Written Statement of the International Union for Conservation of Nature (IUCN), with Annex

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE NO 21)

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

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

WRITTEN STATEMENT
OF THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD COMMISSION ON ENVIRONMENTAL LAW, SPECIALIST GROUP ON OCEANS, COASTS AND CORAL REEFS

25 NOVEMBER 2013

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STATEMENT OF INTERNATION UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, WORLD COMMISSION ON ENVIRONMENTAL LAW, OCEANS, COASTS AND CORAL REEFS SPECIALIST GROUP

CHAPTER 1

INTRODUCTION

I. International Union for Conservation of Nature (IUCN) and Natural Resources

1. In an Order 2013/2 dated 24 May 2013, the President of the International Tribunal for the Law of the Sea (the Tribunal or ITLOS) invited States Parties to the Law of the Sea Convention (the Convention or LOSC),[1] the Sub-Regional Fisheries Commission (the SRFC) and intergovernmental organizations listed in the Annex to Order 2013/2 to present written statements on four questions submitted by the SRFC to the Tribunal for an advisory opinion, designated Case No. 21.

2. The International Union for Conservation of Nature and Natural Resources (IUCN) is an intergovernmental organization with a formally accredited permanent observer mission to the United Nations. It was invited by communication from the Registrar on 5 June 2013 to provide this written statement to the Tribunal as an organization listed in the Annex to Order 2013/2.

3. IUCN is the world's oldest and largest global environmental network. It has a democratic membership union with more than 1,000 government and nongovernment member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries. Its mission is to help the world find pragmatic solutions to our most pressing environment and development challenges. It supports scientific research, manages field projects all over the world and brings governments, non-government organizations, United Nations agencies, companies and local communities together to develop and implement policies, laws and best practices.

4. The World Commission on Environmental Law (WCEL) of the IUCN is an extensive global network of over 500 environmental law specialists in more than 130 countries who provide their services to IUCN *pro bono publico*. The WCEL advances environmental law by developing legal concepts and instruments, and by building the capacity of societies to employ environmental law for conservation and sustainable development.

[1] 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); 1833 UNTS 396. (Hereinafter LOSC)

II. Background

5. The SRFC confronts a problem of illegal fishing activities by national, sub-regional and distant water fishing vessels. Concerns include fishing in restricted zones, illegal transshipment of catch on the high seas, unlicensed vessels, noncompliant equipment such as small-mesh nets, and obstruction of identification of vessels. The member States have undertaken a number of measures to combat the problem, including maritime surveillance measures, but lack of resources has hampered their efforts.

6. The SRFC has, accordingly, asked this Tribunal to render an advisory opinion to address four questions pursuant to Article 21 of the Statute of the Tribunal, Article 138 of the Rules of the Tribunal, and 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 Sub-Regional Fisheries Commission (the MCA Convention).[2] These are:

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?

III. Jurisdiction

7. The Tribunal's advisory jurisdiction was invoked by the Sub-regional Fisheries Commission, an intergovernmental organization, pursuant to Article 33 of the MCA Convention. Article 33 provides that the SRFC's Conference of Ministers "may authorize the Permanent Secretary of the SRFC to bring a given legal matter" to ITLOS for an advisory opinion. According to the Rules of the Tribunal, Article 138, the Tribunal has advisory jurisdiction where an international agreement related to the purposes of the Convention, such as the MCA Convention, provides for the submission of a request for an advisory opinion; this is consistent with Article 21 of the Statute of the Tribunal.

8. The MCA Convention is directly related to the purposes of the LOSC, as it effectuates the LOSC's direction to coastal States to cooperate through regional, subregional and global organizations to conserve and manage the living resources of the exclusive economic zone, in

[2] Convention on the Determination of the Minimal [sic] Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC), 2012, Art. 2(4), available with the materials of the SRFC's request for an advisory opinion on the ITLOS website. (Hereinafter MCA Convention)

LOSC Articles 61, 62, and in particular, Articles 63 (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 64 (highly migratory species). The MCA Convention does this by mandating that member States establish consistent practices for access to surplus resources, licenses, equipment, vessel regulation, artisanal fishery regulation, port State measures and enforcement.

9. The instant request for an advisory opinion was authorized and submitted according to the procedures specified by the MCA Convention, as described in the SRFC's Technical Note. The questions posed by the SRFC are framed in terms of law and raise issues of international law, the interpretation of the Law of the Sea Convention and of related agreements, and ask the Tribunal to advise on legal rights and obligations.

10. Article 138(1) of the Tribunal's Rules states that 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" (emphasis added). This phrasing tracks the language of Article 65 of the Statute of the International Court of Justice (the ICJ): "[t]he Court may give an advisory opinion on any legal question". It is in contrast to the requirement that the Seabed Disputes Chamber (the Chamber) provide an opinion when its advisory jurisdiction is properly invoked under Article 191 of the Convention. There is no reason in this case for the Tribunal to exercise its discretion and decline to give an opinion.

IV. Applicable Law

11. For a Tribunal advisory opinion, the Tribunal uses, *mutatis mutandis*, the procedural and substantive rules provided for Seabed Disputes Chamber advisory opinions (Rules, article 138(3)). Article 40(2) of the Statute states "In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable." (*see also*, Rules, Article 130(1)). The applicable law provided for contentious cases is found in the LOSC, Article 293(1), which directs the Tribunal to apply the Convention and other rules of international law not incompatible with the Convention (see also Statute, Article 23).

12. Customary international law consistent with the LOSC applies. In its first advisory opinion, the Seabed Disputes Chamber identified a number of customary rules as rules of international law not incompatible with the Convention. The Chamber described the process whereby the precautionary approach has been the subject of "a trend towards making this approach part of customary international law," beginning with Principle 15 of the Rio Declaration, continuing with the incorporation of the precautionary approach into treaties and other instruments, reinforced by the statement of the ICJ in the *Pulp Mills* case, Article 31 of the Vienna Convention, and inclusion of the precautionary approach in the Nodules and Sulphides Regulations; it again referenced the ICJ's *Pulp Mills* decision to find that environmental impact assessment is an obligation of international law.[3] The Chamber

[3] *Advisory Opinion*, paras 131, 138, 145-50 (citing ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010*).

frequently referred to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts as a source of customary law.

13. In its *Bangladesh/Myanmar* case,[4] the Tribunal justified the application of customary international law on the basis of two articles of the LOSC specifically referring to Article 38 of the Statute of the International Court of Justice, which lists custom as a source of international law. The Tribunal had previously used custom in the *M/V "Saiga"* case to determine the degree of force that could be used to arrest a vessel, as this matter was not dealt with in the Convention.[5]

14. The Chamber used interpretive criteria stated in the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"), which it characterized as customary international law, to analyze International Seabed Authority regulations.[6]

15. Certain treaties, such as the LOSC itself and the Vienna Convention, may be considered representative of customary international law. Others may provide context for interpretation of the Convention, particularly those that may be considered subsequent agreements or practice of the parties.[7] An example is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[8] The LOSC directs States Parties to cooperate in the management of straddling and highly migratory fish stocks; the Fish Stocks Agreement, as its lengthy formal title indicates, is the embodiment of this directive.

16. The SRFC has indicated several instruments that it finds relevant to the questions it asks of the Tribunal. Some of these call for States to form regional fisheries organizations, and as such have bearing on interpretation of the MCA Convention. Others are collateral instruments that support the goals of the MCA Convention. Still others are referenced in the MCA Convention itself, and have a clear relevance to the implementation of the LOSC through the MCA Convention.

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[4] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh v. Myanmar*), ITLOS Case No. 16, 14 March 2012, para. 183.

[5] *The M/V Saiga Case*, (*Saint Vincent and the Grenadines v. Guinea*), ITLOS Case No. 2, 1 July 1999, paras. 155-156.

[6] *Advisory Opinion*, para. 57 (citing *Volga* case, para. 77).

[7] Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Arts. 31-33. (Hereinafter Vienna Convention)

[8] 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, 2167 UNTS 3 (Hereinafter Fish Stocks Agreement or FSA)

17. Instruments that are not binding treaties but that have been negotiated in good faith by States in the expectation that they will be observed are also relevant to the analysis of the questions before the Tribunal. This is a parallel to the Chamber's reference to the regulations of the International Seabed Authority as "binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences."[9].

18. The World Commission on Environmental Law, Specialist Group on Oceans, Coasts and Coral Reefs of the International Union for Conservation of Nature appreciates the opportunity to submit this written statement, and to present to the Tribunal the bases for the following conclusions.

CHAPTER 2

QUESTION 1: WHAT ARE THE OBLIGATIONS OF THE FLAG STATE IN CASES WHERE ILLEGAL, UNREPORTED AND UNREGULATED FISHING ACTIVITIES ARE CONDUCTED WITHIN THE EXCLUSIVE ECONOMIC ZONES OF THIRD PARTY STATES?

I. The concept of IUU fishing activities under international law

19. Question 1 seeks clarification of the obligations of the flag State in relation to IUU fishing activities conducted within the EEZ of another State. It is assumed that the phrase "fishing activities" in the question refers to fishing by vessels registered in, and therefore having the nationality of, the flag State. Thus, Question 1 is concerned with the obligations of a flag State where vessels having its nationality engage or have engaged in IUU fishing activities in the EEZ of another State.

20. The expression "IUU fishing" includes three discrete activities – illegal fishing, unreported fishing and unregulated fishing. Each is defined in paragraph 3 of the International Plan of Action on IUU Fishing (IPOA-IUU), adopted by the FAO in 2001.[10] According to paragraph 3.1, illegal fishing refers to activities:

> 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
>
> 3.1.2 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

[9] *Advisory Opinion*, para. 60.

[10] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001, available at: http://www.fao.org/docrep/003/y1224e/y1224e00.HTM. (Hereinafter IPOA-IUU)

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

21. "Unreported fishing," according to paragraph 3.2 of the IPOA-IUU, refers, as far as the EEZ is concerned, to fishing activities "which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations." Hence, unreported fishing in the EEZ of a coastal State will, *ipso facto*, be illegal. "Unregulated fishing", according to paragraph 3.3 of the IPOA-IUU, in practice, will take place only on the high seas and therefore is treated as irrelevant to Question 1 for purposes of this submission. While in theory unregulated fishing could take place in the EEZ this would be in highly restricted and unlikely circumstances.[11] Accordingly, it is submitted that Question 1 concerns only illegal fishing in the EEZ, and the obligations of the flag States of foreign vessels in relation thereto.

22. The IPOA-IUU definition of IUU fishing has been reproduced, verbatim or almost verbatim, in a number of international instruments and in national legislation. These include the FAO Port State Measures Agreement,[12] the SRFC's MCA Convention, measures adopted by several Regional Fisheries Management Organizations (RFMOs),[13] and legislation

[11] "Unregulated" fishing in the EEZ would be true only if (1) the EEZ fell within the area of application of an RFMO, and then it only relates to fishing by non-RFMO member States, stateless vessels or a "fishing entity" (para. 3.3.1 of the IPOA); or (2) the coastal State had not adopted any conservation and management measures (para. 3.3.2 of the IPOA). As regards (2), it seems unlikely that this would be the case in practice (and if it were, it would be a breach of Art 61 of the LOSC)

[12] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009, Art. 1(e), available at http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf. As at the date of making this submission, the Agreement was not in force. (Hereinafter "PSM Agreement")

[13] See, for example, Western and Central Pacific Fisheries Commission, Conservation and Management Measure 2010-06, available at: http://www.wcpfc.int/system/files/CMM%202010-06%20%5BEstablish%20a%20List%20of%20IUU%20Vessels%20for%20the%20WCPFC%5D%2004112011.pdf? ; Indian Ocean Tuna Commission, Resolution11/03, available at: http://www.iotc.org/files/CMM/IOTC%20-%20Compendium%20of%20ACTIVE%20CMMs%2015%20September%202013.pdf; North-East Atlantic Fisheries Commission, Scheme of Control and Enforcement, Art. 1(l), available at: http://neafc.org/scheme/contents; South East Atlantic Fisheries Organization, Scheme of Observation, Inspection, Compliance and Enforcement, Art. 2(e), available at: http://www.seafo.org/ConservationMeasures/2013%20CM/SEAFO_SYSTEM_2013.pdf; International Commission for the Conservation on Atlantic Tunas, Resolution 01/18, available at: http://www.iccat.es/Documents/Recs/ACT_COMP_2013_ENG.pdf; International Commission for the Conservation of Atlantic Tunas, Recommendation by ICCAT to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported, and Unregulated Fishing Activities in the ICCAT Convention Area, Resolution 2002-23, available at http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2002-26-e.pdf, Commission for the Conservation of Antarctic Marine Living Resources, Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures, Conservation Measure 10-06 (2008), available at: http://www.ccamlr.org/sites/drupal.ccamlr.org/files//10-06.pdf; Inter-American Tropical Tuna Commission, Resolution to Establish a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean, Resolution C-05-07, available at: http://www.iattc.org/PDFFiles2/Resolutions/C-05-07-IUU-Vessel-list.pdf

adopted, inter alia, by the EU and others.[14] Although the IPOA-IUU is not legally binding,[15] it can be argued, in view of the practice just described, that its definition of IUU fishing has passed into the general corpus of international law.

II. A coastal State's rights to regulate fishing by foreign vessels in its EEZ

23. Before considering a flag State's obligations in respect of illegal fishing by vessels having its nationality within the EEZ of another State, it is useful first to outline a coastal State's rights regarding fisheries in the EEZ. The international legal regime of EEZ fisheries is governed by the LOSC, the EEZ provisions of which are regarded as having crystalized into customary international law.[16] Article 56(1) of the LOSC provides that within the EEZ a coastal State has "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil…" In exercise of those sovereign rights, a coastal State may permit the vessels of other States to fish in its EEZ. Where a coastal State is unable to take the whole of the allowable catch which it is obliged to set for its EEZ under Article 61(1) of the LOSC, it must admit the vessels of other States to fish for that part of the allowable catch surplus to its own harvesting capacity.[17] A foreign vessel may be admitted to fish in a coastal State's EEZ either under a license obtained directly from the coastal State or, more commonly, under an agreement between the coastal State and its flag State providing for the access of foreign vessels to the EEZ (such agreements are referred to hereafter as access agreements). Regardless of the means by which a foreign vessel is given access to the EEZ, it is subject while fishing to the legislative jurisdiction of the coastal State. This follows from the coastal State's sovereign rights described above and from Article 62(4), which sets out a non-exhaustive list of the kind of laws and regulations that may be adopted by the coastal State to govern foreign fishing in its EEZ. Such laws and regulations must be "consistent with" the LOSC and "due notice" of their existence must be given.[18]

24. Article 62(4) further 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." Failure to comply with those laws and regulations will constitute "illegal fishing" within the meaning of the IPOA-IUU. The term "nationals" in Article 62(4) is not defined. The term "nationals" is used

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[14] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, Art. 2, *Official Journal of the European Union* (OJEU), 2008 L266/1; United States, High Seas Driftnet Fishing Moratorium Protection Act, 50 CFR 300.201.

[15] IPOA-IUU, Art. 4.

[16] *Continental Shelf Case (Libya v. Malta)*, [1985] ICJ Rep. 13 at para. 34; and *Delimitation of Maritime Areas between Canada and France Arbitration*, (1992) 31 ILM 1145, at para. 49.

[17] LOSC, Art. 62(2) and (3).

[18] LOSC, Art. 62(5).

elsewhere in the LOSC in a fisheries context – in Article 63(3) and 64 in the case of EEZ fisheries, in Articles 116-118 in the case of high seas fisheries – but in none of those Articles is the term defined. It is submitted that when used in the fisheries provisions of the LOSC (including Article 62(4)), the term includes vessels registered in the flag State, as shown by Article 91 of the LOSC and the drafting history of Articles 116-118. Article 91 provides that ships have the nationality of the State whose flag they fly: thus, a ship is a national of its flag State. As regards drafting history, Articles 116-118 of the LOSC are similar to, and are clearly modeled on, Articles 1 and 4(1) of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.[19] Article 14 of that Convention defines "nationals" as used in Articles 1 and 4 as "fishing boats . . . having the nationality of the State concerned ... irrespective of the nationality of the members of their crews."

25. It could be argued that the term "nationals" in Article 62(4) and the other fisheries provisions of the LOSC should also include natural and legal persons serving on or owning fishing vessels. Whether or not that is so, the State of nationality of such persons cannot be described as the flag State, which is a term used only in the context of vessels. Thus, any questions relating to the activities of natural and legal persons within the EEZ of a foreign State fall outside the scope of Question 1, which asks only about the "obligations of the flag State."

III. The obligations of flag States in relation to fishing activities conducted by their nationals in the EEZs of third States

26. While Article 62(4) requires "nationals [i.e., vessels] of other States fishing" in the EEZ to comply with the coastal State's fisheries laws and regulations, the LOSC sets out no explicit obligations on flag States in respect of the activities of fishing vessels having their nationality in the EEZs of foreign coastal States. It will be argued in the following paragraphs that a requirement can now be read into the LOSC that a flag State is under an obligation to ensure that vessels having its nationality comply with the coastal State's fisheries laws and regulations when fishing in its EEZ, whether such fishing takes place pursuant to an access agreement between the flag State and the coastal State, under a license obtained directly from the coastal State, or without the permission of the coastal State. Such a requirement is derived from extensive State practice relating to the access of foreign fishing vessels to coastal State EEZs and various soft law instruments, and justified by the object and purpose of the LOSC and supported by treaty developments relating to high seas fisheries. Each of these matters will be examined in turn.

27. Turning first to State practice, this takes a number of forms. First, a number of groups of States have concluded treaties at the regional or sub-regional level under which they undertake not to grant access to the vessels of third States to fish in their EEZs unless such access arrangements include an obligation on flag States to ensure that such vessels comply with the laws and regulations of the coastal State. (For the sake of simplicity, a provision in an access arrangement requiring a flag States to ensure that its vessels comply with the laws and regulations of the coastal State will be referred to hereafter as a flag State vessel compliance clause.) Examples of regional and sub-regional treaties of the kind described include the

[19] 559 UNTS 285.

Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, 1982;[20] the Minimum Terms and Conditions of Fisheries Access, adopted by the Forum Fisheries Agency in 1990 and amended in 2011;[21] and the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 1992.[22] A second form of practice is the legislation of a number of coastal States which stipulates that any access treaty concluded with a foreign State must contain a flag State vessel compliance clause. A non-exhaustive list of such legislation is given in section A of the Appendix at the end of this submission. The third form of practice is a considerable number of access agreements containing a flag State vessel compliance clause. A non-exhaustive list of such agreements is given in section B of the Appendix. The practice just described involves more than 80 coastal States, which come from all regions of the world and include virtually all the main distant-water fishing States. The few access agreements that did not include vessel compliance provisions tended to be older agreements adopted just as the 200 nm EEZ was being extended and thus still adapting to the new regime. It is submitted that such practice meets the requirement for practice to be sufficiently widespread and consistent if it is to generate a new rule of customary international law.[23]

28. The other requirement for custom, *opinio juris*, is more difficult to demonstrate. As far as is known, States have not articulated their reasons for engaging in the practice described above, nor indicated whether they have included a flag State vessel compliance clause, or the need for such a clause, in the agreements and legislation referred to because they have felt under a legal obligation to do so. Nevertheless, the obligation of all States to carry out their obligations, be they conventional or customary, and in good faith would support *opinion juris*. Further, given the degree of practice and the apparent lack of any objection to the inclusion of flag State vessel compliance clauses in access agreements, it is legitimate to infer that the necessary *opinio juris* exists.[24] Thus, one may conclude that a rule of customary international law has emerged to supplement the LOSC to the effect that a flag State is under a duty to ensure that its vessels fishing in the EEZ of another State comply with the latter's laws.

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[20] Art. II(c)(iv). The text of the Agreement is available at: http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/Nauru%20Agreement.pdf. The seven parties to the Agreement are Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea and Solomon Islands.

[21] Para. 13. The text of this instrument is available at: http://www.ffa.int/system/files/HMTC%20FFC77%20Approved_0.pdf. In addition to the seven States referred to in the previous note, parties include Australia, Cook Islands, Fiji, New Zealand, Niue, Samoa, Tokelau, Tonga, Tuvalu and Vanuatu.

[22] Art. III(1). The text of the Treaty is available at: http://www.ffa.int/system/files/Niue%20Treaty_0.pdf. The parties to the Treaty are Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

[23] *North Sea Continental Shelf, Judgment*, [1969] ICJ Rep. 3 at para. 73 and *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgments, [1986] ICJ Rep. 14 at para. 184.

[24] It is often the case that *opinio juris* has to be inferred because there is no direct evidence indicating that a given State has recognized a particular practice as legally binding. See *Restatement of the Law, Foreign Relations Laws of the United States*, 3rd (186), Section 102 Comment c ("[*O*]*pinio juris* may be inferred from acts or omissions.")

