

Written Statement of the Food and Agricultural Organization of the United Nations (FAO)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE NO. 21)

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

**WRITTEN STATEMENT OF
THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)**

IN RESPONSE TO THE INVITATION CONTAINED IN ORDER 2013/2 DATED 24 May 2013

I. Introduction and background

1. The Conference of Ministers of the Sub-Regional Fisheries Commission (“SRFC”), at its Fourteenth Extraordinary Session, held from 27 to 28 March 2013 in Dakar, Republic of Senegal, decided to authorize the Permanent Secretary of the SRFC, to submit a request for an advisory opinion to the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”) on the following questions:

- “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?”¹

2. By Order 2013/2 of 24 May 2013, the Tribunal invited, in accordance with paragraph 3 of Article 133 of the Rules of the Tribunal, the States Parties to the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), the SRFC and other intergovernmental organizations listed in the annex to the same Order, to present Written Statements on the questions submitted to the Tribunal for an advisory opinion. By Order 2013/2, the Tribunal fixed 29 November 2013 as the time-limit within which Written Statements might be presented to the Tribunal.

3. FAO observes that a number of the regional fishery bodies invited by the Tribunal to provide Written Statements, as listed in the annex to Order 2013/2, were established in accordance with the Constitution of the Food and Agriculture Organization of the United Nations (FAO). These bodies are:

- Bodies established in accordance with Article VI of the FAO Constitution (“Article VI Statutory Fisheries Bodies”):
 - o Fishery Committee for the Eastern Central Atlantic (CECAF);
 - o Southwest Indian Ocean Fisheries Commission (SWIOFC);
 - o Western Central Atlantic Fishery Commission (WECAFC).
- Bodies established in accordance with Article XIV of the FAO Constitution (“Article XIV Statutory Fisheries Bodies”):
 - o Asia-Pacific Fishery Commission (APFIC);
 - o General Fisheries Commission for the Mediterranean (GFCM);
 - o Indian Ocean Tuna Commission (IOTC);
 - o Regional Commission for Fisheries (RECOFI).

¹ It is noted that there are significant differences between the French and English language versions of Question 3.

4. Article VI Statutory Fisheries Bodies² are established by a resolution of the Conference or the Council of FAO and are primarily advisory in nature. Their membership is open to all Members of FAO unless otherwise specified. By contrast, Article XIV Statutory Fisheries Bodies³ are established by an international agreement adopted within the framework of the FAO Constitution. Membership of these bodies is open to FAO Members and non-Members. They have advisory and regulatory powers and may, for example, adopt conservation and management measures that are binding on their Members. While they are administratively linked to FAO, they enjoy a certain level of functional autonomy.⁴

² Article VI provides, in relevant part:

"1. The Conference or Council may establish commissions, the membership of which shall be open to all Member Nations and Associate Members, or regional commissions open to all Member Nations and Associate Members whose territories are situated wholly or in part in one or more regions, to advise on the formulation and implementation of policy and to coordinate the implementation of policy. The Conference or Council may also establish, in conjunction with other intergovernmental organizations, joint commissions open to all Member Nations and Associate Members of the Organization and of the other organizations concerned, or joint regional commissions open to Member Nations and Associate Members of the Organization and of the other organizations concerned, whose territories are situated wholly or in part in the region.

2. The Conference, the Council, or the Director-General on the authority of the Conference or Council may establish committees and working parties to study and report on matters pertaining to the purpose of the Organization and consisting either of selected Member Nations and Associate Members, or of individuals appointed in their personal capacity because of their special competence in technical matters. The Conference, the Council, or the Director-General on the authority of the Conference or Council may, in conjunction with other intergovernmental organizations, also establish joint committees and working parties, consisting either of selected Member Nations and Associate Members of the Organization and of the other organizations concerned, or of individuals appointed in their personal capacity. The selected Member Nations and Associate Members shall, as regards the Organization, be designated either by the Conference or the Council, or by the Director-General if so decided by the Conference or Council. The individuals appointed in their personal capacity shall, as regards the Organization, be designated either by the Conference, the Council, selected Member Nations or Associate Members, or by the Director-General, as decided by the Conference or Council."

