transits through the EEZ of a State and the adjacent High Seas, States involved in the fisheries shall endeavor, directly or through proper regional or sub-regional organizations, to directly agree upon the necessary steps for the conservation of those species in the adjacent area.

With respect of highly migratory species, States concerned, directly or through the appropriate regional organizations, will cooperate to ensure the conservation and promoting optimal use of such species in the whole region; that is, in and out of the EEZ. If no proper international organizations exist, the States involved in the fisheries shall cooperate to establish one.

Articles 63 and 64, among others, served as a basis for the 1995 Agreement which delves into the concept of the obligation to cooperate and consider certain criteria to authorize fisheries on the adjacent high seas, among them, the obligation of conservation. Thus, among its main aspects is cooperation for the creation or establishment of Regional Fisheries Management Organizations and the development of the concept of compatibility of conservation and management steps, without ever derogating the sovereign rights of the coastal State.

In that respect, the New York Agreement asserts the criterion of compatibility of measures (Article 7) as an important tool for conservation and management of marine living resources, by projecting the efforts in that regard in the different marine areas. The 1995 Agreement states: "*Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible…*" and it adds "*…coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such*

*stocks."*

To that end, among other aspects, account should be taken of previously agreed measures and applied for waters under national jurisdiction and ensure that the establishment of measures for the High Seas does not undermine the effectiveness thereof. In the event that those measures previously adopted for the High Seas are different from those adopted for the EEZ of a coastal State, like care should be taken not to undermine the effectiveness of the former.

Such measures should be agreed upon in a reasonable time; otherwise, a case of dispute settlement may arise. In addition, this principle entails the duty for coastal States to inform those fishing on the High seas or vice versa, whether directly or through their regional fisheries organizations, of the steps taken for the conservation and management of these fish stocks.

It is also worth mentioning that cooperation for conservation and management (article 8) is a fundamental principle that permits to answer the question made, as it is aimed at ensuring an effective conservation and management of these stocks.

This cooperation should be materialized directly or through competent regional or sub-regional fisheries management organizations or arrangements, bearing in mind the characteristics proper to the sub-region or region.

Therefore, an effective international law on the matter demands that ORP mechanisms be in force so that conservation and management rules and practices around the rights and obligations of flag States and fishing vessels authorized to fly them are generated.

**CONCLUSIONS**

- To summarize, it is the view of Chile that a distinction between the various actors is necessary to ascertain the rights and obligations according to the powers of flag States, port States and coastal States.
- At the same time, the illegal, unreported, unregulated (UII) fishing concept is sufficiently rooted in the law, and there is an opinion juris which has been modeled through a series of international agreements, resolutions and domestic

laws.

- It is the duty of a flag State to establish national rules and regulations appropriate to impose sanctions or corrective measures when its flag vessels violate said obligations. In this ambit, due regard should be paid to the coastal States powers to enforce sanctions and measures which cannot be undermined by the flag State.
- Flag State duties are not to be equated with the obligations of a flagged vessel. A State obligation is not only different from that which is borne by a vessel. But it is also subject to international principles in which a flag State cannot guarantee - unless with its consent – that any vessel flying its flag does not conduct IUU fishing.