29. A requirement for flag States to ensure that their vessels comply with the laws and regulations of a coastal State when fishing in its EEZ is also found in a number of soft law instruments. The Code of Conduct for Responsible Fisheries, which was adopted by the FAO in 1995 (the Code or Code of Conduct),[25] provides in Article 6.10 that "States should ensure compliance with and enforcement of conservation and management measures." Article 6.11 goes on to stipulate that States "should ensure that the activities of [their] vessels do not undermine the effectiveness of conservation and management measures ... adopted at the national ... level." Although the Code is described as "voluntary",[26] it is not without a degree of normativity. Article 1.1 states that "parts of [the Code] are based on relevant rules of international law" and that the Code also "contains provisions that may be or may already have been given binding effect by means of other obligatory legal instruments amongst the Parties." Article 4.1 states that all FAO members "should collaborate in the fulfilment and implementation of the objectives and principles" contained in the Code. Article 4.2 provides that the FAO will "monitor the application and implementation of the Code." In practice, reports of the meetings of the FAO's Committee on Fisheries record the degree to which FAO members have implemented the Code and call on States that have not fully implemented the Code to do so. The second soft law instrument that is relevant is the IPOA-IUU. Its paragraph 34 stipulates that flag States "should ensure that vessels entitled to fly their flag do not engage in . . . IUU fishing." The IPOA-IUU has a similar normative status to the Code,[27] but arguably goes further since it states that all States should implement the IPOA by means of the adoption of a national plan of action.[28] The third soft law instrument is the Voluntary Guidelines for Flag State Performance, adopted by the FAO in 2013.[29] Paragraph 8 of the Guidelines states that "the flag State ensures that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States." The Guidelines have much the same normative status as the Code.[30]

30. The three FAO instruments just described have insufficient normativity in their own terms to create legally binding obligations on flag States. However, it is submitted that they derive the necessary normativity to create such obligations exogenously. This may occur in two different ways. First, the three instruments may be viewed as instances of State practice to be added to the State practice enumerated in paragraph 27 above to reinforce the proposition that a rule of customary international law, imposing a duty on flag States to

[25] Code of Conduct for Responsible Fisheries, FAO Doc. 95/20/Rev. 1 (1995), available at: http://www.fao.org/docrep/005/v9878e/v9878e00.HTM (Hereinafter Code of Conduct)

[26] Code of Conduct, Art. 1.1.

[27] IPOA-IUU, paras. 4, 5, 87 and 93.

[28] IPOA-IUU, paras. 9.1, 14.1 and 25.

[29] Paragraph 3 of the Guidelines states that they apply to "fishing and fishing related activities in maritime areas beyond national jurisdiction. They might also apply to fishing and fishing related activities within the national jurisdiction of the flag State, or of a coastal State, upon their respective consent, without prejudice to paragraphs 8 and 39 to 43." Available at ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf. (Hereinafter Guidelines)

[30] Guidelines, paras. 1, 56 and 58.

ensure that their vessels comply with the coastal State's laws when fishing in the EEZ, has emerged to supplement the LOSC. A second way in which the three FAO instruments may be considered to have the necessary normativity is to view them as a concretization of the customary international law rule of *sic utere tuo ut alienum non laedas*. The principle was famously announced in the Trail Smelter case[31] and followed in the *Corfu Channel* case.[32] The principle was cast in explicitly environmental terms in Principle 21 of the 1972 Stockholm Declaration on the Human Environment[33] and repeated in Principle 2 of the Rio Declaration on Environment and Development.[34] As the two Principles indicate, States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." The International Court of Justice has held that this principle is part of customary international law.[35] The principle is clearly applicable in the present context. Fishing vessels are obviously "within the jurisdiction" of the flag State, even when fishing within the EEZ of another State.[36] Illegal fishing on anything other than a trivial scale will "cause damage to the environment" of the coastal State through depletion of stocks and consequential adverse impacts on the ecosystem. As the Tribunal observed in the *Southern Bluefin Tuna* case, "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[37]

31. Reading into the LOSC an obligation on flag States to ensure that their vessels comply with the coastal State's laws and regulations when fishing in its EEZ, supports the object and purpose of the LOSC. As Article 31(1) of the Vienna Convention on the Law of Treaties emphasizes, a treaty is to be interpreted in the light of its object and purpose. The object of the LOSC includes, according to its preamble, the establishment of "a legal order for the seas and oceans which . . . will promote . . . the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."[38] To support this objective, a requirement for flag States to ensure that their vessels comply with applicable conservation and management measures has already been introduced for high seas fisheries since the adoption of the LOSC as reflected by the FAO Compliance Agreement[39] and the Fish Stocks Agreement.[40] There is

[31] *Trail Smelter* arbitration (1941), III RIAA 1905 at 1965.

[32] *Corfu Channel case* (*United Kingdom v. Albania*) [1949] ICJ Rep. 3 at 22.

[33] 11 ILM 1416 (1972).

[34] 31 ILM 874 (1992).

[35] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapon* [1996] ICJ Rep. 226 at para. 29; *Case concerning the Gabčíkovo -Nagymoros Dam Project (Hungary v. Slovakia),* [1997] ICJ Rep. 7 at para. 53 and *Case concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14 at para. 193.

[36] *See e.g.*, Restatement (Third of the Foreign Relations Law of the United States) 14 May 1987, Section 601, Comment (c) ("'Activities within its jurisdiction or control' includes ...activities on ships flying it flags.")

[37] *Southern Bluefin Tuna Cases (New Zealand v. Japan); Australia v. Japan),* Order for Provisional Measures of 27 August 1999, para. 70, (1999) 38 ILM 1624. (Hereinafter "*Southern Bluefin")*

[38] LOSC, Preamble, para. 4.

[39] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Art. III(1), 2221 UNTS 91. (Hereinafter "Compliance Agreement")

clearly a need for an analogous obligation for EEZ fisheries, either through recognition that a new rule of customary international law has emerged to supplement the LOSC, or through recognition that an agreed interpretation of the LOSC has developed through the practice of its parties, or through recognition that such an obligation is a concrete application of the customary international law rule articulated in Stockholm Principle 21 and Rio Principle 2. Recognition of such an obligation for EEZ fisheries is particularly necessary given the degree of illegal fishing that takes place. It has been estimated that as much as one third of the total global marine fish catch is taken illegally.[41] The Technical Note submitted by the SRFC to the Tribunal with its request for an Advisory Opinion emphasizes that illegal fishing by foreign vessels within the EEZs of the member States of the SRFC has been a particular problem for those States, leading to a loss of income and damage to fish stocks.[42]

32. Apart from the general obligation on flag States to ensure that their vessels comply with the coastal State's laws when fishing in its EEZ, that it is submitted exists, it may be that the access agreements of individual member States of the SRFC with third States contain further obligations. The only such access agreements of which the IUCN is aware are the agreements of Cape Verde and Mauritania with the EU, which contain an obligation identical to the general obligation contended for here, but no other relevant obligations (see further paragraph 66).

33. If, as is submitted, there is an obligation on flag States to ensure that their vessels comply with the coastal State's laws when fishing in its EEZ, the next question is to identify more precisely the content of that obligation.

IV. Content of the flag State's obligation to ensure that its vessels comply with the laws and regulations of the coastal State when fishing in its EEZ

34. In its Advisory Opinion of 2011 the Seabed Disputes Chamber considered provisions in the LOSC similar in wording to the obligation discussed here which require a State sponsoring a contractor carrying out activities in the Area "to ensure" that the contractor complies with its obligations under the LOSC and all other mining regulations. Of these provisions, the Chamber concluded:

> 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

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[40] Fish Stocks Agreement, Art. 18(1).

[41] D. J. Agnew, J. Pearce, G. Pramod, T. Peatman, R. Watson, J. R. Beddington and T. J. Pitcher, "Estimating the Worldwide Extent of Illegal Fishing" (2009) 4(2) *PLoS ONE*, available at <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004570>.

[42] SRFC Technical Note, pp. 3-4.

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".[43]

35. What is involved in such an obligation of conduct, of due diligence, was spelt out by the International Court of Justice in the *Pulp Mills* case. In considering the obligations of the parties in that case (Argentina and Uruguay) under a bilateral treaty between them "to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures," the Court observed that this was:

> [A]n obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party ... would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.[44]

36. The same approach was taken by the Seabed Disputes Chamber in its Advisory Opinion. The Chamber emphasised that a sponsoring State must not only adopt relevant "laws and regulations" but also take "administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction"[45] and "include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor."[46]

37. Applying the broad principles spelt out by the Chamber and the Court to the flag State's obligation in the present context, it is submitted that the flag State is required to take the measures spelled out below, all of which are called for by the three FAO instruments discussed earlier (as indicated).

- The flag State must prohibit its vessels from fishing in the EEZs of other States unless both it and the coastal State authorize them to do so. The flag State shall not grant such authorization unless it is able to exercise effective jurisdiction and control over its vessels and is satisfied that its vessels have the ability to comply with the terms and conditions of such an authorization.[47]
- The flag State must adopt legislation that requires its vessels fishing in the EEZ of another State to comply with the laws and regulations of that State provided such laws and regulations are consistent with the LOSC and that makes a breach of such laws and regulations an offence under the law of the flag State.[48]

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[43] *Advisory Opinion*, para. 110.

[44] *Pulp Mills* case, para. 197.

[45] *Advisory Opinion*, para. 119.

[46] *Advisory Opinion*, para. 218.

[47] Code of Conduct, Arts. 6.11 and 8.2.1-3; IPOA-IUU, paras. 44-47; and Guidelines, paras. 8, 19 and 35.

[48] Code of Conduct, Art. 8.2.7; IPOA-IUU, paras. 16-17 and 47.7; and Guidelines, para. 34.

- The flag State must implement effective mechanisms to detect possible breaches of the coastal State's fisheries laws and regulations by its vessels by requiring them, e.g., to report their position and catch in real time, to carry a transponder, to complete an electronic log book, etc. and by inspecting vessels when they return to its ports.[49]
- The flag State shall, if requested by the coastal State, co-operate with the coastal State in the arrest of its vessels suspected of fishing in the EEZ in breach of the coastal State's laws and regulations and in any subsequent administrative or criminal proceedings taken against such vessels.[50]
- The flag State must take administrative and/or criminal proceedings against its vessels that are reasonably suspected of having violated the laws and regulations of the coastal State when fishing in the EEZ.[51]
- Where one of its vessels has been found to have violated the laws and regulations of the coastal State when fishing in the EEZ, the flag State must impose sanctions of sufficient severity to act as a deterrent to future breaches of the coastal State's laws and regulations and to deprive the vessel of the economic benefits of its illegal fishing.[52]

The obligations set out in the bullet points above are considered to be legally binding. This is not because they are called for by the three FAO instruments, which, as pointed out earlier, are not legally binding, but because the FAO instruments articulate and concretize the broad principles indicated by the Seabed Disputes Chamber and the International Court of Justice for the fulfillment by a State of a due diligence obligation to secure compliance by its nationals with particular measures – in the present case, compliance by the flag State's vessels with the coastal State's laws and regulations.

V. Conclusion

38. Question 1 asks what are the obligations of a flag State where a vessel having its nationality engages or has engaged in illegal fishing in the EEZ of another State, i.e., has fished in the EEZ without the permission of that State or in contravention of its laws and regulations. It is submitted that the answer to this question, as explained in section III, is that a flag State is under an obligation, flowing from customary international law and/or the subsequent practice of parties to the LOSC establishing an agreed interpretation of the LOSC, to ensure that its vessels comply with the laws and regulations of the coastal State when fishing in its EEZ. This obligation requires a flag State to: prohibit its vessels from fishing in the EEZs of other States unless so authorized; enact legislation requiring its vessels to comply with the coastal State's laws and regulations; have mechanisms in place to monitor such compliance; co-operate with the coastal State in investigating and taking enforcement action against vessels suspected of non-compliance, as well as taking such action independently; and sanction with deterrent penalties vessels found not to be complying. The obligation

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[49] Code of Conduct, Arts. 6.10, 7.7.3 and 8.1.4; IPOA-IUU, paras.24 and 47; and Guidelines, paras. 20-22.

[50] IPOA-IUU, paras. 28 and 31; and Guidelines, paras. 2(j), 21(e), 36, 40 and 43.

[51] Code of Conduct, Art. 8.2.7; and Guidelines, paras. 2(g), 21, 25, 36, 38 and 42.

[52] Code of Conduct, Arts. 7.7.2 and 8.2.7; IPOA-IUU, para.21; and Guidelines, paras. 21(d) and 38.

applies regardless of whether a vessel is fishing in the EEZ pursuant to an access agreement between its flag State and the coastal State, under a license obtained directly from the coastal State, or without the permission of the coastal State.

CHAPTER 3

QUESTION 2: TO WHAT EXTENT SHALL THE FLAG STATE BE HELD LIABLE FOR IUU FISHING ACTIVITIES CONDUCTED BY VESSELS SAILING UNDER ITS FLAG?

I. Introduction

39. Question 2 requires consideration of the extent to which a flag State shall be held "liable" for IUU fishing activities conducted by vessels sailing under its flag. In its Advisory Opinion of 2011 the Seabed Disputes Chamber considered the term "responsibility" to refer to the primary obligations of a State and "liability" to refer to the consequences of a breach of those obligations.[53] The same understanding of these two terms is employed in this submission, although it should be noted that in its Draft Articles on State Responsibility (ASR) the International Law Commission (ILC) uses the term "responsibility" rather than "liability" to refer to the consequences of a breach of a State's obligations.[54]

40. According to Articles 1 and 2 of the ASR, a State is liable where it is in breach of one of its international obligations as a result of an act or omission that is attributable to it. To answer Question 2, it is therefore necessary to consider whether IUU fishing activities by vessels constitute a breach of the international obligations of their flag States that is attributable to the latter. Fishing vessels are usually privately owned, and thus on the face of it their activities cannot give rise to the liability of the flag State as the acts of private individuals are not attributable to the State.[55] However, that is not the end of the matter. As the Chamber observed in its Advisory Opinion of 2011, after having found that the obligation on sponsoring States to ensure compliance by sponsored contractors with mining regulations in the Area was an obligation of conduct, not of result:

> 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.[56]

It therefore follows that where IUU fishing activities indicate that the flag State has breached its obligation of due diligence to ensure that its vessels do not engage in illegal fishing in the

[53] *Advisory Opinion*, para. 66.

[54] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 26. The Draft Articles are generally considered to represent customary international law as their frequent invocation and application by international courts and tribunals, including the Tribunal and its Seabed Disputes Chamber, testify.

[55] ILC Commentary on its Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Article 8, paragraph 1, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 26 at 47.

[56] *Advisory Opinion*, para. 112.

EEZ of another State (see section III of Chapter 2), such a breach being obviously attributable to the flag State, the latter will be liable for such breach.

41. Question 2 asks about flag State liability for IUU fishing in general, not simply in relation to IUU fishing in the EEZ. It is therefore necessary to consider whether the flag State is under any obligations in relation to fishing by its vessels on the high seas that could give rise to its liability in the event of IUU fishing by its vessels there. Such obligations do not fall within the scope of Question 1 and thus were not considered in Chapter 2. It is therefore necessary to address here the scope of a flag State's obligations in respect of the IUU fishing activities of vessels entitled to fly its flag and fishing on the high seas.

II. The obligations of flag States in relation to high seas fishing

42. Article 87 of the LOSC codified the customary international law freedom of all States to fish on the high seas. That freedom is, however, subject to a number of qualifications, including the treaty obligations of States and the rights and interests of coastal States specified in Articles 63(2),[57] 64,[58] 65[59], 66[60] and 67[61] of the LOSC,[62] as well as a variety of obligations imposed on flag States with respect to the fishing activities of their vessels. Such obligations are set out in the LOSC, post-LOSC fisheries treaties[63] and various soft law instruments.[64] Not all of those obligations are directly relevant to IUU fishing activities. Only those obligations that are directly relevant to IUU fishing will be identified here.

43. As noted in Chapter 2, the concept of IUU fishing encompasses three distinct, but interrelated, elements. "Illegal fishing", according to the IPOA-IUU and the usage of the term in State practice,[65] encompasses fishing activities (i) "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 (ii) fishing activities "in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization." Thus, on the high seas illegal fishing can occur under two circumstances: (i)

[57] Dealing with so-called straddling stocks, i.e., a stock or stocks of associated species occurring both within the EEZ and on the high seas.

[58] Dealing with highly migratory species.

[59] Dealing with marine mammals.

[60] Dealing with anadromous stocks.

[61] Dealing with catadromous stocks.

[62] LOSC, Art. 116.

[63] Notably the Fish Stocks Agreement and Compliance Agreement.

[64] In particular, the Code of Conduct, the IPOA-IUU and the Guidelines.

[65] See paragraphs 27-28 above.

breach of the national legislation of the flag State, implementing relevant international obligations or (ii) fishing activities on the high seas contrary to relevant international obligations and conservation and management measures of regional fisheries management organizations (RFMOs) to which the flag State is a member or cooperating non-member where the flag State has failed to promulgate relevant implementing legislation.

44. The concept of "unreported fishing" under paragraph 3.2 of the IPOA and in State practice covers, as far as the high seas are concerned, fishing activities "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". It follows that "unreported fishing" on the high seas will either be illegal fishing contrary to the national laws of the flag State implementing its international obligations, where the flag State fails to implement relevant legislation, or illegal because it is in contravention of the conservation and management measures of relevant RFMOs.

45. "Unregulated fishing", according to paragraph 3.3 of the IPOA-IUU, has two components, namely: (i) fishing activities on the high seas inconsistent with or contrary to the conservation and management measures of an RFMO by vessels without nationality, flying the flag of a State not a member of the RFMO, or flying the flag of a "fishing entity"[66]; and (ii) fishing activities "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 the conservation of living marine resources under international law." In relation to (i), where the vessels undertaking the fishing activities are stateless, Question 2 will not be applicable. Where a "fishing entity" is a member or a cooperating non-member of an RFMO, the fishing activity will also be illegal under paragraph 3.1 of the IPOA-IUU. Where fishing is by vessels of a non-member State of an RFMO, the flag State, if it is a party to the Fish Stocks Agreement, will also be in breach of an obligation under Article 8(3) of the Agreement to cooperate by participating in a relevant RFMO.[67]

46. The main obligations of flag States in relation to high seas fishing that appear particularly relevant to IUU fishing are set out below. It will be observed that most of the obligations are to be found in the Compliance and Fish Stocks Agreements. Such obligations will be binding only on the parties to those agreements, which are far fewer than for the LOSC,[68] although it is possible that, as argued in Chapter 5 below (see paragraphs 142-154),

[66] The concept of "fishing entity" was popularised by the Fish Stocks Agreement (see Art. 1(3)). The application of the concept in State practice suggests that it is a reference to Taiwan, Province of China. See the special issue of *Ocean Development & International Law*, Vol. 37, No. 2, 2006, particularly Martin Tsamenyi, "The Legal Substance and Status of Fishing Entities in International Law: A Note", pp.123-132.

[67] Fish Stocks Agreement, Art. 8(3) ("Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.")

[68] At the time of making this submission, the Compliance Agreement had 39 parties and the Fish Stocks Agreement 81 parties. It should be noted that the European Union exercising its exclusive competence over fishery matters signs FAO instruments on behalf of its 28 member States, which partly accounts for the

at least some of the provisions of these Agreements have passed into customary international law as a result of their frequent endorsement by the UN General Assembly, the FAO, RFMOs and others. A further possible limitation is that the Fish Stocks Agreement applies only to straddling and highly migratory stocks. However, in practice most high seas fishing is directed at such stocks. Furthermore, according to the SRFC's Technical Note, these are the stocks that are of most interest to member States of the SRFC.[69] The obligations set out below are also to be found in the three FAO instruments discussed earlier. However, specific references to those instruments will not be given here as the obligations are already to be found in treaties, which unlike the FAO instruments, are legally binding. It may be that relevant flag State obligations are also to be found in RFMOs, of which the most relevant one for SRFC member States is the International Convention for the Conservation of Atlantic Tunas, 1966.[70]

47. In sum, therefore, the main obligations of flag States that appear particularly relevant to IUU fishing on the high seas are as follows:

- The flag State must cooperate with other States to take such measures as may be necessary for the conservation of the living resources of the high seas.[71]
- The flag State must prohibit its vessels from fishing on the high seas unless it has authorized them to do so. The flag State shall not grant such authorization unless it is able to effectively exercise its responsibilities under the Compliance and Fish Stocks Agreements in respect of its vessels.[72]
- The flag State must take such measures as may be necessary to ensure that its vessels comply with relevant conservation and management measures of RFMOs and do not engage in any activity that undermines the effectiveness of conservation and management measures for the high seas.[73]
- The flag State must put in place effective mechanisms to monitor the fisheries activities of its vessels on the high seas, including requiring them to report their position and catch, to carry an observer on board and to carry a transponder, and by inspecting vessels both at sea and when they return to its ports.[74]
- The flag State must take administrative and/or criminal proceedings against its vessels that are reasonably suspected of having violated applicable conservation and management measures when fishing on the high seas.[75]
- Where one of its vessels has been found to have violated applicable high seas

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difference in the number of Parties to the two aforementioned instruments. Further, China and Thailand, two main high seas fishing States, are not party to either of the instruments.

[69] SRFC Technical Note, p. 3.

[70] 673 UNTS 63.

[71] LOSC, Arts. 117 and 118.

[72] Compliance Agreement, Art. III(2) and (3); and Fish Stocks Agreement, Art. 18(2) and (3).

[73] Compliance Agreement, Art. III(1)(a); and Fish Stocks Agreement, Arts. 18(1) and 19(1).

[74] Compliance Agreement, Art. III(7); and Fish Stocks Agreement, Art. 18(3).