³ Article XIV provides, in relevant part:

"1. The Conference may, by a two-thirds majority of the votes cast and in conformity with rules adopted by the Conference, approve and submit to Member Nations conventions and agreements concerning questions relating to food and agriculture.

2. The Council, under rules to be adopted by the Conference, may, by a vote concurred in by at least two thirds of the membership of the Council, approve and submit to Member Nations:

(a) agreements concerning questions relating to food and agriculture which are of particular interest to Member Nations of geographical areas specified in such agreements and are designed to apply only to such areas;

(b) supplementary conventions or agreements designed to implement any convention or agreement which has come into force under paragraphs 1 or 2(a)."

⁴ The differing nature of these bodies is described in the *Preliminary Review of Statutory Bodies with Particular Reference to Article XIV Bodies and their Relationship with FAO*, FAO Programme Committee, 104th Session, Rome, 25-29 October 2010, PC 104/9, as follows:

"8. ... Statutory bodies include a large number of committees, commissions and treaties established under Article VI or Article XIV of the Constitution, dealing for the most part with technical and scientific matters. As a general rule, bodies established under Article VI are part of the Organization. They do not have a 'life of their own'. Article XIV, on the other hand, makes provision for the negotiation within meetings convened by, or on behalf of the Director-General, and the subsequent adoption by the Conference or the Council of conventions and agreements. These instruments are said to have a 'life of their own' and usually provide for obligations extending beyond those set out in the Constitution and the other Basic Texts of FAO. For instance, these bodies may adopt regulatory measures directly binding upon the Members of the concerned body and may have autonomous budgets."

See also *Principles and Procedures which should govern Conventions and Agreements concluded under Articles XIV and XV of the Constitution, and Commissions and Committees established under Article VI of the Constitution*:

"2. In accordance with the provisions of Article VI of the Constitution, the Conference and the Council may establish general or regional commissions as well as committees and working parties, and may convene general, technical, regional or other meetings. For the necessary juridical act to be accomplished, all that is required is a decision of the Conference or Council.

3. Article XIV of the Constitution applies to conventions and multilateral agreements concluded under the aegis of the Organization. These are agreements concluded between States with respect to which, in conformity with the principles of public international law, the expressed consent of sovereign entities constitutes the required juridical act.

4. However, the procedure of multilateral agreements has been used on several occasions to establish commissions and committees entrusted with specific tasks which fall within the general terms of reference of the Organization.

5. It must be borne in mind that the express purpose of multilateral agreements is to create contractual obligations for those who become parties to them. Contracting parties undertake to do or not to do certain things, such obligations being generally assumed for a given period. It follows directly from this principle that any agreement concluded under Article XIV of the Constitution among Member Nations of the

II. International legal instruments developed under auspices of FAO in the field of fisheries

5. This Written Statement (hereinafter “this Statement”) provides background information on pertinent provisions of those international legal instruments relevant to fisheries adopted under the FAO Constitution, with a view to assisting the Tribunal in its consideration of the four questions addressed to it by the Permanent Secretary of the SRFC. The Statement is factual in nature and does not seek to interpret the international instruments.

6. A range of international legal instruments have been concluded under the auspices of FAO addressing fisheries management and conservation of marine living resources. While some of these instruments focus on technical and operational matters, other instruments have been developed to address illegal, unreported and unregulated (“IUU”) fishing, introducing minimum standards and responsibilities for States in their capacity as flag State, coastal State, port State and market State, consistent with the applicable principles and rules of international law.

7. This Statement describes the following instruments that contain provisions on flag State responsibilities, coastal State responsibilities and IUU fishing:

- The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter “the Compliance Agreement”);
- The Code of Conduct for Responsible Fisheries (hereinafter “the Code of Conduct”);
- The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter “the IPOA-IUU”);
- The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter “the Port State Measures Agreement”).