[75] Compliance Agreement, Art. III(8); and Fish Stocks Agreement, Art. 19(1).

> conservation and management measures, the flag State must impose sanctions of sufficient severity, that is effective, to act as a deterrent to future breaches of such measures and to deprive the vessel of the economic benefits of its IUU fishing.[76]

48. IUU fishing on the high seas on any kind of scale can be the result of a breach of one or more of the above obligations by the flag State concerned, such as the failure of the flag State to adopt and effectively enforce national legislation ensuring compliance with the conservation and management measures adopted by an RFMO, or to adopt and enforce laws and regulations for authorized fishing, that is, to effectively exercise flag State jurisdiction on the high seas outside RFMO areas. In such circumstances, since such failure is clearly attributable to it, the flag State will be liable.

III. The obligation of flag States to make reparation

49. As the Permanent Court of International Justice stated in the *Factory at Chorzów* case, "the breach of an engagement involves an obligation to make reparation in an adequate form."[77] Furthermore,

> ... 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[78]

50. These principles have been confirmed by the ICJ in several subsequent cases.[79]

51. These customary law principles have been adopted by the ILC in its ASR. Thus, Article 31 provides:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

52. The State must also cease any wrongful conduct of a continuous nature and offer assurances and guarantees of non-repetition if the circumstances so require.[80] As indicated in

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[76] Compliance Agreement, Art. III(8); and Fish Stocks Agreement, Art. 19(2).

[77] *Factory at Chorzów case (Germany v. Poland), Jurisdiction,* 1927, PCIJ, Series A, No.9, p. 21.

[78] *Factory at Chorzów case (Germany v. Poland), Merits*, 1928 PCIJ, Series A, No. 17, p. 47.

[79] See, for example, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, [2007] ICJ Rep. 43 at para. 460.

[80] ILC Draft Articles on State Responsibility, Art. 30.

the quotation from the *Factory at Chorzów* case above and as provided for in the ILC's ASR, the responsible State's obligation to make full reparation for the injury caused by the internationally wrongful act may take the form of restitution, compensation or satisfaction, either singly or in combination.[81] Restitution requires the re-establishment of the situation that existed before the wrongful act was committed where that is not materially impossible.[82] If restitution is not possible, the responsible State is under an obligation to give compensation for financially assessable damage, including any loss of profits that can be established.[83] Where restitution or compensation is not possible or in combination with those remedies, the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused: this may take the form of an acknowledgement of the breach, an expression of regret, a formal apology or any other appropriate way so long as it does not humiliate the responsible State.[84]

53. The question of what reparation for IUU fishing may be claimed and by which States is closely linked to the issue of invocation of responsibility, and this matter is therefore considered next.

IV. The invocation of State responsibility

54. Article 42 of the ASR provides that a State is entitled as an "injured State" to invoke the responsibility of another State if the obligation breached is owed to (a) that State individually or (b) "a group of States including that State, or the international community as a whole and the breach of the obligation (i) specially affects that State; or (ii) is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation."

55. Where a flag State is liable (or responsible, in the ILC's terminology) following IUU fishing that results from its failure to fulfill its obligation to ensure that its vessels comply with the coastal State's laws and regulations (as explained in paragraph 37 above), the coastal State will clearly be an "injured State" within alternative (a) above. That means that the coastal State may request the flag State to take the necessary steps to comply with its obligation, require the flag State to make reparation, and/or take countermeasures against the flag State in accordance with the conditions set out in Articles 49-53 of the ILC's ASR. To enforce a claim, the coastal State would need to establish a causal link between the flag State's failure to comply with its obligation and the damage caused. There may be challenges in assessing the amount of damage and apportioning the payment of any compensation owed between flag States where the vessels of several States have engaged in IUU fishing in the EEZ. It is, however, submitted that restitution could be based on lost income in license fees

[81] ILC Draft Articles on State Responsibility, Art. 34. See *M/V Saiga* Case (No. 2) (St. Vincent & the Grenadines v. Guinea), para 171 (July 1, 1999) citing Article 42(1) of the pre-2001 Draft Articles of the International Law Commission on State Responsibility)

[82] ILC Draft Articles on State Responsibility, Art. 35.

[83] ILC Draft Articles on State Responsibility, Art. 36. According to Bodansky et al., the internationally wrongful act giving rise to liability for compensation must be proved as proximate cause to the harmand cannot be punitive: see Daniel Bodansky, John R. Crook & Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility" (2002) 96 *American Journal of International Law* 833 at 838.

[84] ILC Draft Articles on State Responsibility, Art. 37.

or reduced incomes of its fishermen as a result of IUU fishing. For example, in June 2013, the United States Federal Court for the Southern District of New York ordered three men to pay US$29 million in restitution to the South African government for illegal fishing in that country's waters for almost 15 years.[85]

56. Where IUU fishing takes place on the high seas, the position is different. The "injured State" within the meaning of Article 42 of the ILC's ASR might include the State Parties of an RFMO, relevant coastal States if straddling stocks and HMS found in or migrating to their EEZs were affected, or other users of the sea. In case of very serious injury to fish stocks or the marine environment, it is even possible that one or more States might claim on behalf of "the international community as a whole" under the ASR, Article 42(b)(ii) or Article 48.

57. The Seabed Disputes Chamber addressed the rights of the international community when it described States' obligations to preserve the environment of the high seas when they sponsor deep seabed mining in the Area as having an *erga omnes* character, in its 2011 Advisory Opinion referencing Article 48 of the ASR.[86] Article 48 provides that a State other than the injured State is entitled to invoke the responsibility of another State if:

> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (b) the obligation breached is owed to the international community as a whole.

58. The progressive development of the principle of obligations "towards all" began when the ICJ recognized obligations *erga omnes* in its *Barcelona Traction* case.[87] In the *Nuclear Tests (New Zealand v. France)* case, the ICJ relied on France's unilateral declaration of its intent to halt atmospheric nuclear weapons testing, which it described as "*erga omnes*," and "an undertaking to the international community" to terminate as moot New Zealand's claims, brought on its own behalf and also on behalf of the international community, the Cook Islands, Niue and the Tokelau Islands. [88] It is particularly apt to the legal regime of the high seas.

59. It would seem that the condition in ASR Article 48(a) is satisfied with respect to States parties to the LOSC, the Compliance Agreement and/or the Fish Stocks Agreement. Thus, any party to those treaties could invoke the responsibility of a flag State in breach of its obligations relating to IUU fishing on the high seas. Those obligations could also be viewed as owed to the international community as a whole (condition (b)) as IUU fishing has been so heavily condemned by the international community, in particular by the UN General

[85] See, *US v. Bengis, Slip Copy*, 2013 WL 2922292 (S.D.N.Y. 2013). (The three men also were sentenced to time in prison. This was pursuant to a settlement under the Lacey Act, an American law that prohibits the trade of wildlife, fish or plants that have been taken illegally in violation of state or foreign law. These men were caught trying to sell on the United States market rock lobster that had been poached in South African waters.)

[86] *Advisory Opinion*, para. 180.

[87] *Barcelona Traction, Light and Power Company Limited Case* (Belgium v Spain) [1970] ICJ Reports 1970.

[88] *Nuclear Tests (New Zealand v. France)*, Judgment, [1974] I.C.J. Rep. 457 at paras 51-53. The ICJ used the same language was used in the parallel case, *Nuclear Tests (Australia v. France)*]

Assembly[89] and the FAO,[90] and based on the common interest of all States, land-locked or coastal, in the marine environment of the high seas. In that case, any State could invoke the responsibility of a flag State in breach of its obligations. Where the responsibility of a flag State is invoked under Article 48, the State(s) invoking such responsibility may claim from the responsible State:

> (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
> (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.[91]

Where they were not individually injured, other States fishing on the high seas might regard themselves as "beneficiaries of the obligation breached." They would still need to prove losses as a result of a flag State's failure to prevent its vessels from engaging in IUU high seas fishing. As for the possible remedy of countermeasures, Article 53 of the Draft Articles leaves open the question of whether the States referred to in Article 48 may take countermeasures against States in breach of their international obligations.

60. There are three suggested ways to assess damages and all should be part of the flag State legislative package.

> (1) The flag State develops legislation that affixes a particular value for species of fish. The value may reflect the value to other persons to legally take the fish, the replacement cost, or the intrinsic value to the fish.
> (2) The flag State has a system of fines – e.g., a daily fine of a certain amount for each day of IUU or a fine based on the number of kilos of IUU fish.
> (3) Proof of actual loss.

If the IUU fishing were on the high seas, then the restitution could be paid to an RFMO having jurisdiction such as the SRFC, which requested this Advisory Opinion. This would effectively be the same approach adopted by the Seabed Disputes Chamber for "the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor" or in this case the vessel owner, which is in effect sponsored by the flag State.

61. Previous adjudications have recognized material, immaterial and pure environmental loss damages. For example, in the *Rainbow Warrior* Arbitration, referring to the *Factory at Chorzów* case, the arbitrator recognized its competence to award monetary compensation for "serious moral and legal" damages for breach of a treaty obligation.[92] The "F4" Panel of the UN Compensation Commission, established to review direct environmental damage and depletion of natural resources arising from Iraq's invasion and occupation of Kuwait, in its fifth and final report (Security Council, S/AC.26/2005/10, June 30, 2005) concluded that

[89] See its series of resolutions on sustainable fisheries, e.g., its most recent resolution, Resolution 67/79, adopted on 11 December 2012, paras. 48-68.

[90] Notably through the IPOA-IUU.

[91] ILC Draft Articles, on State Responsibility, Art. 48(2).

[92] However, New Zealand had not made any request for monetary compensation for France's breach of the 1986 Treaty with New Zealand. See, *Rainbow Warrior (N.Z./Fr.)*, paras. 117, 118, 20 R.I.A.A. 217, 270 (1990).

"there is no justification for the contention that general international law precludes compensation for pure environmental damage." The Panel went on to award financial compensation to restore various types of environmental damage including the enhancement of biodiversity in alternative sites. Additionally, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety recognizes significant adverse effects on conservation and sustainable use of biodiversity as a compensable type of damage.[93] Many States now recognize liability for lost ecosystem services, including the European Union, under its Liability Directive.[94]

62. RMFO member States are likely to be well-positioned to conduct restitution or to use financial compensation for the benefit of the damaged marine environment because of their knowledge of the resource. The principle that such compensation for damage to environmental resources must be used to restore the claimed damage is seen in an international setting with the example of the UN Compensation Commission Follow-up Programme, which required awards for environmental damage to be used to restore the lost ecosystem services.[95] It is also seen in national legal regimes where the government stands in the role of public trustee and may only use compensation on behalf of the community interest in the damaged environment.[96]

IV. Conclusion

63. Where a flag State fails to comply with its obligation to ensure that its vessels comply with the coastal State's laws and regulations when fishing in the EEZ, or the set of obligations designed to ensure that its vessels comply with applicable conservation and management measures relating to the high seas, it will be liable. Such liability involves a requirement for the flag State to put an end to its non-compliance with the obligations referred to and to make reparation, which will probably take the form of compensation and/or satisfaction. In the case of IUU fishing in the EEZ, the coastal State will be able to invoke the liability of the flag State and claim reparation from it and/or take countermeasures. On the high seas States—including specially affected coastal States, members of the relevant RFMO, parties to certain fisheries treaties, users of the sea, and States acting on behalf of the international community as a whole—may be able to invoke the liability of the flag State and claim reparation and/or take countermeasures.

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[93] Adopted 16 Oct. 2010. The Protocol will enter into force on the ninetieth day after the date of deposit of the 40th instrument of ratification, acceptance, approval or accession.

[94] Council Directive 2004/35 of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive), OJ L143/56 (2004), as amended by Council Directive 2006/21/EC, OJ L102 (2006).

[95] Decision 258 concerning Follow-up Programme for Environmental Claims Awards, taken by the Governing Council of the United Nations Compensation Commission at its 150th meeting on Dec. 8, 2005, S/AC.26/258 (2005), reprinted in 35 Environmental Policy and Law 276 (2005).

[96] See, *e.g.*, CERCLA, 42 U.S.C. Sec. 9601 et seq ., 43 C.F.R. Part 11

CHAPTER 4

QUESTION 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?

I. The scope of question 3

64. Question 3 asks about the liability of a flag State or an international agency for the violation of the fisheries legislation of a coastal State by a vessel holding a fishing license issued within the framework of an agreement with that flag state or international agency. Such a violation is illegal fishing within the definition of IUU fishing in the FAO International Plan of Action on IUU Fishing (see para. 3.1.1, which was quoted in paragraph 20 above). Thus, as far as the liability of the flag State for such violation is concerned, that issue has already been dealt with under Question 2 in Chapter 3 above, and so there is no need to say anything further about it here. Furthermore, the French text of Question 3 makes no reference to the flag State.

65. The term "international agency" in Question 3 is taken here to mean "international organization", as this is the term used in the French text of Question 3 ("organisation internationale") and is a much more widely-used and well-understood term than "international agency".

66. Question 3 does not refer to international organizations in general, but only to an international organization that has concluded an "international agreement" with the coastal State (English text) or is "the holder of fishing licenses" ("détentrice de licenses de pêche" in the French text), licenses presumably issued by the coastal State. Thus, Question 3 refers to international organizations that have the competence, either in place of their member States or together with their member States, to conclude an agreement with a non-member coastal State in order to obtain fishing licenses for fishing vessels to fish in the waters coming under the sovereignty or jurisdiction of that coastal State. As far as the IUCN is aware, there is currently only one international organization that has such competence. That is the EU, which has the competence, to the exclusion of its Member States, to conclude treaties with third States concerning "the conservation of marine biological resources under the common fisheries policy."[97] In the exercise of its exclusive treaty-making powers in the field of

[97] Art. 3(1)(d) and 3(2) of the Treaty on the Functioning of the European Union, *Official Journal of the European Union* (OJEU), 2010 C83/47. *See also* the declaration that the EU made when depositing its instrument of formal confirmation of the LOSC, which states that the EU's Member States "have transferred competence to it with regard to the conservation and management of sea-fishing resources. Hence in the field of sea-fishing it is for the Community [now Union] to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations." The declaration is available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#European Community

fisheries, the EU has over the years concluded agreements with all the members of the SRFC providing for the access of EU fishing vessels to their waters.[98] Such agreements contain only general principles: details of the numbers of licenses to be issued, regulations governing fishing by licensed vessels, the amount of "financial compensation" to be paid by the EU, etc. are set out in protocols to the agreements. Such protocols typically have a shorter duration than the agreements. Without a protocol in force, an agreement is effectively non-operational. However, the only agreements between the EU and SRFC member States that currently have a protocol in force, and thus are effectively operational, are the agreements with Cape Verde and Mauritania.[99] Although the EU has concluded agreements with the other SRFC member States,[100] none have protocols in force, and indeed some protocols lapsed a considerable while ago.[101]

67. Question 3 is not very clear about the relationship between an international organization of the kind just described and the fishing vessel violating the coastal State's legislation. The English text of the question suggests that the fishing vessel is fishing within the EEZ of a coastal State that is not a member of the international organization concerned under a license obtained within the framework of an access agreement between that organization and that coastal State which provides for the access of vessels from that organization to that State's EEZ. Such agreements will be referred to hereafter as access agreements. The French text of Question 3 is much less specific, referring only to the vessels "benefitting from the licenses" held by an international organization. (The French text in its entirety reads: "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?"). While laconic, the French text is not incompatible with the English text, and it will therefore be assumed that Question 3 refers to the situation where a vessel is fishing within the EEZ of a coastal State pursuant to an access agreement between that State and an international organization.

68. That then raises the question of the relationship between such a vessel and the international organization as far as the flag (i.e., nationality) of a vessel is concerned. In theory, the vessel could fly the flag of the international organization. However, while this

[98] *See* http://ec.europa.eu/fisheries/cfp/international/agreements/index_en.htm.

[99] Fisheries Partnership Agreement between the European Community and Cape Verde, 2006, OJEU 2006 L414/3; Fisheries Partnership Agreement between the European Community and the Islamic Republic of Mauritania, 2006, OJEU 2006 L343/4.

[100] Fisheries Partnership Agreement between the European Community and Guinea-Bissau, 2007, OJEU 2007 L342/5; Agreement between the European Community and Gambia on Fishing off Gambia, 1987, OJEC 1987 L146/3; Agreement between the European Community and Senegal on Fisheries Off the Coast of Senegal, 1979, OJEC 1980 L226/18; and Agreement between the European Community and Sierra Leone, 1990, OJEC 1990 L125/38. The EU negotiated a Fisheries Partnership Agreement with Guinea in 2008 (OJEU 2009 L156/35)and provisionally applied it from the beginning of 2009. Following the violent suppression of popular protests by the government of Guinea in September 2009, the EU decided to terminate provisional application of the Agreement and not to proceed to its ratification. There appear to have been no developments in EU-Guinea fisheries relations since then. The Agreement would have replaced an earlier access agreement concluded in 1983 (OJEC, 1983 L111/2). See further the EU website at note 99.

[101] The protocols with Gambia and Sierra Leone lapsed in 1996, the protocol with Senegal in 2006, and the protocol with Guinea-Bissau in 2011. Although a new protocol with Guinea-Bissau was initialled in February 2012, its adoption was put on hold in response to the military coup in Guinea-Bissau in April 2012 and appears still to be on hold.

might be possible (although it should be noted that the LOSC does not address the matter[102]), there are in practice no international organizations that grant fishing vessels the right to fly their flag. That is so even in the case of the EU. The current basic regulation governing the Common Fisheries Policy defines a "[European] Community [now Union] fishing vessel" as "a fishing vessel flying the flag of a Member State and registered in the [European] Community [now Union]."[103] Thus, Question 3 must be taken as referring to fishing vessels that fly the flag (and have the nationality) of a member State of the international organization concerned.

69. Question 3 does not appear to apply to vessels that fly the flag of a non-member State of the international organization concerned but that are owned or operated by nationals of one or more of the member States of that organization. -Nor does Question 3 appear to apply where a fishing vessel flying the flag of a Member State of an international organization obtains a license to fish in the EEZ directly from a coastal State, outside the framework of any access agreement between an international organization and the coastal State, or where a fishing vessel flying the flag of a Member State of an international organization fishes in the EEZ without the permission of the coastal State. Neither situation falls within the ambit of either the English or the French texts of Question 3.

70. Question 3 asks whether an international organization is "liable" for the violation of the fisheries legislation of a coastal State by a vessel holding a fishing license issued within the framework of an access agreement. The French text of Question 3 uses the term "responsable". As referenced above in paragraph 39 in Chapter 3, the Seabed Disputes Chamber in its Advisory Opinion of 2011 observed that the English term "liability" and the French term "responsabilité" both refer to "the secondary obligation, namely the consequences of a breach of a primary obligation."[104] It also noted that, by contrast, the ILC's Draft Articles on State Responsibility use the term "responsibility" to refer to such secondary obligation.[105] The ILC's Draft Articles on the Responsibility of International Organizations also use the term "responsibility" in the same sense.[106] The terminology of Question 3 is the same as that of the Chamber in its Advisory Opinion. This Chapter, like Chapter 3, will use the same terminology, although occasionally, when specifically referring to the ILC's Draft Articles, the terms "responsibility" and "responsible" will be used, with the understanding that they are considered as being synonymous with "liability" and "liable".

71. Summing up, it is submitted that Question 3 should be understood as asking about the liability of an international organization where a fishing vessel having the nationality of a

[102] The one provision in the LOSC that addresses the issue of ships flying the flag of an international organization, Article 93, is limited to ships on the official service of the UN, its specialized agencies and the IAEA.

[103] Regulation 2371/2002, Art. 3(d), OJEU 2002 L358/59.

[104] *Advisory Opinion*, para. 66.

[105] Ibid.

[106] See Draft Articles on the Responsibility of International Organizations, with Commentaries, Report of the International Law Commission on the Work of its 63rd Session (2011), UN Doc. A/66/10, p. 52, General Commentary, para. 3.

member State of that organization, fishing within the EEZ of a coastal State not a member of that organization under a license obtained within the framework of an access agreement between that organization and that coastal State, violates the fisheries legislation of the coastal State.

II. The liability of an international organization for illegal fishing by vessels having the nationality of a member State of that organization within the EEZ of a non-member coastal State – general principles

72. It is submitted that the starting point for discussion of the liability of an international organization should be the Draft Articles on the Responsibility of International Organizations, adopted by the ILC in 2011 and taken note of by the UN General Assembly and commended to the attention of Governments and international organizations.[107] Although the Draft Articles are more a case of progressive development than codification,[108] they are the most authoritative and comprehensive statement about the international responsibility of international organizations that currently exists. The Draft Articles on the Responsibility of International Organizations broadly parallel the ILC's Draft Articles on State Responsibility. Thus, the basic principle of responsibility (or liability, to use the terminology of the Seabed Disputes Chamber) is the same, namely that an international organization is responsible (liable) where there is conduct that constitutes a breach of the organization's international obligations and that conduct is attributable to the organization.[109]

73. It follows from this basic principle that the answer to Question 3 requires: (i) the identification of the relevant international obligations of an international organization; (ii) the identification of conduct, attributable to such an organization, that would constitute a breach of those obligations; and (iii) where there was such a breach, identification of the consequences of the organization's resulting liability. Each of these three matters is considered in turn.