8. It is observed that, of the instruments identified above, the Code of Conduct and the International Plan of Action are voluntary in nature.⁵ They are, however, based upon rules of international law and are not, therefore, completely devoid of any legal effect.⁶ Furthermore, some provisions of non-binding instruments have subsequently been incorporated into binding international and regional instruments.⁷

Organization should entail financial or other obligations going beyond those already assumed under the Constitution of the Organization. Failing this, there would be no grounds for such an agreement, at least not in the legal form prescribed under Article XIV of the Constitution.

6. Hence, any multilateral agreement between Member Governments may undoubtedly provide for the establishment of a commission or an executive body, but this should not be an end in itself since under Article VI the Conference and the Council are empowered to establish such bodies merely by a decision on their part. Consequently, the setting up of a commission or a committee by a multilateral agreement is justified only when such agreement presupposes the assumption of specific obligations going beyond mere participation in the work of the body thus established.”

Report of the Conference of FAO, Ninth Session, Rome, 2-23 November 1957, reflected in Part O of Volume II of the FAO Basic Texts, page 175.

⁵ Article 1.1 Code of Conduct and paragraph 4 IPOA-IUU.

⁶ Article 3 Code of Conduct provides that it is to be interpreted and applied in conformity with the relevant rules of international law, including the United Nations Convention on the Law of the Sea, 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 (UNFSA), and other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party. Paragraph 4 IPOA-IUU provides that it is voluntary, and refers to the Code of Conduct, in the framework of which it was developed.

⁷ The Port State Measures Agreement gives binding effect to certain provisions of the IPOA-IUU. It also gives binding effect to the provisions of its non-binding predecessor, the Model Scheme on Port State Measures to Combat IUU fishing, adopted by the FAO Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August – 2 September 2004.

9. It is noted that the Voluntary Guidelines on Flag State Performance, agreed at the second Resumed Technical Consultation on Flag State Performance, held in Rome, from 4 to 8 February 2013, are not presented in this Statement as the instrument cannot, at this stage, be regarded as final. The Technical Consultation requested that the Secretariat review the text of the Voluntary Guidelines on Flag State Performance to ensure language and legal consistency, to reorganize paragraphs under appropriate titles and subtitles and to edit the numbering format as required, prior to submitting the Guidelines to the FAO Committee on Fisheries for consideration at its Thirty-first Session in June 2014.⁸

A. The Compliance Agreement

10. The Compliance Agreement was approved by the FAO Conference during its 27th Session, held from 6 to 24 November 1993.⁹ It entered into force on 24 April 2003 and currently has 39 Parties. It is only binding on the Parties to the Agreement. It primarily concerns the responsibilities of the flag State over vessels used or intended for fishing on the high seas, and the obligation to maintain a record of fishing vessels.

11. The Compliance Agreement aims to promote compliance with international conservation and management measures which are defined in Article I(b) of the Agreement as:

“measures to conserve or manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. They may be adopted by global, regional or subregional fisheries organizations, subject to the rights and obligations of their members, or by treaties or other international agreements.”

12. The Compliance Agreement applies to all fishing vessels used or intended for fishing on the high seas.¹⁰ There are however two limitations in the Agreement which concern the type of fishing vessel to which the Agreement applies. Firstly, the definition excludes support vessels not directly involved in fishing operations.¹¹ Secondly, Parties may exempt vessels of less than 24 meters in length entitled to fly their flag¹² from the application of the Compliance Agreement unless this would undermine the objective and purpose of the Agreement.¹³ This

This Model Scheme was endorsed by the FAO Committee on Fisheries at its Twenty-sixth Session, held from 7 to 11 March 2005, and by the FAO Council at its Hundred and Twenty-Eighth Session, held from 20-25 June 2005.

RFMOs may also play a role in giving binding effect to certain instruments. For example, by Resolution 10/11 on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the Indian Ocean Tuna Commission (IOTC) adopted a detailed set of measures based on the Port State Measures Agreement. In the preamble, The IOTC notes the Port State Measures Agreement and indicates its desire to implement it in the IOTC competence area notwithstanding that it has not entered into force.