III. The liability of an international organization – practical application

A. Obligations of an international organization

74. In chapter 2 it was argued that a flag State is under an obligation, deriving from customary international law, to ensure that its vessels, when fishing in the EEZ of another State, comply with the laws and regulations of that coastal State. The content of the obligation was outlined in paragraph 37. It is submitted that where an international organization, in the exercise of its (exclusive) competence in fisheries matters, concludes an access agreement with a non-member coastal State providing for vessels having the nationality of its member States to fish in that coastal State's EEZ, it is subject to a similar obligation. The flag member States of such an organization will not be parties to the access agreement: for this reason, the obligation to ensure compliance should rest on the international organization and not on the flag member States.

[107] UN General Assembly Resolution 66/100, adopted on 9 December 2011, para. 3.

[108] Draft Articles on the Responsibility of International Organizations, General Commentary, para. 5.

[109] Draft Articles on the Responsibility of International Organizations, Arts. 3 and 4.

75. In practice in the case of the EU, every single access agreement that the EU has concluded with third States, including the member States of the SRFC, has contained a clause requiring the EU to ensure that EU fishing vessels comply with the laws and regulations of the third State concerned when fishing in the latter's EEZ.[110]

76. In theory, an international organization could be subject to other obligations in an access agreement that bore on the question of liability for illegal fishing, but there are no such obligations in the EU's access agreements with third States, and the IUCN is not aware of any access agreements involving other international organizations.

B. Conduct attributable to an international organization that would breach its obligations

77. As explained in paragraph 72-73 above, an international organization is liable only where conduct attributable to it breaches the obligations outlined in paragraphs 78-80 below. Illegal fishing by privately-owned vessels (and most fishing vessels are privately owned), as conduct by non-State actors, is not attributable to an international organization.[111] The latter will therefore not be liable for such illegal fishing. However, such fishing, particularly if on a significant scale, may indicate that the international organization in question is not fulfilling its obligation to ensure that its vessels comply with the coastal State's laws. Where that is so, such a breach of its obligation will entail the liability of the international organization, at least in principle. However, the position is not entirely straightforward.

78. In paragraph 37 above, it was submitted that the obligation of a flag State to ensure that its vessels comply with the laws and regulations of the coastal State requires the flag State to: (1) prohibit its vessels from fishing in the EEZs of other States unless so authorized; (2) enact legislation requiring its vessels to comply with the coastal State's laws and regulations; (3) have mechanisms in place to monitor such compliance; (4) co-operate with the coastal State in investigating and taking enforcement action against vessels suspected of non-compliance; (5) take such enforcement action independently; and (6) sanction with deterrent penalties vessels found not to be complying. It may be that not all these matters fall within the competence of an international organization. For example, in the case of the EU, the first four requirements listed above fall within its exclusive competence, as do some types of administrative sanction against its fishing vessels, such as withdrawal of a vessel's license to fish within the EEZ of a non-member coastal State granted within the framework of an access agreement. Failure by the EU to take such measures would thus clearly be attributable to it and engage its liability. However, in relation to the fifth requirement, the institution of criminal proceedings against vessels reasonably suspected of breaching the coastal State's fisheries legislation, the EU has no competence. This matter remains within the competence

[110] The access agreements that the EU has concluded with third States are all included in the list of agreements in the appendix. A few of those agreements have been replaced by subsequent agreements with the same clause; a few others replace earlier agreements with the same clause.

[111] Draft Articles on the Responsibility of International Organizations, Introductory Commentary to Chapter II of the Draft Articles, para. 5.

of the Member States.[112]

79. The question then is whether the failure of a flag Member State to institute criminal proceedings against one of its vessels reasonably suspected of having breached the coastal State's fisheries legislation could be attributed to the EU. There are two provisions of the ILC's Draft Articles on the Responsibility of International Organizations that are potentially relevant. First, under Article 6 the conduct of an "agent" of an international organization in the performance of the functions of that agent is to be considered as an act of the organization, whatever position the agent holds in respect of the organization. It could possibly be argued that the prosecuting authorities and courts of an EU Member State should be considered to be the agents of the EU when dealing with an alleged offence by an EU vessel in a non-member State's EEZ, given that the EU has no competence to take criminal proceedings itself. However, a national prosecuting authority or court does not fit easily within the definition of "agent" in Article 2(d) of the Draft Articles on the Responsibility of International Organizations, which defines an "agent" as "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts." Furthermore, in its commentary on Article 6, the ILC notes that an agent may be "seconded" by a State, which again suggests that a national prosecuting authority or national court does not fall within the concept of an agent. The second possibly relevant draft article on attribution is Article 7. This provides that "the conduct of an organ of a State" shall be considered as the act of an international organization if the latter "exercises effective control over that conduct." Although EU Member States are required by EU law to "control . . . [and] take enforcement measures relating to the fishing activities outside Community waters of Community fishing vessels flying their flag . . . includ[ing] investigation, legal pursuit of infringements and sanctions,"[113] the prosecuting authorities and courts of an EU Member State could hardly be said to be under the "effective control" of the EU when taking such action.

80. If actions by the prosecuting authorities and courts of an EU Member State against one of that State's fishing vessels alleged to have breached a non-member State's fisheries legislation are to be attributed to the EU, rather than straining the provisions of Articles 6 and 7 of the ILC's Draft Articles to establish attribution, it may be more fruitful to look at any special rules that apply to the liability (responsibility) of the EU. Article 64 of the ILC's Draft Articles on the Responsibility of International Organizations provides that the Draft Articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization . . . are governed by special rules of international law." It appears that there is such a special rule in the case of the EU. According to the ILC, the Commission of the EU has stated that the conduct of Member States "when they implement binding acts" of the EU "would have to be attributed to the EU."[114] A similar position has been taken by dispute settlement panels of the WTO. In one case a panel accepted the then EC's "explanation of what amount to its *sui generis* domestic constitutional

[112] See the EU's declaration on formal confirmation of its signature of the LOSC, note 97 above, where it is stated that matters within the exclusive competence of Member States include "the enforcement of penal and administrative sanctions."

[113] Reg. 2371/2002, Arts. 23(2) and 24. "Community" in these provisions should now be read as "Union".

[114] ILC Draft Articles on the Responsibility of International Organizations, Commentary on Article 64, para. 2.

arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general.'" [115] While the actions of the prosecuting authorities and courts of an EU Member State in respect of one of that State's vessels alleged to have breached a non-member State's fisheries legislation is hardly the same as implementing a binding EU act, it is perhaps sufficiently analogous that the same principle should apply, namely that the EU should be regarded as liable.

C. The consequences of the liability of an international organization

81. Where an international organization has incurred liability for breach of its obligation to ensure that the vessels of its member States comply with the laws and regulations of a non-member State when fishing in its EEZ, the consequences will be the same, *mutatis mutandis*, as those for a flag State that has incurred liability for breach of the same obligation. This is because the ILC's Draft Articles on the Responsibility of International Organizations parallel its Draft Articles on State Responsibility as far as this question is concerned. Thus, the international organization is required to put an end to the breach of its obligation and to make reparation, which will probably take the form of compensation and/or satisfaction.[116] The coastal State will be able to invoke the responsibility of the organization and claim reparation from it and/or take countermeasures.[117]

IV. The possible liability of a member State of an international organization whose vessels have fished illegally within the EEZ of a non-member State

82. The question arises to whether a member State of an international organization is also liable where one of its vessels has fished illegally in the EEZ of a non-member State where its access to that EEZ was pursuant to an access agreement between the international organization and that coastal State. It is submitted that insofar as breach of the obligation to ensure that vessels having the nationality of a member State of an international organization comply with the coastal State's laws and regulations results from conduct relating to matters which fall within the area of exclusive competence of that organization, only the organization, and not its member States, is liable. Any other position would undermine the organization's exclusive competence and affect the distribution of competences between the organization and its member States. This approach also accords with one of the basic principles of the ILC's Draft Articles on the Responsibility of International Organizations, that in general the member States of an international organization are not liable (responsible)

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[115] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Report of the Panel, WT/DS/174/R (2005), para. 7.725. A similar position was taken by the panel in *European Communities – Measures affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS/291-3/R (2006), para. 7.101. For further examples of practice supporting the position put forward here, see F. Hoffmeister, "Litigating against the European Union and its Member States: Who responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 723.

[116] ILC Draft Articles on the Responsibility of International Organizations, Arts. 30, 31 and 34-37.

[117] ILC Draft Articles on the Responsibility of International Organizations, Arts. 43 and 51-56.

if that organization commits an internationally wrongful act.[118] Conversely, it is submitted that insofar as breach of the obligation to ensure that vessels having the nationality of a member State of an international organization comply with the coastal State's laws and regulations results from conduct relating to matters which fall within the area of exclusive competence of that member State,[119] and insofar as such as breach cannot be attributed to the organization (as was suggested above, might be possible in the case of the EU), only that State, and not the organization, is capable of bearing liability under international law. Any other position would undermine the member State's exclusive competence and affect the distribution of competences between the member States and the organization.[120] The two propositions put forward here are reflected in Article 6(1) of Annex IX of the UN Convention on the Law of the Sea. This provides that "parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or any other violation of this Convention." Article 5 in turn provides that when becoming parties to the Convention, an international organization and its member States shall each make declarations "specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States." Article 5 also provides that member States of an international organization that is a party to the Convention are presumed to have competence over all matters governed by the Convention in respect of which transfers of competence to the organization have not been declared.

83. One qualification to the position stated in the preceding paragraph should be made. This is where the failure of a flag State member of an international organization to prosecute one of its vessels for illegal fishing in the EEZ of a third State amounts to breach of the obligation to ensure compliance with the coastal State's laws: if, contrary to what was suggested above was the position in the EU, such a failure cannot be attributed to that organization, the flag Member State would be liable. But the international organization might also be liable if breach of the duty to ensure compliance also resulted from its failure to take required measures that fell within its competence, such as the failure to have a system of authorization of fishing vessels in place. In that situation both the flag Member State and the organization would be liable.

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[118] ILC Draft Articles on the Responsibility of International Organizations, Commentary on Article 62, paras. 2-7. The Draft Articles, in Articles 58-62, contain some exceptions to the general principle stated here, but discussion of those provisions, which generally deal with rather unusual and atypical situations, lies beyond the scope of this submission.

[119] In the case of the EU, it follows from earlier discussion (see para. 81) that there are few fisheries matters that are within the exclusive competence of the Member States. According to the declaration made by the EU when confirming its signature of the UN Convention on the Law of the Sea (see note 88), fisheries matters within the exclusive competence of Member States comprise "measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions." The latter do cover an aspect of the obligation to ensure compliance. However, if the failure to take administrative or criminal proceedings against vessels that are reasonably suspected of having violated the coastal State's laws and regulations can be attributed to the EU, as was argued may be the case in para. 82 above, then only the EU, and not the Member State, will be liable.

[120] Articles 14-17 of the ILC's Draft Articles on the Responsibility of International Organizations set out certain situations where an international organization may incur liability in respect of the commission by a member State of an internationally wrongful act. Discussion of those provisions, which generally deal with rather unusual situations, is beyond the scope of this submission.

84. The preceding two paragraphs dealt with the question of liability (responsibility) in respect of matters where either an international organization or its member States have exclusive competence. That leaves the situation relating to matters where competence is shared between an international organization and its member States. Although that situation is quite common in the EU, there are no matters of shared competence that are relevant to the obligation to ensure compliance. The possibility of competence being shared between an international organization and its member States does not appear to be envisaged by the UN Convention on the Law of the Sea and is not explicitly addressed by the ILC's draft articles.[121] It is therefore unnecessary to discuss the issue of liability where competence is shared any further here.

IV. Conclusion

85. Question 3 is concerned with the liability of an international organization where fishing vessels having the nationality of member States of that organization, fishing within the EEZ of a coastal State not a member of that organization under a license obtained within the framework of an access agreement between that organization and that coastal State, violate the laws and regulations of the coastal State. The international organization will not be liable for that illegal fishing as such. However, such illegal fishing may indicate a breach of the obligation of the organization, flowing either from customary international law or the provisions of an access agreement, to ensure that its vessels comply with the coastal State's laws and regulations. If there is a breach of that obligation, the organization will be liable. Where aspects of the obligation to ensure compliance fall within the competence of a member State of that organization, and cannot be attributed to the organization, that member State will be liable instead of the organization or will be liable together with the organization if the latter has failed to ensure compliance in relation to matters falling within its competence. In either case, liability involves a requirement to put an end to the breach of the relevant obligations and make reparation, which will probably take the form of compensation and/or satisfaction. The coastal State will be able to invoke the liability of the international organization or the flag member State, as the case may be, and claim reparation from it and/or take countermeasures.

[121] The Draft Articles on the Responsibility of International Organizations do, however, include several provisions that envisage situations, generally rather unusual ones, where both an international organization and its member States may have responsibility: see Arts. 14-18 and 58-62.

CHAPTER 5

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?

I. Introduction

86. In considering coastal State rights and obligations tied to the sustainable management of fish stocks, it is apparent that Question 4 has eight distinct analytical aspects. First, two different types of fisheries are implicated by the question: those that are comprised of shared stocks[122] and those that include stocks of common interest.[123] Second, the question posed concerns coastal State rights and obligations related to these two types of stocks in general terms, but it also queries rights and obligations (if any) as they especially relate to small pelagic species[124] and tuna.[125] Third, the question seeks an answer about both rights and obligations. Finally, the division of ocean space into the EEZ and the high seas beyond must be accounted for in outlining applicable rights and obligations. In Question 4 the Tribunal is only concerned with the EEZ.

87. In addition, the Tribunal should be attuned to the situation of developing coastal

[122] MCA Convention, Art. 2(12) (Shared stocks are "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".) It is apparent that this definition encompasses stocks covered by both Articles 63(1) and 63(2) of the LOSC. In this Written Statement, stocks covered by Article 63(2) are referred to as "straddling stocks" per customary usage and stocks covered by Article 63(1) are called "joint stocks" in order to distinguish them from the broader term "shared stocks" as it is used in the MCA Convention.

[123] So far as we are aware, the term "stocks of common interest" is not in common usage. It is found in the SRFC Technical Note (p. 3) to signify "the presence of transboundary fish stocks and fish stocks of common interest" being of "great benefit" to SRFC Member States. As such, it appears to refer to stocks that SRFC Members catch or have licensed third State vessels to catch. That presumably includes all EEZ resources, as well as straddling fish stocks and highly migratory fish species. Thus, there is a fair bit of overlap between the terms "shared stocks" and "stocks of common interest".

[124] The term "small pelagic species" can be defined as "a diverse group of mainly planktivorous fishes that share the same habitat, the surface layers of the water column, usually above the continental shelf and in waters not exceeding 200 meters in depth". P.J. Dalzell, "Small Pelagic Fishes" in A. Wright & L. Hill, eds., *Nearshore Marine Resources of the South Pacific* (1993), 97, at 98. So far as we are aware, no international fisheries instrument is specifically dedicated to such species or makes special provision(s) for them as such. See further P. Fréon, P. Cury, L. Shannon & C. Roy, "Sustainable Exploitation of Small Pelagic Fish Stocks Challenged by Environmental and Ecosystem Changes: A Review" (2005) 76 *Bulletin of Marine Science* 385-462.

[125] Tuna is a highly migratory species covered by Annex I of the Convention and the coastal State is subject to LOSC Article 64. Tuna is also monitored and managed by the Commission for the Conservation of Southern Bluefin Tuna; Inter-American Tropical Tuna Commission; the International Commission for the Conservation of Atlantic Tunas (ICCAT); Indian Ocean Tuna Commission; and the Western and Central Pacific Fisheries Commission under their respective constituent instruments. The waters off the coasts of SRFC member States fall within the geographic area covered by the ICCAT. See further Tuna.org at: http://www.tuna-org.org/ (an informal framework for sharing information from the tuna bodies mentioned in this note).

States.[126] In particular, recognizing the special relationship between the fisheries, developing States, sustainable development, and human rights is particularly apt in the context of SRFC Member States. Paragraph 169 of the Rio+ 20 Declaration, The Future We Want, in order to enhance capacity and effectiveness, recently highlighted the need to fully account for the special requirements of developing States under Part VII of the Fish Stocks Agreement (FSA). Moreover, sustainable development is closely linked to healthy fisheries not only for providing a means of subsistence for a large part of the world, but also in meeting the rights to food and self-determination.

88. The legal task that Question 4 poses for the Tribunal is helpfully outlined in the SRFC Technical Note of March 2013. The SRFC seeks an answer to Question 4 that "is aimed at supporting the SRFC Member States to enable them ... to derive the greatest benefit from the effective implementation of *the relevant international legal instruments* and at ensuring that the challenges they are facing from IUU fishing are better met." (p. 6)(emphasis added). The Technical Note highlights that these instruments have promoted a "fast-changing regional and international legal environment" for international fisheries regulation, especially since 1993 (p. 4) and refers to the contribution that the Tribunal can make to bring clarity to the situation by virtue of its advisory function. For the SRFC, it would be "particularly useful for the SRFC Member States to know precisely what their rights and obligations are" under these instruments (p. 6).

89. The Technical Note highlights a number of relevant international instruments related to the SRFC request of an advisory opinion, but the relevant instruments of concern for Questions 4 and the sustainable management of joint, straddling and highly migratory stocks are more limited. They include: 1) LOSC,[127] 2) Fish Stocks Agreement [128]; 3) the Code of Conduct, 4) IPOA-IUU 5) the Johannesburg Declaration on Sustainable Development (Declaration on SD) and the accompanying Plan of Implementation (PoI)[129]; and 6) the

[126] We do not contend that fisheries conservation and management obligations of States are subject to differentiated responsibilities. Instead, the nature of these obligations requires uniformity in performance, much like the obligations of States sponsoring activities in the Area. See *Advisory Opinion*, paras. 151-163. As highlighted above, this does not mean that the special situation of developing countries can be ignored. Indeed, effective implementation of developing country coastal State obligations requires that their needs be addressed as recognized by the Convention and FSA.

[127] As of 18 September 2013, all seven Member States of the SRFC are parties to the Convention. See Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, Table recapitulating the status of the Convention and of the related Agreements, as at 18 September 2013 (Hereinafter "Status Table), available at: http://www.un.org/depts/los/reference_files/status2010.pdf.

[128] As of 18 September 2013, two Members States of the SRFC have ratified the Fish Stocks Agreement (Guinea and Senegal). Two Members States have signed (Guinea-Bissau and Mauritania) the Agreement and are bound by the customary obligation not to engage in acts that would defeat the FSA's object and purpose. ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p 247 (Art. 18 of the Vienna Convention on the Law of Treaties does not apply directly because neither Guinea-Bissau nor Mauritania are parties to that Convention). The remaining three SRFC Members States (Cape Verde, the Gambia, and Sierra Leone) are non-parties. See Status Table, *supra*, n 127.

[129] Report of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20 (26 August – 4 September 2002).

Agreement on Port State Measures to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSM Agreement).[130] Each of these instruments is addressed in turn below.

90. A final preliminary aspect bearing on the answer to Question 4 concerns the opposability of rights and invocation of responsibility. Naturally, the international rights and obligations for any particular coastal State will be entailed, in part, in applicable customary international law and general principles of law. More importantly for present purposes, however, are the plethora of treaty rights and obligations in play. These treaty rights and obligations will generally be limited by the doctrine of *pacta tertii* and will not entail obligation or confer rights on third parties outside of limited formal exceptions [131] or their passage "into the general corpus of international law".[132]

II. The rights and obligations of the coastal State in ensuring sustainable management of joint, straddling, and highly migratory stocks

A. Preliminary considerations

91. At a fundamental level, all States have a profound responsibility for the preservation and care of the oceans and its living resources underlies the rights and obligations of the coastal State in ensuring the sustainable management of joint, straddling, and highly migratory stocks. This responsibility implicates a stewardship of the seas on the part of States and is written into Article 192 of the Convention, which provides that "States have the obligation to protect and preserve the marine environment".[133]

92. It is worth considering the language of Article 192 in more detail. The key normative word "obligation" connotes the duty of a State to take affirmative action or refrain from action in relation to the verbs "protect" and "preserve".[134] These two terms, in turn, reinforce

[130] Agreement on Port State Measures to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Ref. No. 37 (not in force). As the SRFC notes, the MCA Convention incorporates the PSM Agreement's main principles and is binding on all SRFC Member States. See ITLOS Technical Note, at 5, part IV, para. 1.

[131] Vienna Convention, Arts. 26, 34-38 *Pacta tertii* is an aspect of the Vienna Convention long recognized as custom. See G.G. Fitzmaurice, "Fifth Report on the Law of Treaties" [1960] YBILC, vol. II, at 84 [10].

[132] *North Sea Continental Shelf Cases* (FRG v. Denmark; FRG v. Netherlands) [1969] ICJ Rep. 3, 41-45 (Judgment)(recognizing that a treaty provision that is of a "fundamentally norm-creating character", contained in a widely ratified law-making treaty, can constitute "a general rule of international law" binding "of itself", even on non-parties).

[133] In the view of a number of eminent publicists, Art. 192 reflects an identical customary international law obligation binding on parties outside the Convention. See Philomene Verlaan, "Geo-engineering, the Law of the Sea and Climate Change" (2009) 4 *Carbon & Climate L. Rev.* 446, 449, n 15. Part XI of the Convention, involving the "common heritage", also raises the concept of an ocean custodianship for mineral resources.