⁸ See Administrative Report of the Technical Consultation on Flag State Performance, Rome, 2-6 May 2011, 5-9 March 2012, 4-8 February 2013, paragraph 26.

⁹ FAO Conference Resolution 15/93, adopted during the 27th Session of the FAO Conference, C 1993/REP, paragraph 265.

¹⁰ Article II(1) Compliance Agreement. The Compliance Agreement does not explicitly mention vessels used for fishing related activities, which may include refrigerator vessels and other support vessels that enable fishing boats to stay at sea for extended periods of time, which can play an important role in supporting fishing and IUU fishing activities. In contrast, the scope of application of the Port State Measures Agreement, negotiated in 2009, explicitly includes fishing related activities, acknowledging the important role of such activities in fishing and IUU fishing activities (fishing related activities are defined as “any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea” (Article I(d) Port State Measures Agreement)).

¹¹ The Preamble does, however, refer to vessels engaged in transshipment of fish.

¹² Article I(f) determines that “vessels entitled to fly its flag” and “vessels entitled to fly the flag of a State” include vessels entitled to fly the flag of a member State of a regional economic integration organization.

¹³ Subject to certain conditions, set out in Article II(2)(a) and (b) and Article II(3) of the Compliance Agreement. Article III(1)(b) Compliance Agreement establishes that a Party having granted an exemption for fishing vessels of less than 24 metres in length from the application of the Agreement, is nevertheless required to take measures in respect of any such exempted fishing vessel that undermines the effectiveness of international conservation and management measures.

exemption is optional and it does not remove the basic obligation of the flag State to ensure that such vessels do not undermine conservation and management measures on the high seas.

13. Article III is the most important clause in the Agreement, for it sets out the main responsibilities of the flag State. In essence, it places an obligation on the flag State to take

“such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.”¹⁴

14. Article III continues:

“In particular, no Party shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that Party. A fishing vessel so authorized shall fish in accordance with the conditions of the authorization.”¹⁵

15. Further duties are imposed to give content to these basic obligations, including provisions concerning: not granting an authorization unless the flag State is able to exercise effectively its responsibilities in respect of the vessel; non-authorization of a vessel still under suspension; the requirement that vessel be marked so as to be readily identified in accordance with generally accepted standards, such as the FAO vessel marking scheme; the requirement of information on the operations of a vessel; and, the imposition of sanctions of sufficient gravity as to be effective in securing compliance with requirements of the Agreement. The Compliance Agreement establishes that the high seas fishing authorization issued by the flag State is deemed to be cancelled when the fishing vessel ceases to be entitled to fly the flag of the Party.¹⁶

16. The Compliance Agreement requires that flag States do not issue high seas fishing authorizations to vessels having previously undermined the effectiveness of international conservation and management measures while registered in the territory of another Party, subject to a number of specific conditions.¹⁷ This aims at addressing the practice of some vessel operators which engage in IUU fishing activities to re-flag their vessels frequently.

17. A Party is required to ensure that each fishing vessel entitled to fly its flag provide it with such information on its operations as may be necessary to fulfill the obligations under the Agreement.¹⁸

18. Article IV of the Compliance Agreement provides that each Party must maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and that measures must be taken as may be necessary to ensure that all such fishing vessel be entered in that record.¹⁹

19. Article VI of the Compliance Agreement addresses the exchange of information and establishes that each Party is to make available to FAO certain information with respect to each fishing vessel entered in the record including in relation to vessel characteristics,

¹⁴ Article III(1)(a) Compliance Agreement.

¹⁵ Article III(2) Compliance Agreement.

¹⁶ Article III(4) Compliance Agreement.

¹⁷ Article III(5)(a) and Article III(5)(b) provide that the prohibition to authorize vessels does not apply if the suspension of a high seas fishing authorization by another State Party has expired and if the authorization has not been withdrawn by a State Party within the previous three years. The same applies in respect of suspensions and withdrawals by non-Parties, if sufficient information is available. Article III(5)(c) provides that Article III(5)(a) and (b) do not apply where the ownership of the fishing vessel has changed and the new owner has provided sufficient evidence that the previous owner or operator has no further legal, beneficial or financial interests in or control of the vessel. Similarly, Article III(5)(d) provides that fishing vessels may be authorized notwithstanding Article III(5)(a) and (b) if the State Party determines that granting the authorization would not undermine the purpose and object of the Compliance Agreement.

¹⁸ Article III(7) Compliance Agreement, including in particular information pertaining to the area of its fishing operations and to its catches and landings.

¹⁹ Article IV Compliance Agreement.

operations and authorizations.²⁰ Parties are, furthermore, encouraged to provide additional information.²¹ FAO circulates the information to other Parties and makes the information available to global, regional or subregional fisheries organizations, subject to restrictions imposed by the Party concerned regarding its distribution.²² Parties must notify FAO promptly of modifications,²³ additions and deletions to the national record, including the reasons for deletion of a vessel from the record.²⁴ A Party is also required to report to FAO all relevant information in relation to vessels flying its flag that undermine the effectiveness of international conservation and management measures, including the identity of the vessels and the measures imposed.²⁵ Furthermore, each Party which has reasonable grounds to believe that a fishing vessel not entitled to fly its flag has engaged in any activity that undermines the effectiveness of international conservation and management measures, is to draw this to the attention of the flag State concerned, and may, as appropriate, draw it to the attention of FAO. The Party must provide the flag State with full supporting evidence and may provide FAO with a summary of such evidence.²⁶ Each Party is also required to inform FAO of situations in which it has granted an authorization in respect of a vessel previously registered in the territory of another Party where a period of suspension has not expired, or where an authorization to fish has been withdrawn.²⁷

20. Parties, in their capacity as flag States, have the obligation to take enforcement measures in respect of vessels acting in contravention of the provisions of the Compliance Agreement, including, where appropriate, making such contraventions offences under national legislation, applying sanctions that are appropriate to encourage compliance and to deprive offenders from accrued benefits.²⁸

21. The Compliance Agreement requires that Parties cooperate, in particular, on the exchange of information, including evidentiary material, relating to activities of fishing vessels in order to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures.²⁹ Parties are also required to ensure that vessels entered in the national record be marked in accordance with generally accepted standards to facilitate their identification.³⁰

22. Article VIII of the Compliance Agreement contains a number of provisions that relate to fishing vessels flying the flag of non-Parties. The Agreement requires that Parties cooperate in a manner consistent with the Agreement and international law to the end that fishing vessels flying the flag of non-Parties do not engage in activities that undermine the

²⁰ Article VI(1) Compliance Agreement.

²¹ Article VI(2) Compliance Agreement.

²² Article VI(4) Compliance Agreement.

²³ Article VI(3) Compliance Agreement.

²⁴ Article VI(5) and (6) Compliance Agreement.

²⁵ Article VI(8)(a) Compliance Agreement. Reports on measures imposed may be subject to such limitations as may be required by national legislation with respect to confidentiality.

²⁶ Article VI(8)(b) Compliance Agreement.

²⁷ Article VI(9) Compliance Agreement. This situation refers to authorizations granted pursuant to Article III(5)(d) Compliance Agreement.

²⁸ Article III(8) Compliance Agreement.

²⁹ Article V(1) Compliance Agreement.

³⁰ Article III(6) Compliance Agreement.

effectiveness of international conservation and management measures.³¹ Parties are, furthermore, required to exchange information with respect to activities of vessels flying the flag of non-Parties that undermine the effectiveness of international conservation and management measures.³²

B. The Code of Conduct

23. The Code of Conduct for Responsible Fisheries was adopted by the FAO Conference during its Twenty-Eight Session, held from 20 to 31 October 1995.³³ The Code of Conduct is a voluntary instrument that is global in scope and applies to all fisheries activities, irrespective of where they take place.³⁴ It is directed to Members and non-Members of FAO, fishing entities, subregional, regional and global organizations, and all persons concerned with the conservation of fishery resources and management and development of fisheries.³⁵

24. The Code provides that States not Party to the Compliance Agreement should be encouraged to accept the Agreement and to adopt laws and regulations consistent with it.³⁶ Flag States should take enforcement measures in respect of fishing vessels entitled to fly their flag which have been found by them to have contravened applicable conservation and management measures.³⁷ In this regard, it is noted that the Preamble of the Compliance Agreement states:

“*Noting* that this Agreement will form an integral part of the International Code of Conduct for Responsible Fishing called for in the Declaration of Cancun”.