[134] It is worth noting that the term "ensure" (or other similar "soft" language) does not hedge or condition this obligation and, thus, it is likely that it constitutes an obligation "of result" and not of "conduct". See *Advisory Opinion,* para. 110 (p. 22-23).

each other and imply an intergenerational duty to ensure that processes necessary for ocean health are maintained and continue forward for posterity. Finally, the phrase "marine environment" comprehends, in an expansive fashion, all aspects and features of the oceans – the seabed, subfloor, water column, and all their resources, and the artificial legal constructs of maritime zones. Article 192, then, through the idea of trusteeship, sets the stage for more specific coastal State rights and obligations in relation to the sustainable management of all fish stocks.

93. A second fundamental feature that underlies the rights and obligations to ensure sustainable management of stocks is the duty of all States, including the coastal State, to cooperate in respect of straddling stocks and highly migratory species. This duty is imposed on parties to the Convention[135] and parties to the Fish Stocks Agreement. Beyond treaties, though, the duty to cooperate in good faith is an ancient norm of international law[136] and is reflected in Article 1(3) of the United Nations Charter.[137] In relation to the sustainable management of joint, straddling, and highly migratory stocks, the duty to cooperate is said to be an obligation resting on all states as a matter of customary international law.[138] The duty to cooperate is the essential guiding principle for the effective sustainable management of any shared natural resource and its content in the context of fish stocks is fleshed out more fully below in light of specific rights and obligations.

94. Finally, it is well to remember that the law of the sea continues to develop and evolve its normative posture on the imperatives of conservation of living resources.[139] As the

[135] LOSC, Arts. 63 and 64.

[136] See Peter H. Sand, "The Evolution of International Environmental Law" in D. Bodansky, J. Brunneé & E. Hey,eds., *Oxford Handbook of International Environmental Law* (2006), pp. 31-32. See also *The MOX Plant Case (Ireland* v. *United Kingdom)* ITLOS Reports 2001, p. 95, para. 82.

[137] Charter of the United Nations and Statute of the International Court of Justice (1945), vol. I, p. 3. See also Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (24 October 1970).

[138] See Rosemary Rayfuse, "Countermeasures and High Seas Fisheries Enforcement" (2004) 51 *Neth. Int'l L. Rev.* 41, 57-59; Rosemary Rayfuse, "To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries" (2005) 20 *Int'l J. Marine & Coastal L.* 509, 525; Andrew Serdy, "Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?" (2010) 15 *Ocean & Coastal L.J.* 23, 26-27. See also Art. 4, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, vol. II, p. 155 (with Commentary).

[139] The Convention itself recognizes that it is a "living" instrument in a number of places by allowing recourse to be had to subsequent international legal developments outside the Convention. Article 293, for example, in providing applicable law for the Tribunal, allows recourse to "other rules of international law" outside the Convention that are not incompatible with the Convention. This allows the Tribunal to take an evolutionary interpretation to the Convention, similar to that of human rights courts. See *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89 (23 March 1995), at para. 71 ("the Convention is a living instrument which must be interpreted in the light of present day conditions" and "cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago"). See also the Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 (1 October 1999), at para. 115 and the concurring opinion of A.A. Cançado in the same case, at para. 10.

International Court of Justice (ICJ) highlighted in the 1974 *Fisheries Jurisdiction Case* (UK v. Iceland):

> [i]t is one of the advances in maritime international law resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea ... has been replaced by a recognition of a duty to have due regard to ... the needs of conservation for the benefit of all.[140]

As highlighted in paragraph 143 below, the continuing collapse of fishery after fishery around the world raises a urgent necessity to go much further than the 1974 jurisprudence of the ICJ. Rather than "due regard", what the essential interest of the international community requires today is a duty to take the action necessary to save the living resources of the sea.

B. The LOSC and the duty to cooperate to conserve fisheries

95. Article 56(1)(a) of the Convention establishes the sovereign rights of the coastal State over the living resources in the 200 nautical mile EEZ "for the purpose of exploring and exploiting" and "conserving and managing" these resources. Under Articles 63 and 64, the living resources referred to in Article 56(1) include joint, straddling, and highly migratory stocks that are present in the EEZ. Further, under Article 56(1)(b)(iii) the coastal State exercises jurisdiction over "the protection and preservation of the marine environment" required by Article 192 within the EEZ.

96. The Convention makes clear that the sovereign rights of the coastal State to "explore and exploit" living resources in the EEZ are not absolute. Instead, they are tempered by Article 193, which affirms the sovereign rights of coastal States to exploit their resources, but only "in accordance with their duty to protect and preserve the marine environment". Additionally, under Articles 56(1)-(2), the right to exploit is "qualified" by a number of paramount obligations of cooperation in the conservation and management of common stocks found in the EEZ as detailed below. That a costal State's conservation and management obligations are, and must be, paramount to exploitation rights in the context of Question 4 is confirmed by the fact that right to exploit "common pool" resources like joint, straddling, and highly migratory stocks is ultimately rendered nugatory without such overriding obligations.[141]

97. Moreover, the sovereign rights of the coastal State over the natural resources of the EEZ is limited by other treaties, customary international law, and general principles that govern the sustainable use of resources, the protection of biological diversity, and the

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[140] *Fisheries Jurisdiction Case* (UK v. Iceland), [1974] ICJ Reports 3, 32.

[141] The classic authority is Garret Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243-1248. In this sense, the need to conserve and protect the marine environment and its resources in order to foster their sustainable use is similar to the connection between the environment and human rights. In both cases, "[t]he protection of the environment is ... a *sine qua non*" for the other "as damage to the environment can impair and undermine" the existence of the other. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (Judgment) [1997] ICJ Rep. 4, 88-89 (Vice-President Weeramantry).

preservation of the environment.[142] Article 2(3) makes clear that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". Under Article 56(2), in the EEZ the coastal State must have "due regard to the rights and duties of other States".

1. Major conservation rights and obligations

98. What, then, are the conservation and management obligations of coastal States? Article 61 provides the primary framework. Under Article 61(1), the coastal State has both a right and duty to "determine the allowable catch" (TAC) of all living resources found in the EEZ. The singular purpose of the TAC is to limit unsustainable exploitation and, thus, promote conservation.[143]

99. Article 61(2) specifically requires the coastal State to ensure that EEZ living resources (including joint, straddling, and highly migratory stocks) are not endangered by over-exploitation. Over-exploitation is prohibited by Article 61(2), at least to the extent it threatens "the maintenance of the living resources in the [EEZ]".[144] In order to meet this duty to prevent over-exploitation, the coastal State must adopt "proper conservation and management measures"[145] based on "the best scientific evidence available".[146] To this end, the coastal State must cooperate, as appropriate, with competent international organizations, including scientific bodies and RFMOs.

100. Under the Convention, the coastal State, cooperating where required by the Convention, has significant power to decide what "proper conservation and management measures" for the EEZ are dictated by each stock considered. Article 62(4) provides an indicative list of possible measures and "other terms and conditions" that the coastal State can establish through municipal legislation. These include: licensing (individuals and vessels);

[142] To give an example, ITLOS took account of the post Convention development of the precautionary approach in the *Southern Bluefin Tuna Cases*, paras. 77-79 and in *Advisory Opinion*, paras. 131-135. *See also Southern Bluefin Tuna Cases* (Judge Laing), paras. 16-19; (Judge Treves), para. 9.

[143] There is some debate about whether or not Article 61(1) requires that a TAC be established for every fish stock within the EEZ. The language seems to indicate this is so. For a contrary view, see W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), p. 46. In any event, as discussed below, it is certain that if a TAC had not been established for a stock that an outside state was interested in fishing as a surplus stock in the EEZ, the coastal State would be bound to establish a TAC or be subject to conciliation under Article 297(3)(b)(ii).

[144] D.R. Christie, "It Don't Come EEZ: The Failure and Future of Costal State Fisheries Management" (2004) 14 *Journal of Transnational Law & Policy* 1, 10 ("the clearest obligations created for coastal States by Article 61 is the duty to prevent overexploitation"). As explained below, in the face of uncertainty, rates of exploitation must by precautionary in nature.

[145] "Proper" conservation and management measures can be thought of as those which are appropriate for the stock in question and are necessary and sufficient to ensure that over-exploitation does not occur. In other words, proper measures are those that are effective in keeping exploitation at safe levels. Again, as explained below, in the face of uncertainty, proper measures must also be precautionary in nature.

[146] It is worth remembering that the FAO warns States that stocks that are fully exploited are at risk of being over-exploited unless strict management measures are expeditiously implemented. FAO, *State of the World Fisheries and Aquaculture 2012* (2012), at 53.

fees; quotas; minimum sizes; area, time, and gear restrictions; and monitoring and enforcement procedures.[147]

2. Associated and dependent species

101. Article 61(4) requires the coastal State, when taking conservation and management measures, to "take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened". The general reference to "effects on species", without more, clearly signals that the complex biological relationships between stocks (targeted, associated and dependent) must be taken into consideration. This goes beyond a simple look at the occurrence of bycatch or incidental catch. In other words, to consider the "effects on species" is one part of what today is called an "ecosystem approach".[148] Article 61(4) seeks to maintain the viability of associated and dependent species which are not commercially exploitable and in so doing provides protection for these species and their role within the marine ecosystem of which they are a part. This broad meaning of the phrase "effect on species" in Article 61(4) -- and its logical implications -- is confirmed by reading the words of Article 61(4) "in their context and in the light of" the Convention's "object and purpose."[149]

102. Starting with the Convention's object and purpose, ~~as~~ the Preamble to the Convention recites as one of its central objects "establishing … a legal order for the seas and oceans which will facilitate … the conservation of their living resources, and the study, protection and preservation of the marine environment". This is clearly supported by the fundamental obligation to protect and preserve the marine environment in Article 192. Thus, two central objectives of the Convention – conservation and environmental protection – provide clear support for the broad reading of Article 61(4).

103. Looking at the context of Article 61(4), in addition to the Preamble and Article 192 already mentioned, the text of the Convention also provides in Article 61(3) that the conservation and management measures mandated by Article 61(2) take into account "the interdependence of stocks" in determining maximum sustainable yield (MSY) as discussed below. Moreover, Article 194(5) obliges all States, including coastal States, to take measures "necessary to protect and preserve rare or fragile ecosystems as well as habitat for depleted, threatened or endangered species and other forms of marine life". Accordingly, it appears clear that the Convention ought to extend coastal State obligations under Article 61(4) to encompass ecosystem management in so far as associated and dependent species are threatened.

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[147] For further examples of conservation and management measures, see *Fisheries Jurisdiction* (Spain v. Canada), Judgment (Jurisdiction) [1998] ICJ Rep. 432, 461, para. 70.

[148] The ecosystem approach finds support in the obligations of coastal States party to the Convention on Biological Diversity. See further, *infra*, at paras. 101, 110 and 113 and accompanying notes.

[149] Vienna Convention, Art. 31(1). Under Art. 31(2), context includes the text of the treaty as a whole.

3. Surplus stock

104. Articles 62(2), 69(3) & 70(4) combine to require that coastal States allow other States – especially developing, landlocked, and geographically disadvantaged States – to harvest surplus stocks in the EEZ. If the harvesting capacity of the coastal State approaches a point that would allow it to harvest the entire TAC in the EEZ, then the coastal State must cooperate in the establishment of equitable arrangements that will allow developing, landlocked, and geographically disadvantaged States to participate in the EEZ fisheries.

4. Information sharing

105. Because conservation and management measures are to be based on the best scientific evidence available, Article 61(5) obliges coastal States, and other states fishing in a coastal State's EEZ, to cooperate by contributing and exchanging scientific information and data on a regular basis, including with international organizations where appropriate.[150]

5. Maximum sustainable yield

106. Article 61(3) is explicit that MSY is to serve as the objective for the conservation and management measures required by Article 61(2). MSY is not defined in the Convention, but it has been taken to mean the biggest annual catch that can be sustained continuously over time.[151] Even before the adoption of the Convention this sort of view of MSY had been widely criticized[152] because of the real difficulty in determining MSY in the face of uncertainty, full exploitation, or even declining stocks.[153] The Tribunal might take this opportunity to provide certainty to the parties about the meaning of MSY in the face of the continuing collapse of fisheries worldwide. Such an interpretation should accord with the conservation, protection, and preservation obligations in the Convention.

107. Under Article 61(3), the coastal State must design EEZ conservation and management measures that will "maintain or restore populations of harvested species at levels that produce a maximum sustainable yield". Even without the Tribunal's interpretive guidance as to the meaning of MSY, Article 61(3) establishes a number of "qualifications" to the allowable harvest size under a MSY determination. From a conservation perspective, the extent of a

[150] Article 61(5) obliges all coastal States sharing a joint stock to cooperate with a flag State whose vessels are allowed to fish within the EEZ of a single coastal state. Even further, the obligation does not appear to be confined by the language of Article 61(5) to cases of fisheries for straddling, joint, or highly migratory stocks, although this may be implicit in the use of the term "as appropriate".

[151] See S.M. Kaye, *International Fisheries Management* (2001), 50-51.

[152] It has long been recognized that using an unbridled MSY as the primary objective of fisheries management involves a number of conservation disadvantages including a stock's vulnerability to collapse where environmental conditions impact the stock being MSY managed. See J.R. Beddington & R.M. May, "Harvesting natural populations in a randomly fluctuating environment" (1977) 197 *Science* 463-65.

[153] M. Markowski, "The International Legal Standard for Sustainable EEZ Fisheries Management" in G. Winter, ed., *Towards Sustainable Fisheries Law: A Comparative Analysis* (2009), 3, 29; R. Barnes, "The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?, in D. Freestone, R. Barnes & D.M. Ong, eds., *The Law of the Sea: Progress and Prospects* (2006), 233, 243.

MSY is explicitly "qualified" by relevant "environmental factors" and "generally recommended international minimum standards" approved at the global, regional, or sub-regional level.

108. These qualifications on MSY, and others under Article 61(3), such as "the economic needs of coastal fishing communities and the special requirements of developing states" cannot be used to undermine the coastal State obligation to ensure that the maintenance of stocks is not "endangered by over-exploitation" under Article 61(2). In other words, the flexibility provided by these qualifications to MSY is directed at setting catch levels within the limits of MSY. In cases where environmental qualifications are paramount, catch levels will be lower than MSY.

109. In no case, however, can the qualifications under Article 61(3) be used as a pretext to set catch levels above MSY.[154] Indeed, the very definition of a "qualification" in this context, whether it is environmental or economic, requires that its application can only result in a harvest size lower than what unbridled MSY would otherwise permit. Something that is qualified is something that is subject to "a condition which limits".[155] Prima facie, then, levels of harvesting in excess of MSY that rely on Article 61(3) qualifications are contrary to the obligation set out in Article 61(3). Common sense confirms this. Allowing harvest levels beyond MSY would directly counteract, through overexploitation, "measures ... designed to maintain or restore" stocks at levels that can in fact "produce the maximum sustainable yield". Moreover, as detailed below, MSY under the FSA is a "minimum standard" for limit reference points and requires harvest levels to be set below MSY at levels ordinarily lower than that even allowed under the Convention.[156]

110. The relevant "environmental factors" referred to in Article 61(3) that serve to "qualify", and therefor limit, the size of MSY harvests are not specified in the Convention beyond the non-exclusive list in Articles 61(3) and 61(4): "fishing patterns", "interdependence of stocks", and harvest effects on "associated" and "dependent" species. Other "environmental factors" of importance in the contemporary management of fisheries that the coastal State should consider include: habitat and ecosystem components and their interactions, food web implications, trophic levels, and prey-predator relationships.[157]

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[154] Indeed, the view of a number of fishery bodies appears to be that MSY should be set conservatively as a matter of course. *See e.g.,* Mid-Atlantic Fishery Management Council , *Evolution to an Ecosystem Approach to Fisheries* (March 2006), at 27, available at: http://mafmc.squarespace.com/s/Ecosystem-Report.pdf; Western and Central Pacific Fisheries Commission, *Draft Final Report of the Preparatory Conference, vol. III* (2004), at 19, available at: http://www.wcpfc.int/system/files/Vol_III.pdf.

[155] *Ballentine's Law Dictionary* (3rd ed., 1969), at 1033. The Oxford English Dictionary defines "qualified" similarly: "Limited or modified; having some qualification or restriction attached; conditional or partial". Oxford English Dictionary, "qualified, adj. and n.", definition 5b, OED Online. September 2013. Oxford University Press. http://www.oed.com/view/Entry/155867 (accessed October 31, 2013).

[156] D. Nelson, "The Development of the Legal Regime of High Seas Fisheries" in A. Boyle & D. Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 113, 126-27.

[157] See generally B. Gosh & T.K. Kar, "Possible ecosystem impacts of applying maximum sustainable yield policy in food chain models" (2013) 329 *Journal of Theoretical Biology* (21 July), 6-14.

111. Additionally, in taking required conservation and management measures, Article 61(3) requires the coastal State to take into account any existing international minimum standards that have been recognized globally, regionally, or sub-regionally in setting MSY. The 1995 FAO Code of Conduct and FAO International Plans of Action are two major sources of these minimum standards. We note that the UN General Assembly has repeatedly declared that the "Code of Conduct for Responsible Fisheries … and other related instruments, including the international plans of action" like the IPOA-IUU "set out principles and global standards of behavior for responsible practices for conservation of fisheries resources and the management and development of fisheries".[158] Further, the Outcome Document of the 2012 UN Conference on Sustainable Development, "The Future We Want", states that implementation of the Code of Conduct is "required at all levels" by States.[159] It also recommits States to eliminate IUU fishing as advanced in the Plan of Implementation adopted by the Johannesburg World Summit on Sustainable Development in 2002 by developing and implementing national and regional action plans in accordance with the IPOA-IUU[160] that entail effective and coordinated measures by coastal States, flag States, port States, chartering nations and the States of nationality which identify vessels engaged IUU fishing and deprive offenders of the benefits accruing from it.

112. The consensus-based and repeated support by the international community for the FAO Code of Conduct and IPOA-IUU convincingly establishes them as sources of "international minimum standards" that must be taken into account under Article 61(3). International standards found in these instruments are numerous. They include the need to ensure that conservation and management measures provide that:

- excess fishing capacity is avoided and exploitation of the stocks remains economically viable;
- the economic conditions under which fishing industries operate promote responsible fisheries;
- the interests of fishers, including those engaged in subsistence, small-scale and artisanal fisheries, are taken into account;
- biodiversity of aquatic habitats and ecosystems is conserved and endangered species are protected;
- depleted stocks are allowed to recover or, where appropriate, are actively restored;
- adverse environmental impacts on the resources from human activities are assessed and, where appropriate, corrected; and
- pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non- fish species, and impacts on associated or dependent

[158] See the General Assembly resolutions set out at n. 186 *infra*. Other international plans of action include the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, the International Plan of Action for Conservation and Management of Sharks, and the International Plan of Action for the Management of Fishing Capacity. FAO, International Plans of Action, available at: http://www.fao.org/fishery/code/ipoa/en.

[159] Id. at paras. 158-177, Report of the United Nations Conference on Sustainable Development, U.N. Doc. A/CONF.216/16 (20-22 June 2012), 30-34, at 32-33.

[160] Id. at paras. 30-36, Report of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20* (26 August – 4 September 2002), 22-27, at 23-24.

species are minimized, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques; and

- assessment be made of the impacts of environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks, and assess the relationship among the populations in the ecosystem.[161]

113. International minimum standards also include an ecosystem approach to fisheries conservation and management, including in setting MSY, that needs to be taken into account. Starting in 1976, the IUCN, in its "Principles Replacing Maximum Sustainable Yield as a Basis for Management of Wildlife Resources" referred instead to the maintenance of ecosystems in a state that ensures that both consumptive and non-consumptive values are realized on a continuing basis.[162] More importantly, however, Regional Fisheries Management Organizations (RFMOs) and Regional Seas Agreements have increasingly adopted an ecosystem approach and demonstrate that state practice acknowledges the approach as a best practice minimum standard today.[163] Such an approach entails strategic environmental assessments, marine protected areas, and modern governance norms including participation, transparency and accountability.[164]

6. Joint, straddling, and highly migratory stocks

114. The coastal State's duty to cooperate in the conservation and management of joint, straddling, and highly migratory stocks is further specified in Articles 63 and 64.

115. Article 63 of the Convention deals with joint stocks and straddling stocks (and stocks of associated species). These are stocks that are found within one coastal State's EEZ and which "straddle" the EEZs of other coastal States, or an adjacent area of high seas in which other distant-water fishing States are exploiting such stocks. Article 63(1) addresses joint stocks and requires coastal States that share stocks across EEZs to "seek, either directly or through appropriate subregional or regional organizations, to agree upon measures necessary to co-ordinate and ensure the conservation and development" of these stocks.

116. Article 63(2) establishes a basic obligation to cooperate on coastal States that share straddling stocks and with States fishing for such a stock in a high seas area adjacent to the EEZ(s) of the coastal State(s). It does this by explicitly insisting that these States shall

[161] Art. 7.2.2, FAO, Code of Conduct for Responsible Fisheries (1995), p 10.

[162] IUCN Resolution No. 8, 12th General Assembly of IUCN (1976).

[163] See the ecosystem approaches found under the Convention on the Conservation of Antarctic Marine Living Resources; Convention for the Protection of Natural Resources and Environment of the South Pacific Region, art. 14; Convention for the Protection of Marine Environment of the North East Atlantic, Annex V. For regional seas agreements see *The International Legal Regime of the High Seas and the Seabed beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas in Marine Areas Beyond National Jurisdiction*, Convention on Biological Diversity Technical Series no. 19 (Nov. 2005).

[164] See M.P. Sissenwine & P.M. Mace, "Governance for Responsible Fisheries: An Ecosystem Approach" in M. Sinclair & G. Valdimarsson, eds., *Responsible Fisheries in the Marine Ecosystem* (2003), chap. 21

negotiate, *inter alia*, either directly or through a regional or sub-regional fishing management organization (RFMO), an agreement on measures necessary to conserve straddling stocks found within the EEZ and adjacent areas of high seas.

117. It is clear, then, that Articles 63(1) and 63(2) require the coastal State to "seek to" reach agreement on measures necessary for the effective conservation of joint and straddling stocks. The Convention, however, does not specify the nature of these conservation measures and leaves these for the determination of States in the context of particular fisheries. The Convention is also silent about what is to happen if agreement is not reached. As often noted, the FSA was negotiated to overcome these weaknesses in Article 63 and should today be taken to include the duty to negotiate on measures that render conservation effective.

118. Article 64 of the Convention addresses highly migratory species. It explicitly requires the coastal State and distant-water fishing States that exploit highly migratory stocks, including tuna, to cooperate directly or through an RFMO to ensure, *inter alia*, conservation within and beyond the EEZ.

7. Enforcement and responsibility

119. Under Article 73(1) the coastal State may "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with [the] Convention". It is important, however, to keep in mind the limitations on enforcement actions under Articles 73(3)-(4) and other rules of international law.[165]

120. The failure of the coastal State to observe any of its obligations to conserve and manage the living marine resources habituating the EEZ is an internationally wrongful act that entails state responsibility.[166]

C. 1995 Fish Stocks Agreement (FSA)

121. In the face of serious and continuing depletion of fisheries around the world,[167] the FSA operationalizes the general obligation to cooperate on straddling stocks (and joint stocks to the extent they are also straddling stocks). Coastal states, together with States fishing on the high seas, have obligations to cooperatively manage straddling and highly migratory stocks by implementing provisions of the Convention in very specific ways.

[165] See *M/V Saiga Case (No.2)* (St Vincent and the Grenadines v Guinea) ITLOS Case No. 2, 1 July 1999; *Tomimaru Case* (Japan v. Russian Federation), ITLOS Case No. 15, 6 August 2007.

[166] ILC Draft Articles on State Responsibility, Arts. 1 and 2.

[167] Libraries are full of evidence that document the almost uniformly downward indicators of the health of fisheries around the world driven in large measure by excess effort and capacity, linked with capital and operating cost subsidies. See FAO, *State of the World Fisheries and Aquaculture 2012* (2012), at 200.

122. Under Article 3, the FSA generally applies only to the conservation and management of straddling and highly migratory stocks on the high seas, excepting Articles 5, 6, and 7. Article 3(2), in particular, requires the coastal State to apply "the general principles [of conservation and management] enumerated in Article 5" to "fish stocks within areas under national jurisdiction". Article 3(1) also directs the application of the precautionary approach set out in Article 6 (and Annex II) in the conservation and management of stocks "within areas under national jurisdiction".

123. Under Article 4, the FSA must be "interpreted and applied in the context of and in a manner consistent with the Convention". The Convention and its interpretation and application are, likewise, informed by provisions of the FSA. Moreover, for SRFC parties belonging to both treaties (Guinea and Senegal), the FSA provides interpretative fodder for the Convention as a "subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions" under Article 31(3)(a) of the VCLT.[168]

124. It should also be noted that a number of the provisions of the FSA codified or have progressed existing customary norms. Because only two SRFC Member States are party to the FSA, in Section E below we note instances of the existence of customary norms that parallel FSA provisions as concurrent sources of rights and obligations of the coastal State. Parallel customary norms, of course, would bind SRFC Member States who are not party to the FSA.

1. The duty to cooperate

125. Article 7(1) of the FSA, refers to the new mechanisms of cooperation established in Part III of the FSA, and builds on the general obligation on all States to cooperate on the conservation of fish stocks by closing gaps in Articles 63 and 64 of the Convention. Article 7(2) provides that conservation and management measures for the high seas and coastal State EEZs "shall be compatible in order to ensure conservation and management of straddling [and highly migratory] fish stock in their entirety". For the high seas, the mandatory compatibility of measures can be viewed as a way to limit catch rates beyond the coastal State's EEZ to that which is commensurate to that within the EEZ.

126. Under Articles 7(2)(d) and 7(2)(e), compatible measures are to be ecosystem based and "must take into account the biological unity … of the stocks" and "impact on the living marine resources as a whole". Importantly, in ensuring the compatibility of conservation and management measures, Article 7(2)(a) indicates that the coastal State has significant influence. This is because, as a predicate matter, the TAC established by the coastal State as of right under Article 61 of the Convention "*shall*" be taken into account and "*ensure*" that high seas' measures established by States fishing on the high seas do not undermine conservation effectiveness. The historical background to the Article. Art. 7(2) talks about compatibility of conservation and management measures "established for the high seas" (i.e., through cooperative efforts in an RFMO) and "those adopted for areas under national jurisdiction" (i.e., previously adopted by coastal States pursuant to Part V of LOSC). This

[168] D.H. Anderson, "The Straddling Stocks Agreement of 1995: An Initial Assessment" (1996) 44 *International and Comparative Law Quarterly* 463, 468.

clearly subjects high seas measures to the sovereign rights of coastal States in their EEZs. This view is also consistent with LOSC Art. 63(2) and LOSC Art 116 (b). This particular formulation in UNFSA Art 7(2) is premised on the post LOSC concerns about gaps in managing high seas fisheries, which led to the UN Fish Stocks conference.

2. Major conservation and sustainable use obligations

127. Article 5 (including references to Annex I) of the FSA sets out the primary conservation and management measures mandated by the Agreement for coastal States and States fishing on the high seas. It establishes a detailed, but non-exclusive, list of measures of general application that coastal States and States fishing on the high seas must give effect to in meeting "their duty to cooperate under the Convention". In particular, under Article 5, States shall:

- adopt measures, based on the best scientific evidence and accounting for the interests of artisanal and subsistence fishers, to ensure long-term sustainability of fish-stocks (Arts. 5(a),(b), and (i))
- apply the precautionary approach (Art. 5(c))[169]
- assess the impact of fishing on target stocks and species belonging to the same ecosystem (Art. 5(d))
- adopt measures for species related to target stocks (Art. 5(e))
- implement and enforce conservation and management measures (Art. 5(l))
- minimize pollution, waste, and harmful impacts on non-target species by virtue of fishing gear and fishing techniques (Art. 5(f))
- protect marine biological diversity (Art. 5(g))
- prevent excess fishing effort and capacity harmful to the sustainable use of fishery resources (Art. 5(h))
- collect and share data on fishing activities and conduct scientific research to support conservation (Arts. 5(j) and (k))

128. Article 5(b) continues to use MSY as the FSA conservation and management objective. However, the FSA is more stringent in its deployment of MSY than the Convention because, in addition to the qualifications mentioned in Article 61(3) of the Convention, the FSA also requires the application of a precautionary approach. Conservation and management objectives established under the FSA's precautionary approach require that MSY be set below what is required under the Convention. This is because MSY is to serve as a "minimum standard" in setting limits as discussed below.[170]

3. The precautionary approach and MSY

129. The precautionary approach reflected in Article 6 and Annex 2 of the FSA, is today accepted as a fundamental customary norm that governs activities that have the potential to significantly affect the environment, including the living marine resources of the ocean

[169] Coastal State obligations related to the precautionary approach are addressed in detail in section II.E.2.b.

[170] We note that the Plan of Implementation adopted by Johannesburg World Summit on Sustainable Development in 2002 (para. 31(a)) and the 2012 Rio+ 20 Declaration on 'The Future We Want' (para. 168) call for depleted stocks to be restored to levels that can produce MSY by 2015.

environment.[171] Under Article 6(1), all States, including the coastal State, "shall apply the precautionary approach widely to the conservation, management, and exploitation" of straddling and highly migratory stocks. When information about stocks is "uncertain, unreliable, or inadequate", under Article 6(2) States "shall be more cautious" and they must take "uncertainties" into account, under Article 6(3)(c), when establishing conservation and management measures. Under Article 6(5), fish stocks that appear to be under stress shall receive "enhanced monitoring in order to review their status and the efficacy of conservation and management measures". Under Article 6(6), "new or exploratory fisheries" must be subject to precautionary conservation measures "as soon as possible".

130. Annex 2 of the FSA, which forms "an integral part" of the FSA under Article 48(1), sets out a detailed procedure using precautionary reference points to govern exploitation and monitor the effects of conservation and management measures. Under Annex II(2), each stock that is exploited a must have two precautionary reference points: a "conservation" or "limit" reference point, and a "management" or "target" reference point. If a fish stock falls below its conservation/limit reference point, then "conservation and management action should be initiated to facilitate stock recovery" under Annex II(5). Under Annex II(7), maintaining or reestablishing MSY is to serve as a basis for "management strategies" for stocks not yet overfished and "rebuilding targets" for stocks that have been subject to excessive fishing capacity and effort.

131. However, where information about stocks is "uncertain, unreliable or inadequate", as is almost always the case, the precautionary approach of the FSA and the conservation/limit and management/target reference points in Annex II impose significant qualifications on the reach of MSY and further qualify its outer limits under Articles 61(3) and 119(1)(a) of the Convention. A number of provisions make this clear. First, Article 6(4) of the FSA requires that States take measures to ensure that "when reference points are approached, they will not be exceeded." It is certain that "being more cautious" in the face of uncertainty requires MSY to be set lower rather than higher. Second, under Annex II(5), "management strategies" developed to meet the objectives of management/target reference points "shall ensure that the risk of exceeding limit reference points is very low." Again, this provision militates against the establishment of high MSYs. Third, under Annex II(7), maximum sustainable yield is to "be regarded as a minimum standard for limit reference points." As a minimum standard, States are certainly able to, and should, do better than to push maximum limits when information is inadequate. Finally, for decimated stocks, MSY "can serve as a rebuilding target" under Annex II(7). A target, of course, is just that. It says nothing about allocation and setting a low MSY to bring back a depleted stock to high levels is a worthy aim and permissible.

132. The precautionary approach also has special application to small pelagic species and tuna in relation to MSY. Recent research shows that managing fisheries for lower trophic level species such as small pelagics may compromise the ability to maintain the biomass of higher trophic level species such as tunas at levels that could produce maximum sustainable

[171] See *e.g.*, *Advisory Opinion*. paras.131-135; *Pulp Mills*, para. 164. According to the Seabed Disputes Chamber, the customary requirements of the precautionary approach are associated with the customary obligation of all States to exercise due diligence to prevent environmental harm.

yields because of the reduction of forage fish.[172] This research demonstrates that in relation to "associated or dependent species" highlighted in FSA Annex II(4) and "the interdependence of stocks" mentioned in Articles 61(3) and 119(1)(a) of the Convention, managing for MSY of small pelagic species must be qualified.

4. The duties to collect and share data, and assess potential impacts

133. The obligation to take a precautionary approach to the conservation and management of fisheries entails the concomitant duties to collect and share data and assess the impact of activities that may have a harmful impact.[173] Both are necessary to ensure the best informed decision-making about conservation and management measures in the face of uncertainty.

134. To this end, Articles 14(a) and (b) requires that States, in accordance with Annex I, to "collect and exchange scientific, technical and statistical data" on straddling and highly migratory stocks that is "sufficient in detail to facilitate effective stock assessment". Annex I, Article 3(1) outlines the specific information that must be collected and shared, including the amount of fish caught by species, the amount of fish discarded, the types of fishing methods used, and the locations of fishing vessels.

135. Article 5(d) dictates that States shall, in giving effect to their duty to cooperate, use all information available, including that collected and shared, to "assess the impacts of fishing, or other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks".

5. The duty to cooperate through an RFMO

136. While addressed in Question 2 in much more detail, it is worth mentioning that under Article 8(3) of the FSA "States fishing for [straddling or highly migratory] stocks on the high seas and relevant coastal States shall give effect to the duty to cooperate by becoming a member of [an RFMO]. Article 8(3) requires the coastal State to cooperate with States fishing in adjacent areas of the high seas for the same stocks by either creating or joining an RFMO.

D. The PSM Agreement[174]

137. The SRFC Technical Note indicates that the Tribunal should have recourse to the PSM Agreement in considering the rights and obligations of the coastal State.[175] At the

[172] Pikitch, E., Boersma, P.D., Boyd, I.L., Conover, D.O., Cury, P., Essington, T., Heppell, S.S., Houde, E.D., Mangel, M., Pauly, D., Plagányi, É., Sainsbury, K., and Steneck, R.S., *Little Fish, Big Impact: Managing a Crucial Link in Ocean Food Webs* (Lenfest Ocean Program, April 2012), pp. 84-92.

[173] See *Advisory Opinion* at para. 145.

[174] See generally, "A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing", FAO Fisheries and Aquaculture Circular No. 1074, FIPI/C1074 (En)(2012).

[175] As footnote 130 above explains, the MCA Convention incorporates the PSM Agreement's main principles and is binding on all SRFC Member States. Nevertheless, we address the PSM Agreement both because the SRFC Member States make this request and because of its broader potential application.

outset we note that outside of force majeure or distress, international law gives foreign vessels no general right of access to the ports of coastal States.[176] Accordingly, the PSM Agreement seeks to overcome the phenomenon of "ports of convenience" and leverage the considerable discretion of port States to combat IUU fishing. Article 2 makes clear that the Agreement is designed to "prevent, deter, and eliminate IUU fishing activities through the implementation of effective port State measures, and thereby ensure the long-term conservation and sustainable use of marine resources and marine ecosystems".

138. Under Articles 1(j) and 3(3) and (4), the PSM Agreement applies, on a non-discriminatory basis, to non-port State, foreign vessels intended or used in, or equipped for IUU fishing or fishing-related activities. This includes container vessels carrying fish not previously landed and supply vessels that support vessels engaged in IUU fishing.

139. Under Articles 7 and 8, a port State must designate ports in which foreign vessels must submit and advance request in order to gain port entry. Article 8(1) and Annex A specify the minimum standard of information that a port State must require a vessel to submit prior to being granted entry into port. These requirements are designed to allow the effective inspection of vessels suspected of engaging in IUU fishing activities.

140. Article 9(4) requires that when a port State "has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing" that port State, ordinarily, "shall deny that vessel *entry* into its ports …". Article 11, establishes conditions under which a port State "shall deny … the *use* of [its] port for landing, transhipping, packaging and processing of fish that have not been previously landed and for other port services, including ... refuelling and resupplying, maintenance and dry docking".

141. Article 11 requires a port State to deny port services if a vessel does not have a valid and applicable authorisation to engage in the relevant fishing or fishing related activities required by the flag or coastal State. It also requires a port State to deny port services if the flag State, following a request by the port State, does not confirm within a reasonable period of time that the fish on board were taken in accordance with applicable requirements. If the port State has reasonable grounds to believe that a vessel has been engaged in IUU fishing, the onus fall on the owner or operator of the vessel under Article 11(1)(e)(i) to prove that the vessel "was acting in a manner consistent with relevant conservation and management measures".

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[176] See *Military and Paramilitary Activities in and against Nicaragua Case* (Nicaragua v United States of America)(Merits) [1986] ICJ Rep 14 para. 213; Arts 25 (2), 211 (3) and 255 of the Convention. Art. 2 of the Statute to the Convention on the International Regime of Maritime Ports (CIRMP), which provides for access to port based on national treatment and reciprocity, does not affect this conclusion because access under the Convention is conditional.

E. Obligations of the coastal State under customary international law

1. Preliminary matters

142. A number of provisions in the Convention and the FSA, which are not binding *per se* on third parties absent consent, nevertheless have legal force for all States (excepting so-called persistent objectors) as customary international law. To prove the existence of custom it is necessary to demonstrate "a general practice accepted as law".[177] The extent to which both practice and its acceptance as law must be established so as to demonstrate a binding customary norm has been said to rest on a "sliding scale".[178] Much has depended on the importance of the norm in issue on this scale. On one end, the ICJ has insisted on significant proof of consistent action by States, coupled with equally significant proof of normative words (*opinio juris*) supporting the action when the stakes are not seen as particularly high.[179] On the other end, where the norm involved is vital for international stability involving issues such as armed force or human rights, the ICJ has been more or less satisfied with the consistent repetition of normative words and has been less concerned with how State actually behave.[180]

143. The desperate plight of fisheries around the world clearly falls on the very high importance end of this scale. Fisheries are a crucial part of food security worldwide. Fish provide the main source of animal protein to about one billion people globally, particularly for many poor people in developing countries. In food deficient countries, fish make up 22% of animal protein consumption overall.[181] The importance of fisheries in ensuring continuing food security has been emphasised by FAO.[182] In addition to their vital contribution to feeding the world, fisheries have a tremendous economic value and are instrumental to the development of States and the livelihoods of individuals. In 2006, the total trade of fish and fishery products reached a record export value of US$86.4 billion.[183] In terms of livelihoods, approximately 38 million people worldwide are employed in fisheries and aquaculture, 95%

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[177] Art. 38(1)(b), Statute of the International Court of Justice, Charter of the United Nations and Statute of the International Court of Justice (1945), vol. I, p. 26.

[178] F.L. Kirgis, "Custom on a Sliding Scale" (1987) 81 *American Journal of International Law* 146, 146-49.

[179] *North Sea Continental Shelf Cases* at paras. 41-45.

[180] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. USA) (Merits), [1986] ICJ Reports 14, 98-103. (Hereinafter *Nicaragua*)

[181] Interim Report of the Special Rapporteur on the Right to Food, The Right to Food, Note by the Secretary-General, U.N. Doc. A/67/268 (8 August 2012) (identifies the challenges facing global fisheries and examines how the individuals most vulnerable to negative impacts can be supported and noting that pursuing a human rights approach is critical to achieving sustainable development in the fisheries sector).

[182] See Report of the twenty-fifth session of the Committee on Fisheries. Rome, 24–28 February 2003, FAO Fisheries Report. No. 702, FIPL/R702(En) (2003).

[183] World Bank, *The Sunken Billions: The Economic Justification for Fisheries Reform* (2009), at 32, 41. The share of developing countries in total fishery exports was 57 per cent by volume and 48 per cent by value. This report also found that new fishing technology combined with a dramatic increase in fishing capacity and effort had undermined the potential net economic benefits from marine fisheries in the order of $50 billion per year – equivalent to more than half the value of the global seafood trade.

of them in developing countries, including SRFC Member States.[184]

144. Accordingly, given the enormous importance of the nutritional and economic value of fisheries, if the Tribunal were to adopt the reasoning of the ICJ in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*), it could examine a host of General Assembly resolutions, international instruments, and other works of international bodies in order to determine whether they "may be understood as an acceptance of the validity of the rule or set of rules declared by these [normative documents] by themselves"[185] and, thus, provide sufficient evidence of custom.

145. On the other hand, if the tribunal were to employ the reasoning of the *North Sea Continental Shelf* cases (*North Sea*), it would look for the presence of the following conditions in order for a treaty provision to be seen as generating a parallel customary norm:

- a "fundamentally norm creating" treaty provision that could be regarded as forming the basis for a general rule of law;
- "wide-spread" and "representative" participation in the treaty, including "specially affected" States;
- extensive and virtually uniform state practice, including by those State whose interests are specially affected; and
- the passage of a sufficient period of time, even if a relatively short period.

146. What follows is analysis of key customary international law obligations of the coastal State associated with rights and duties to sustainably manage joint, straddling, and highly migratory stocks. Our analysis considers, where relevant, both approaches of the International Court of Justice in the identification of customary international law.

2. Key customary norms of international fisheries

a. The obligation to cooperate to conserve marine living resources in Part V of the Convention and Part II of the FSA.

147. *Nicaragua*. The duty to cooperate to conserve marine living resources is clearly a conventional and customary obligation. The UN General Assembly has repeatedly "noted" the existing customary "obligation of all States, in accordance with international law, *as reflected* in the relevant provisions of the Convention, to cooperate in the conservation and management of living marine resources".[186] Moreover, the General Assembly has

[184] Food and Agricultural Organization, *The State of World Fisheries and Aquaculture*, Part 1: World review of fisheries and aquaculture, Fishers and fish farmers (2004).

[185] *Nicaragua* at paras. 99-101.

[186] This fundamental obligation has been repeatedly recognized by States. Every session of the UN General Assembly since 2003 has adopted, by consensus, a resolution entitled *Sustainable fisheries, including through the 1995 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, and related instruments*. The preambular paragraphs and operative paragraph 1 of each of these resolutions confirm that States view Part V of the Convention as reflective of existing customary law. See G.A. Res. 67/79 (11 December 2012); G.A. Res. G.A. Res. 66/68 (6 December 2011); G.A.

repeatedly "reaffirmed" that the obligation to cooperate also includes cooperation in the "sustainable use of the living marine resources of the world's oceans" and that the these obligations to cooperate are "*reflected* ... in particular the provisions on cooperation set out in Part V and Part VII, section 2 of the Convention, and where applicable, the Agreement".[187] These resolutions plainly declare that the customary norm of conservation and management exists separate from its reflection in the Convention and FSA.[188]

148. *North Sea.* Applying the *North Sea* test for custom, it is clear the primary obligations under Part V of the Convention and Part II of the FSA, requiring the coastal State to ensure that the maintenance of the living resources of the EEZ is not threatened by overexploitation, through proper, sustainable conservation and management measures, are *fundamentally norm creating*. These obligations are clear and certain and, moreover, the Convention makes them justiciable by way of conciliation under Article 297(3)(b)(i). In terms of *opinio juris*, the ICJ requires "widespread and representative participation in the convention" under consideration. The Convention has been ratified, as of 18 September 2013, by 166 States. The FSA has received fewer ratifications, but at 81 States as of 18 September, the number is still significant and at least illustrates the *opinio juris* of these States, including major fishing nations.[189] More broadly, however, substantial normative documents of a "soft law" nature

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Res. 65/38 (7 December 2010); G.A. Res. 64/72 (4 December 2009); G.A. Res. 63/112 (5 December 2008); G.A. Res. 62/177 (18 December 2007); G.A. Res. 61/105 (8 December 2006); G.A. Res. 60/31 (29 November 2005); G.A. Res. 59/25 (17 November 2004); G.A. Res. 58/14 (24 November 2003).

[187] *Id.* States recognize the customary force of the relevant provisions on conservation cooperation contained in the Convention and the FSA in paragraph 1 of the *Sustainable Fisheries* General Assembly Resolutions.

[188] It has been observed that "[m]ost states, including the United States, now regard the fisheries provision of the Convention as reflective of customary international law". D.A. Bolton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (1996) 27 *Ocean Development & Int'l L.* 121, 130. Indeed, in relation to sedentary fisheries States have "acknowledged that under the Convention a coastal State had the right to regulate the activities that had negative impacts on the sedentary species of its continental shelf and the right to adopt the necessary measures, including restrictive measures, to protect those resources". Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, U.N. Doc. A/61/65 (20 March 2006), Annex I, para. 9.

[189] Moreover, the provisions of Part II of the FSA, and especially Articles 5 and 6, have been supported (or, in some cases, not contested) by at least twenty-eight non-Parties to the FSA. This is reflected in the discussion of Part II provisions at the two Review Conferences on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. See Report of the resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fisb Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.210/2010/7 (27 July 2010), paras. 9, 21, 24, 26, 36-37, 54-64, 132-137; Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.210/2006/15 (5 July 2006), paras. 40-69, 127-128, Annex, paras. 4-17. Non-party support of Part II provisions is also reflect in participation in the annual rounds of Informal Consultations of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. See the *Reports* of these annual rounds, ICSP9/UNFSA/INF.4 (5 April 2010), paras. 5, 12-16; ICSP8/UNFSA/REP/INF.6 (6 April 2009), paras. 14-17; ICSP7/UNFSA/REP/INF.2 (11 April 2008), paras. 13, 24; ICSP6/UNFSA/REP/INF.1 (29 May 2007), Annex II; ICSP4/UNFSA/REP/INF.1 (18 July 2005), Annex IV;

endorse the FSA and add to the evidence of *opinio juris* on the part of all states.[190] In terms of *state practice*, scholars have found that a large number of States have catch limits and "explicitly refer to 'total allowable catch'.[191] Moreover, the practice of over 140 State Members of the 17 existing marine RFMOs around the world, including many States not party to the FSA,[192] confirms that Part II FSA obligations are increasingly being implemented.[193] In terms of the *time element*, it is clear that the time that has elapsed since the entry into force of the Convention and the FSA is sufficient. If one compares the development of the customary status of the continental shelf, it took less than 13 years from the Truman Proclamation and the acceptance of its customary legal existence.

b. The precautionary approach

149. *Nicaragua.* There has been a general evolution toward, and today a recognition of, the

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ICSP3/UNFSA/REP/INF.1 (19 August 2004), paras. 23, 33, 48; ICSP2/UNFSA/REP/INF.1 (August 2003), para. 11-33, 62-68; ICSP/UNFSA/REP/INF.1 (9 October 2002), para. 10.

[190] The *Sustainable Fisheries* General Assembly resolutions have already been mentioned, see n 186 above. In addition to these important fisheries specific resolutions, from 1984 to the present time the General Assembly has passed and annual resolution entitled *Oceans and the law of the sea* (prior to 1997, the annual resolution was simply entitle *Law of the Sea*). Many of these resolutions have relevance for FSA Article 5 rights and obligations because they recognize the importance of the protection of the marine environment and conservation and management of marine living resources. See G.A. Res. 67/78 (11 December 2012); G.A. Res. 66/231 (24 December 2011); G.A. Res. 65/37 A (7 December 2010)(adopted by a vote of Yes: 123, No: 1, Abstentions: 2, Non-Voting: 66); G.A. Res. 64/71 (4 December 2009); G.A. Res. 63/111 (5 December 2008); G.A. Res. 62/215 (22 December 2007); G.A. Res. 61/222 (20 December 2006); G.A. Res. 60/30 (29 November 2005); G.A. Res. 59/24 (17 November 2004); G.A. Res. 58/240 (23 December 2003); G.A. Res. 57/141 (12 December 2002); G.A. Res. 56/12 (28 November 2001); G.A. Res. 55/7 (30 October 2000); G.A. Res. 54/31 (24 November 1999); G.A. Res. 53/32 (24 November 1998); G.A. Res. 52/26 (26 November 1997); G.A. Res. 48/28 (9 December 1993); G.A. Res. 45/145 (13 December 1990); G.A. Res. 44/26 (20 November 1989). All but Resolution 65/37 have been adopted by consensus. We also call the Tribunal's attention to sections 17.1, 17.74, and 17.79 of Chapter 17 of Agenda 21; Articles 6 and 7 of the 1995 FAO Code of Conduct for Responsible Fisheries; paragraphs 30-37 of the Plan of Implementation of the World Summit on Sustainable Development;

[191] W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), pp. 50-51; B. Kwiatowska "Conservation and optimum utilization of living resources', in T.A. Clingan, Jr., ed., *The Law of the Sea: What Lies Ahead*? (1988), 245, 248 (legislation around the world "shows a good deal of similarity to the [conservation] provisions of the LOS Convention"); D.J. Attard, *The Exclusive Economic Zone in International Law* (1987), 152-154 (Articles 61 and 62 of the Convention have "generated a widespread general practice which conformed with [their] goals well before the 1982 Convention").

[192] In 2007, it was calculated that there were "some 38 regional fisheries bodies [RFBs] worldwide. These include 20 advisory bodies and 18 RFMOs." *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations* (Chatham House, 2007), xviii. The FAO indicates that today there are 43 RFBs. Of these, 17 are RFMOs with a management mandate. See FAO, Regional Fisheries Bodies Database, available at: http://www.fao.org/fishery/rfb/search/en.

[193] See Report of the Secretary-General, The status and implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and its impact on related or proposed instruments throughout the United Nations system, with special reference to implementation of Part VII of the Fish Stocks Agreement, dealing with the requirements of developing States, U.N. Doc. A/58/215 (5 August 2003), Annexes II and III.

customary obligation to apply a precautionary approach to decision-making in the face of uncertainty, including in the management of fisheries.[194] While the Convention lacks an explicit reference to a precautionary approach, it has been convincingly demonstrated that such an approach is implicit in Part V.[195] In setting MSY, for instance, the science must demonstrate that the projected harvest will maintain or restore population levels that can produce such a yield, and not the other way around. If evidence is not available, conservative or cautious limits under the Convention must be adopted.

150. In relation to the precautionary approach reflected in Article 6 of the FSA, the UN General Assembly, in its *Sustainable Fisheries* resolutions, has repeatedly "call[ed] upon *all* States … to apply stock-specific precautionary reference points" as described in Annex II of the FSA and "to apply the precautionary approach in adopting and implementing conservation and management measures".[196] The FSA Article 6 precautionary approach is also reflected in numerous other normative documents, adopted on a consensus basis, over the past decade or more. The 1995 FAO Code of Conduct for Responsible Fisheries (which the General Assembly, in its *Sustainable Fisheries* resolutions, repeatedly calls on all States to apply), requires States to account for a number of uncertainties in implementing the precautionary approach; to determine target and limit reference points and actions to be taken when they are approached or exceeded; and to adopt cautious measures for new fisheries and emergency measures to avoid harmful effects of fishing.[197]

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[194] See *supra* n. 171 and accompanying text. See also Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, U.N. Doc. A/61/65 (20 March 2006), paras. 32-35, 50-58, Annex I, para. 5.

[195] D. Freestone & E. Hey, "Implementing the Precautionary Principle: Challenges and Opportunities", in Freestone & Hey, eds. *The Precautionary Principle and International Law: The Challenge of Implementation* (1996), 249, 261.

[196] See G.A. Res. 67/79 (11 December 2012), paras. 8-11, 85, 134; G.A. Res. G.A. Res. 66/68 (6 December 2011), paras. 7-10, 76, 121, 129; G.A. Res. 65/38 (7 December 2010), paras. 6-9, 73, 117; G.A. Res. 64/72 (4 December 2009), paras. 6-9, 77, 113, 119(d); G.A. Res. 63/112 (5 December 2008), paras. 6-9, 72, 102; G.A. Res. 62/177 (18 December 2007), paras. 5-7, 97; G.A. Res. 61/105 (8 December 2006), paras. 5-7, 80; G.A. Res. 60/31 (29 November 2005), paras. 4, 64; G.A. Res. 59/25 (17 November 2004), paras. 4, 66; G.A. Res. 58/14 (24 November 2003), para. 4.

[197] Code of Conduct Art. 7.5. A number of other FAO guidelines, decisions, and reports also embrace the implementation of the precautionary principle. See *International Guidelines for the Management of Deep-sea Fisheries in the High Seas*, FAO, Report of the Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, 4-8 February and 25-29 August 2008, FAO Fisheries and Aquaculture Report No. 881 (FIEP/R881 (Tri)), appendix F (2008); *Report and Documentation of the Expert Consultation on Deep-Sea Fisheries in the High Seas*, Bangkok, Thailand, 21–23 November 2006, FAO Fisheries Report No. 838, FIEP/R838 (En)(2007); *Report of the FAO Expert Consultation on the Economic, Social and Institutional Considerations of Applying the Ecosystem Approach to Fisheries Management*, Rome, 6-9 June 2006, FAO Fisheries Report No. 799, FIPP/R799 (En)(2006); *Fisheries Management - 2. The Ecosystem Approach to Fisheries: FAO Technical Guidelines for Responsible Fisheries 4, Suppl. 2* (FAO, 2006); *Rome Declaration on Illegal, Unreported and Unregulated Fishing*, FAO, Outcome of the Ministerial Meeting on Fisheries, Rome, 12 March 2005 (CL 128/INF/11), appendix B (2005); *FAO Technical Guidelines for Responsible Fisheries - Precautionary Approach to Capture Fisheries and Species Introductions – 2: Elaborated by the Technical Consultation on the Precautionary Approach to Capture Fisheries (Including Species Introductions)*, Lysekil, Sweden, 6-13 June 1995 (FAO, 2006); 1995 *Code of Conduct for Responsible Fisheries of the Food and Agriculture Organization of the United Nations* (the Code), International Fisheries Instruments with Index (United Nations publication, Sales No. E.98.V.11), sect. III; 1984

151. Furthermore, a number of consensus decisions of the Conference of the Parties to the Convention on Biological Diversity -- the most widely adhered to multilateral environmental agreement with 193 parties – stress the importance of a precautionary approach in the marine environment.[198] This is backed up by series of recommendations of the Convention's Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA).[199]

152. Based the repeated invocation of normative force of the precautionary principle by States, it seems certain that coastal States, in sustainably managing fisheries, must apply the precautionary approach under customary international law.

Strategy for Fisheries Management and Development, Report of the FAO World Conference on Fisheries Management and Development, Rome 27 June – 6 July, 1984.

[198] See generally COP Decision X/29. Marine and Coastal Biodiversity, UNEP Doc. UNEP/CBD/COP/10/29 (29 October 2010); COP Decision IX/20. Marine and Coastal Biodiversity, UNEP Doc. UNEP/CBD/COP/9/20 (9 October 2008); COP Decision VII/5. Marine and Coastal Biodiversity, UNEP Doc. UNEP/CBD/COP/7/5 (13 April 2004); COP Decision V/3. Progress report on the implementation of the programme of work on marine and coastal biological diversity (implementation of decision IV/5), Report of the Fifth Meeting of the Conference of Parties to the Convention on Biological Diversity, UNEP Doc. UNEP/CBD/COP/5/23 (22 June 2000), p. 74; COP Decision IV/5. Conservation and sustainable use of marine and coastal biological diversity, including a programme of work, Report of the Fourth Meeting of the Conference of Parties to the Convention on Biological Diversity, UNEP Doc. UNEP/CBD/COP/4/27 (15 June 1998), p. 84; COP Decision II/10. Conservation and sustainable use of marine and coastal biological diversity, Report of the Second Meeting of the Conference of Parties to the Convention on Biological Diversity, UNEP Doc. UNEP/CBD/COP/2/19 (30 November 1995), p. 59.

[199] See generally SBSTTA Recommendation XVI/4. Marine and Coastal Biodiversity: Ecologically or Biologically Significant Marine Areas, UNEP Doc. UNEP/CBD/SBSTTA/REC/XVI/4 (21 June 2012); SBSTTA Recommendation XVI/5. XVI/5. Marine and coastal biodiversity: sustainable fisheries and addressing adverse impacts of human activities on marine and coastal biodiversity, UNEP Doc. UNEP/CBD/SBSTTA/REC/XVI/5 (21 June 2012); SBSTTA Recommendation XVI/6. Marine biodiversity: marine spatial planning and voluntary guidelines for the consideration of biodiversity in environmental impact assessments and strategic environmental assessments in marine and coastal areas, UNEP Doc. UNEP/CBD/SBSTTA/REC/XVI/5 (21 June 2012); SBSTTA Recommendation XIV/3. In-depth review of the implementation of the programme of work on marine and coastal biological diversity, UNEP Doc. UNEP/CBD/SBSTTA/REC/XIV/3 (30 June 2012); SBSTTA Recommendation XIII/3. Options for preventing and mitigating the impacts of some activities to selected seabed habitats, and scientific and ecological criteria for marine areas in need of protection and biogeographic classification systems, Report of the Subsidiary Body on Scientific, Technical and Technological Advice on the Work of its Thirteenth Meeting, UNEP Doc. UNEP/CBD/COP/9/3 (25 February 2008), p. 37; SBSTTA Recommendation X/4. Global outcome-oriented targets for the implementation of the programmes of work on the biological diversity of inland water ecosystems and marine and coastal biodiversity, Report of the Subsidiary Body on Scientific, Technical and Technological Advice on the Work of its Tenth Meeting, UNEP Doc. UNEP/CBD/COP/8/2 (18 April 2005), p. 42; SBSTTA Recommendation VIII/3. Marine and coastal biodiversity: review, further elaboration and refinement of the programme of work, Report of the Subsidiary Body on Scientific, Technical and Technological Advice on the Work of its Eighth Meeting, UNEP Doc. UNEP/CBD/COP/7/3 (9 April 2003), p. 68; SBSTTA Recommendation VI/2. Marine and coastal biological diversity: progress report on the implementation of the programme of work, including the integration of coral reefs, Report of the Subsidiary Body on Scientific, Technical and Technological Advice on the Work of its Sixth Meeting, UNEP Doc. UNEP/CBD/COP/6/3 (27 March 2001), p. 25; SBSTTA Recommendation I/8. Scientific, technical and technological aspects of the conservation and sustainable use of coastal and marine biological diversity, Report of the Subsidiary Body on Scientific, Technical and Technological Advice on the Work of its First Meeting, UNEP Doc. UNEP/CBD/COP/2/5 (21 September 1995), p. 36.

153. *North Sea.* The customary nature of the precautionary approach under the *North Sea* approach is easily addressed by reference to judicial authority. Both the International Court of Justice and the Seabed Disputes Chamber of this Tribunal have confirmed that the precautionary approach to decision-making in the face of risk and scientific uncertainty is customary international law.[200]

c. Impact assessment and monitoring of fisheries activities

154. A coastal State has a customary international law duty to assess fishery activities that it licenses, permits, or are carried out under its jurisdiction, which may be prejudicial to the rights of other states in the same fisheries or harm the environment beyond national jurisdiction.[201] As the International Court of Justice has highlighted, the use of environmental impact assessment "has gained so much acceptance among States that it may be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[202] Likewise the coastal State is under a customary duty to undertake monitoring of fisheries operations. In particular, "once operations have started ... continuous monitoring of its effects on the environment shall be undertaken."[203]

III. Conclusion

155. The LOSC, FSA, other treaties, and customary international law articulate a series of rights and obligations for coastal States regarding shared stocks and stocks of common interest. Coastal States have a general right to exploit marine resources within their EEZ. This right is qualified by the general obligations to protect and preserve the marine environment and cooperate with other States in the conservation and management of shared and common stocks found within a coastal State's EEZ. Coastal States are also expected to cooperate in establishing equitable arrangements to enable surplus stocks to be fished, cooperate in the collection and exchange of scientific information, maintain and restore stock populations at levels that produce a maximum sustainable yield, apply a precautionary approach and ecosystem-based approaches to fishery management, undertake environmental impact assessment (EIA) and monitoring, and enforce conservation and management measures.

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[200] See *Advisory Opinion.* paras.131-135; *Pulp Mills*, para. 164.

[201] This duty arises by virtue of "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States", *Corfu Channel* (United Kingdom v. Albania)(Merits) [1949] ICJ Reports 1949, p 22, and to "ensure that activities within their jurisdiction and control respect the environment ... of areas beyond national control". *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996(1)] ICJ Reposts, at 242, para. 29. A State is thus obliged to use all means at its disposal, including through prior assessment of activities, in order to avoid activities which take place in its territory, or in any area under its jurisdiction, that can cause significant damage to the rights of another State.

[202] *Pulp Mills,* para. 204.

[203] *Ibid.*, para. 205.

Chapter 6
Summation

I. Question One – Flag State obligations in relation to IUU fishing in EEZs of third States

156. A vessel flagged by a foreign State conducting fishing activities in the exclusive economic zone (EEZ) waters of a coastal State is a national of its flag State. The Law of the Sea Convention (LOSC) 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." This obligation adheres regardless of whether the fishing activities take place pursuant to an access agreement between the flag State and the coastal State, under a license obtained directly from the coastal State, or without the permission of the coastal State.

157. The Convention does not address the possible obligations of flag States in relation to fishing activities by their vessels in the EEZs of other States. It is argued that a rule of customary international law has developed requiring flag States to ensure that their vessels comply with the laws and regulations of the coastal States. This obligation is particularly important where IUU fishing activities take place.

158. As stated by the Seabed Disputes Chamber in its Seabed Advisory Opinion and the ICJ in the *Pulp Mills* case, the obligation for a State to ensure compliance by nationals is an obligation of conduct and of due diligence. Drawing on Food and Agriculture Organization (FAO) instruments, it is submitted that the obligation of due diligence requires the following actions to be taken by flag States within the EEZ of another State:

- The flag State must prohibit its vessels from fishing in the EEZs of other States unless both it and the coastal State authorize them to do so. The flag State shall not grant such authorization unless it is able to exercise effective jurisdiction and control over its vessels and is satisfied that its vessels have the ability to comply with the terms and conditions of such an authorization.
- The flag State must adopt legislation that requires its vessels fishing in the EEZ of another State to comply with the laws and regulations of that State and that makes a breach of such laws and regulations an offence under the law of the flag State.
- The flag State must implement effective mechanisms to detect possible breaches of the coastal State's fisheries laws and regulations by its vessels by requiring them, e.g., to report their position and catch in real time, to carry a transponder, to complete an electronic log book, etc. and by inspecting vessels when they return to its ports.
- The flag State shall, if requested by the coastal State, co-operate with the coastal State in the arrest of its vessels suspected of fishing in the EEZ in breach of the coastal State's laws and regulations and in any subsequent administrative or criminal proceedings taken against such vessels.
- The flag State must take administrative and/or criminal proceedings against its vessels that are reasonably suspected of having violated the laws and regulations of the coastal State when fishing in the EEZ.

- Where one of its vessels has been found to have violated the laws and regulations of the coastal State when fishing in the EEZ, the flag State must impose sanctions of sufficient severity to act as a deterrent to future breaches of the coastal State's laws and regulations and to deprive the vessel of the economic benefits of its illegal fishing.

II. Question 2 – Flag State liability for IUU fishing

159. Consistent with the Seabed Disputes Chamber's approach in the 2011 Advisory Opinion, the term "liability" is used for purposes of this question to refer to the consequences of a breach of primary obligations owed by a State.

160. Given the open nature of question 2, the response also includes IUU fishing on the high seas. As there is no scope to address high sea obligations under question 1, these obligations are briefly canvassed prior to addressing the central issue of liability under question 2.

161. In addition to the obligations that flag States have within EEZs (as outlined in para. 9 above), flag States have specific obligations on the high seas including that:

- The flag State must cooperate with other States to take such measures as may be necessary for the conservation of the living resources of the high seas.
- The flag State must prohibit its vessels from fishing on the high seas unless it has authorized them to do so. The flag State shall not grant such authorization unless it is able to exercise effectively its responsibilities under the Compliance and Fish Stocks Agreements in respect of its vessels.
- The flag State must take such measures as may be necessary to ensure that its vessels comply with relevant conservation and management measures of RFMOs and do not engage in any activity that undermines the effectiveness of conservation and management measures for the high seas.
- The flag State must implement effective mechanisms to monitor the fisheries activities of its vessels on the high seas, including requiring them to report their position and catch, to carry an observer on board and to carry a transponder, and to inspect vessels both at sea and when they return to its ports.
- The flag State must take administrative and/or criminal proceedings against its vessels that are reasonably suspected of having violated applicable conservation and management measures when fishing on the high seas.
- Where one of its vessels has been found to have violated applicable high seas conservation and management measures, the flag State must impose sanctions of sufficient severity to act as a deterrent to future breaches of such measures and to deprive the vessel of the economic benefits of its IUU fishing.

162. Flag State liability arises where a State fails to satisfy the due diligence obligation to ensure that its vessels comply with coastal State laws and regulations, or the international obligations applicable to conservation and management within the high seas and there is a direct causal link between that failure and loss or damage. Where a flag State incurs liability for a breach of any of these obligations, it is under a duty to provide reparations and cease

any wrongful conduct. In the case of IUU fishing in the EEZ, a coastal State will be able to invoke liability and claim reparation and/or take countermeasures. This is because the coastal State will be able show clear injury. On the high seas, States that may be able to invoke the responsibility of the flag State include specially affected coastal States, members of the relevant RFMO, parties to certain fisheries treaties, users of the sea, and States acting on behalf of the international community as a whole.

III. Question 3 – Flag State or International Organization liability for the violation of coastal State law by a vessel with a fishing license granted under an international agreement

163. This question should be understood as asking about the liability of an international organization for a fishing vessel from a member State that violates the fishing laws within a coastal State's EEZ after a fishing access agreement has been concluded between the international organization and the coastal State. The international organization as a matter of due diligence must ensure that vessels under the access arrangement comply with the laws and regulations of the coastal State. Where there is a breach of that obligation, the international organization is liable for reparations to the coastal State and may also be subject to countermeasures by the coastal State.

164. The liability of a member State within an international organization rather than the liability of the international organization depends on who has exclusive competence. If the international organization has exclusive competence, then the international organization is liable. If the member State has exclusive competence, then the member State is liable. In either case, liability involves a duty to provide reparations and put an end to the wrongful conduct. The coastal State, in turn, can invoke liability and claim reparations or take countermeasures.

IV. Question 4 – 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

165. The purpose of this question is to identify relevant sources of international law to assist coastal States in addressing the challenges presented by management of shared stocks and stocks of common interest. Coastal States have a general right under the LOSC to exploit marine resources within their EEZ tempered with the general obligation to protect and preserve the marine environment. Coastal States also have the right and duty to determine the allowable catch of living marine resources within their EEZs. The right to exploit is further qualified by the obligation to cooperate in the conservation and management of shared and common stocks found within a coastal State's EEZ (i.e., joint, straddling, and highly migratory).

166. Specific rights and obligations found under the LOSC, other treaties, and customary law include (*inter alia*):

- considering the effects of harvesting on associated and dependent species when setting conservation and management measures;
- cooperating in establishing equitable arrangements to enable surplus stocks to

be fished;

- cooperating in the collection and exchange of scientific information;
- maintaining and restoring populations at levels that produce a maximum sustainable yield;
- cooperating on joint, straddling, and highly migratory stocks including through RFMOs;
- applying a precautionary approach and ecosystem-based approaches;
- undertaking environmental impact assessment (EIA) and monitoring; and
- enforcing conservation and management measures.

LEGAL COUNSEL FOR THE IUCN

Robin Churchill, Professor of International Law, University Of Dundee, United Kingdom

Donald K. Anton, Professor of Law, The Australian National University College of Law; Barrister and Solicitor of the High Court of Australia and Member of the Bar of the Supreme Court of the United States

David Freestone, Executive Director of the Sargasso Sea Alliance, Bermuda and Senior Advisor to the IUCN

Nilufer Oral, Co-Chair of the WCEL Specialist Group on Oceans, Coasts and Coral Reefs, and Deputy Director of the Istanbul Bilgi University Law School Marine Law Research Center

Cymie R. Payne, Assistant Professor, Rutgers University, NJ, United States of America., Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States

Anastasia Telesetksy, Associate Professor, University Of Idaho College of Law, United States Of America

Martin Tsamenyi, Professor of Law, University of Wollongong, Australia

*With the assistance of**

David Vanderzwaag, Co-Chair of the WCEL Specialist Group on Oceans, Coasts and Coral Reefs, Professor and Canada Research Chair in Ocean Law and Governance
Marine & Environmental Law Institute, Dalhousie University

Robert Makgill, Barrister, Auckland, New Zealand

Matt Gianni, Political and Policy Advisor & Deep Sea Conservation Coalition

Youna Lyons, Senior Research Fellow, Centre for International Law (CIL), National University of Singapore

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Annex to the written statement of IUCN

State Practice relating to a Flag State's Obligation to ensure that its Vessels comply with a coastal State's fisheries laws

A. National Legislation requiring access agreements with foreign States to contain a flag State vessel compliance clause
(Some of the legislation listed below may no longer be current, but that does not diminish its value as practice)

Antigua and Barbuda, Fisheries Act, 1984, s. 7(3), available at:
http://www.laws.gov.ag/acts/chapters/cap-173.pdf

Barbados, Fisheries Act, 1995), s. 7(3), available at:
http://faolex.fao.org/docs/pdf/bar5073.pdf

Cape Verde, Decree Law No. 53, 2005, Art. 30(f), available at:
http://faolex.fao.org/docs/pdf/cvi54656.pdf

Dominica, Fisheries Act, 1987, Art. 7(3), available at:
http://faolex.fao.org/docs/pdf/dmi3639.pdf

Eritrea, Proclamation no 104/1998, The Fisheries Proclamation, Article 15, available at:
http://faolex.fao.org/docs/texts/eri17892.doc

Gambia, Fisheries Act 2007, s. 38 (4a), available at:
http://faolex.fao.org/docs/pdf/gam77403.pdf

Ghana, Fisheries Act 2002, s. 64 (3), available at: http://faolex.fao.org/docs/pdf/gha34737.pdf

Grenada, Grenada Fisheries Act No 15, 1986, s. 7(3), available at:
http://faolex.fao.org/docs/pdf/grn1194.pdf

Indonesia, Fishery Law 31/2004, Art. 30(2), available at:
http://faolex.fao.org/docs/pdf/ins51065.pdf

Iran, Temporary Regulations Catching Fish, Shrimp and Other Sea Animals in Persian Gulf, Oman Sea and All Rivers of Southern Parts of Iran, (2 December 1973) Article 8, available at Food and Agriculture Organization, Regional Compendium of Fisheries Legislation (Indian Ocean Region) (1986): 416

Malaysia, Fisheries Act, 1985, s. 17, available at: http://faolex.fao.org/docs/pdf/mal1869.pdf

Malta, Act No. II of 2001, Art. 18(2), available at:
http://faolex.fao.org/docs/texts/mlt24655.doc

Marshall Islands, Marine Resources Act, 1997, s. 60(4c), available at:
http://faolex.fao.org/docs/pdf/mas24915.pdf

Saint Kitts and Nevis, Fisheries Act, 1984, s. 7(3), available at:
http://faolex.fao.org/docs/pdf/stk2103.pdf

Annex to the written statement of IUCN

State Practice relating to a Flag State's Obligation to ensure that its Vessels comply with a coastal State's fisheries laws

Sierra Leone, Fisheries Management and Development Decree 1994, Art. 23(3a), available at: http://faolex.fao.org/docs/pdf/sie4863.pdf

South Africa, Marine Living Resources Act, 1998, s. 38, available at: http://faolex.fao.org/docs/pdf/saf15984.pdf

USA, Fishery Conservation and Management Act of 1976, PL94-265, sec. 201(c)(4)(C), available at http://www.house.gov/legcoun/Comps/MAGNUSON.pdf

B. Access agreements containing an obligation on the foreign flag State to ensure that its vessels comply with the coastal State's fisheries laws

(Note: the State listed first in the list below is the coastal State; the other State is the foreign flag State. Where an agreement provides for reciprocal access, the two States concerned are listed in alphabetical order and the agreement is asterisked. A number of the agreements listed below are no longer in force, either because they have lapsed without being renewed (as foreign fishing has been phased out of the EEZ of the coastal State concerned) or they have been replaced by a later agreement, which also contains the same obligation. That does not diminish their value as practice)

Angola-EC. Agreement on Fishing off Angola, 1987, Art.3 (1). Text: OJEC 1987 L268/66

Australia-China. Agreement on Fisheries, 1988, Art. VI. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1988-AustraliaChinaFisheries.EN.txt&par=view_treaty_html .

Australia-Indonesia. Agreement relating to Co-Operation in Fisheries, 1992, Art. 7. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1992-AustraliaIndonesiaCooperationFisheries.EN.txt&par=view_treaty_html

Australia-Japan. Fisheries Agreement, 1979, Art. IV. Text: 1217 UNTS 3

Australia-USSR. Agreement Relating To Co-Operation In Fisheries , 1990, Art. 5. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1990-AustraliaUSSRFisheries.EN.txt&par=view_treaty_html

Canada-Cuba. Agreement on Mutual Fisheries Relations, 1977, Art. VI. Text at: http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/Other/bi-24532.pdf

Canada-Bulgaria. Agreement on Mutual Fisheries Relations, 1977, Art. VI(1). Text: 1133 UNTS 251

Canada-EEC. Agreement on Fisheries, 1979, Art. 3. Text: OJEC 1979 L312/2

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Canada-German Democratic Republic. Agreement on Mutual Fisheries Relations, 1977, Art. VI(1). Text: 1133 UNTS 265

Canada-Japan. Agreement on Fisheries, 1978, Art. VII(1). Text: 1133 UNTS 129

Canada-Norway. Agreement on their Mutual Fisheries Relations, 19785, Art. V. Text: 1132 UNTS 123

Canada-Poland. Agreement on Mutual Fisheries Relations, 1982, Art. V. Text: 1468 UNTS 297

Canada-Portugal. Agreement on Mutual Fishery Relations, 1976, Art. V. Text: 1132 UNTS 375

Canada-Romania. Agreement on Mutual Fisheries Relations , 1978, Art. VI. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1978-Canada-RomaniaFisheries.EN.txt&par=view_treaty_html

Canada-Spain. Agreement on Mutual Fisheries Relations, 1976, Art. V. Text: UN Legislative Series B/19, p. 422

Canada-USSR. Agreement on their Mutual Fisheries Relations, 1976, Art. V(1). Text: 1132 UNTS 139

Cape Verde-EC. Fisheries Partnership Agreement, 2006, Art. 5(4). Text: OJEU, 2006 L414/3

Certain Pacific Island States-USA. Treaty on Fisheries, 1987, Art. 4(1) Text: Australia Treaty Series 1988 No. 42

Comoros-EC. Fisheries Partnership Agreement, 2006, Art. 5(4). Text: OJEU 2006 L290/7.

Côte d'Ivoire-EC. Fisheries Partnership Agreement, 2008, Art. 5(4). Text: OJEU-2008 L48/41.

*Denmark and Faroe Islands-EEC. Agreement on Fisheries, 1977, Art. 5. Text: OJEC 1980 L226/12

*Denmark and Faroe Islands-Estonia. Agreement concerning Mutual Fishery Relations, 1992, Art. 5(1). Text: 1774 UNTS 254

*Denmark and Faroe Islands-German Democratic Republic. Agreement concerning Mutual Fishery Relations, 1986, Art. IV(1). Text: 1486 UNTS 90

*Denmark and Faroe Islands-USSR. Agreement concerning Mutual Fishery Relations, 1977, Art. 5(1). Text: 1122 UNTS 171

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Denmark (Greenland)-EC. Fisheries Partnership Agreement, 2007, Art. 5(5). Text: OJEU 2007 L172/4

*Denmark (Greenland)-Norway. Agreement concerning Mutual Fishery Relations, 1992, Art. 4. Text: 1829 UNTS 224

*Denmark (Greenland)-Russia. Agreement concerning Mutual Fishery Relations, 1992, Art. 6. Text: 1719 UNTS 89

*Dominica-EEC. Agreement on Fisheries, 1993, Art. 6(1). Text: OJEC 1993 L299/2

*EEC-Estonia. Agreement on Fisheries Relations, 1992, Art. 5(1). Text: OJEC 1993 L56/2

EEC-Finland. Agreement on Fisheries, 1980, Art. 5. Text: OJEC 1979 C69/7

*EEC-Latvia. Agreement on Fisheries Relations, 1992, Art. 5(1). Text: OJEC 1993 L56/6

*EEC-Lithuania. Agreement on Fisheries Relations, 1992, Art. 5(1). Text: OJEC 1993

*EEC-Norway. Agreement on Fisheries, 1980, Art. 6. Text: OJEC 1980 L226/48.

EEC-Spain. Agreement on Fisheries, 1980, Art. 6. Text: OJEC 1980 L322/4.

*EEC-Sweden. Agreement on Fisheries, 1980, Art. 5. Text: OJEC 1980 L226/2

*EU-Russia. Agreement on Cooperation in Fisheries and the Conservation of the Living Marine Resources in the Baltic Sea, 2009, Art. 8, Text at: http://faolex.fao.org/docs/pdf/bi-87793.pdf

Equatorial Guinea-EC. Agreement on Fishing off the Coast of Equatorial Guinea, 1984, Art. 3(1). Text: OJEC 1984 L188/2

Federated States of Micronesia-EC. Partnership Agreement on Fishing off Federated States of Micronesia, 2006, Art. 5(4). Text: OJEU 2006 L151/3

Gabon-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). Text: OJEU 2007 L109/3

Gambia-EC. Agreement on Fishing off Gambia, 1987, Art. 3(1). Text: OJEC 1987 L146/3

Guinea-EC. Fisheries Partnership Agreement, 2009, Art. 5(4). Text: OJEU, 2009 L156/35.

Guinea-Bissau-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). Text: OJEU 2007 L342/5

Iceland-Belgium. Fisheries Agreement relating to the Extension of the Fishing Limits to 200 NM, 1975, paras. 3-5.Text: *New Directions in the Law of the Sea*, Vol. V, p. 33

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Iceland-EC. Agreement on Fisheries and the Marine Environment, 1993, Art. 6. Text: OJEU 1993 L161/2

Iceland-Germany. Agreement relating to Fishing and to the Conservation of Living Resources in the Waters around Iceland, 1975, Arts. 2, 3, 5, 6 and 7.Text: UN Legislative Series B/19, p. 417.

Iceland-United Kingdom. Exchange of Notes concerning Fishing in the Icelandic Fisheries Zone, 1976, paras. 1-6.Text:. *New Directions in the Law of the Sea*, Vol. V, p. 46

Kiribati-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). Text: OJEU 2007 L205/3

*Lithuania-Sweden. Agreement on Fisheries, 1993, Art. 7(1). Text at: http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/Other/bi-1820.pdf

Madagascar-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). Text: OJEU 2006 L331/7

Mauritania-EC. Fisheries Partnership Agreement, 2006, Art. 5(4). Text: OJEU 2006 L343/4

Mauritius-EC. Agreement on Fishing in Mauritian Waters, 1989, Art. 3(1). Text: OJEC 1989 L159/2

Mexico-Cuba. Fishing Agreement, 1976, Art. VII(1). Text: UN Legislative Series B/19, p. 430

Mexico-USA. Fishing Agreement, 1976, Art. VII(1). Text: UN Legislative Series B/19, p. 425

Morocco-EC. Fisheries Partnership Agreement, 2006, Art. 5(4). Text: OJEU 2006 L141/4

Morocco-Japan. Agreement on Marine Fisheries , 1985, Art. 4. Text at: http://faolex.fao.org/docs/texts/bi-34260.doc

Mozambique-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). OJEU 2007, L331/35

New-Zealand-Japan. Agreement on Fisheries, 1978, Art. IV(1). Text: 1167 UNTS 441

New Zealand-South Korea. Fisheries Agreement, 1978, Art 11. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1978-FisheriesNewZealandKorea.EN.txt&par=view_treaty_html

New-Zealand-USSR. Agreement on Fisheries, 1978, Art. IV(1). Text: 1151 UNTS

*Norway-Russia. Agreement on Mutual Fishery Relations, 1976, Art. 5(1). Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1976-Norway-USSR-FisheriesRelations.EN.txt&par=view_treaty_html

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*Poland-Sweden. Agreement on Fisheries, 1978, Art. VII(1). Text: 1260 UNTS 229

*Portugal-Spain. Agreement on Mutual Fisheries Relations, 1978, Art. 4. 1126 UNTS 25

São Tomé e Príncipe-EC. Fisheries Partnership Agreement, 2007, Art. 5(4). Text: OJEU 2007 L205/36

Senegal-EC. Agreement on Fisheries off the Coast of Senegal, 1979, Art.3 (1). Text: OJEC 1980 L226/18

Seychelles-EC. Fisheries Partnership Agreement, 2006, Art. 5(4). Text: OJEU 2006 L290/2.

Sierra Leone-EC. Agreement on Fishing off Sierra Leone, 1990, Art.3 (1). Text: OJEC 1990 L125/28

Solomon Islands-EC. Partnership Agreement on Fishing off Solomon Islands, 2006, Art 5(4). OJEU 2006 L105/34

South Africa-Spain. Agreement concerning Mutual Fishery Relations, 1979, Art. II(1)(a). Text: 1314 UNTS 248

Tanzania EC. Agreement on Fishing off Tanzania, 1990, Art. 3(1). Text: OJ 1990 L379/25

United Kingdom-Japan. Agreement concerning Fisheries off the Coasts of the Gilbert Islands, 1978, Art. V. Text: 1108 UNTS 145

USA-Bulgaria. Agreement concerning Fisheries off the Coasts of the United States, 1976, Art. V. Text: 1134 UNTS 127

USA-People's Republic of China. Agreement concerning Fisheries off the Coasts of the United States, 1985, Art. VI. Text: 1443 UNTS 172

USA-Republic of China. Agreement concerning Fisheries off the Coasts of the United States, 1976, Art. V. Text: 1076 UNTS 277

USA-Cuba. Agreement concerning Fisheries off the Coasts of the United States, 1977, Art. VI. Text: 1087 UNTS 319

USA-Denmark and Faroe Islands. Agreement concerning Fisheries off the Coasts of the United States, 1984, Art. VI. Text: 2023 UNTS 3

USA-EEC. Agreement concerning Fisheries off the Coasts of the United States, 1977, Art. 5. Text: OJEC 1977 L141/2.

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USA-German Democratic Republic. Agreement concerning Fisheries off the Coasts of the United States, 1976, Art. V. Text: 1067 UNTS 3

USA-Iceland. Agreement concerning Fisheries off the Coasts of the United States, 1984, Art. VI. Text: 2022 UNTS 13

USA-Japan. Agreement concerning Fisheries off the Coasts of the United States, 1977, Art. VII. Text: 1095 UNTS 201

USA-Latvia. Agreement concerning Fisheries off the Coasts of the United States, 1993, Art. VI. Text: 2318 UNTS 107

USA-Lithuania. Agreement concerning Fisheries off the Coasts of the United States, 1992, Art. VI. Text: 2317 UNTS 439

USA-Norway. Agreement concerning Fisheries off the Coasts of the United States, 1981, Art. VI. Text: 1275 UNTS 161

USA-Poland. Agreement concerning Fisheries off the Coasts of the United States, 1976, Arts. V and VIII. Text: TIAS 8524

USA-Portugal. Agreement concerning Fisheries off the Coasts of the United States, 1980, Art. VI. Text: 1266 UNTS 225

USA-Romania. Agreement concerning Fisheries off the Coasts of the United States, 1976, Art. V. Text: 1117 UNTS 3

USA-South Korea. Agreement concerning Fisheries off the Coasts of the United States, 1977, Art. V. Text: 1067 UNTS 209

USA-Spain. Agreement concerning Fisheries off the Coasts of the United States, 1977, Art. V. Text: UN Legislative Series B/19, p. 436

USA-USSR. Agreement concerning Fisheries off the Coasts of the United States, 1976, Art. IV. Text: 1069 UNTS 307

*USA-USSR, Agreement Mutual Fisheries Relations,1988, Art. IV. Text at: http://iea.uoregon.edu/pages/view_treaty.php?t=1988-UnitedStatesUnionSovietSocialistRepublicsMutualFisheriesRelations.EN.txt&par=view_treaty_html

USSR-Bulgaria. Agreement relating to Fishing in the Areas of the Barents Sea adjacent to the Coast of the USSR, 1978, Art. 4. Text: 1154 UNTS 323

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USSR-Poland. Agreement relating to Fishing in the Areas of the Barents Sea adjacent to the Sea Frontage of the USSR, 1978, Art. 4. Text: 1151 UNTS 297