25. Along the same lines, Article 1.1 of the Code of Conduct states:

“The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code.”

26. The Code of Conduct provides principles and standards for responsible fisheries, including in relation to legal and institutional frameworks required for the exercise of responsible fisheries and in the formulation and implementation of appropriate measures.³⁸ The Code of Conduct is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea.³⁹ The Code calls for collaboration in the fulfillment and implementation of its objectives and principles.⁴⁰

³¹ Article VIII(2) Compliance Agreement.

³² Article VIII(3) Compliance Agreement.

³³ FAO Conference Resolution 4/1995, adopted during the Twenty-Eighth Session of the FAO Conference, C 1995/REP, paragraph 81.

³⁴ Article 1.1, 1.2 and 1.3 Code of Conduct.

³⁵ Article 1.2 Code of Conduct.

³⁶ Article 8.2.6 Code of Conduct.

³⁷ Article 8.2.7 Code of Conduct.

³⁸ Article 2, in particular Article 2(c), Code of Conduct.

³⁹ Article 3.1 Code of Conduct. Article 3.2 Code of Conduct provides that the Code is also to be interpreted and applied: in a manner consistent with the relevant provisions of 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; in accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party and in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21, adopted by the United Nations Conference on Environment and Development (UNCED), in particular Chapter 17 of Agenda 21, and other relevant declarations and international instruments.

⁴⁰ Article 4.1 Code of Conduct.

27. The Code of Conduct provides that States, including flag States, should ensure compliance with and enforcement of conservation and management measures and establish effective mechanisms to monitor and control the activities of fishing vessels and fishing support vessels, in accordance with international law, including within the framework of subregional or regional fisheries conservation and management organizations or arrangements.⁴¹

28. States authorizing fishing and fishing support vessels to fly their flags, should exercise effective control over those vessels so as to ensure the proper application of the Code and should ensure that the activities of such vessels do not undermine the effectiveness of conservation and management measures taken in accordance with international law. In respect of vessels flying its flag, a State should ensure that obligations concerning the collection and provision of data relating to their fishing activities are fulfilled.⁴² States should furthermore adopt measures to ensure that no vessel be allowed to fish unless so authorized, in a manner consistent with international law for the high seas, or in conformity with national legislation within areas of national jurisdiction.⁴³

29. States should maintain a record, updated at regular intervals, on all authorizations to fish issued by them.⁴⁴ The provisions related to fishing authorizations and fishing vessel records are further specified in an article dedicated to flag State duties.⁴⁵ In this context, the Code provides that States should maintain records of fishing vessels entitled to fly their flag and authorized to be used for fishing, stating certain details.⁴⁶ Flag States should ensure that no fishing vessels entitled to fly their flag engage in fishing activities on the high seas or in waters under the jurisdiction of other States unless such vessels have been issued with a Certificate of Registry and have been authorized to fish by the competent authorities.⁴⁷ Under the article dedicated to flag State duties, the Code of Conduct provides furthermore that fishing vessels authorized to fish on the high seas or in waters under the jurisdiction of a State other than the flag State, should be marked in accordance with uniform and internationally recognizable vessel marking systems.⁴⁸

30. Within the provisions related to port State duties, the Code of Conduct also addresses the role of flag States.⁴⁹ It provides that port States should take such measures as are necessary to achieve and to assist other States in achieving the objectives of this Code.⁵⁰ Port States should, furthermore, provide such assistance to flag States as is appropriate when a fishing vessel is voluntarily in a port and the flag State of the vessel requests the port State for assistance in respect of non-compliance with, *inter alia*, subregional, regional or global conservation and management measures.⁵¹

⁴¹ Article 6.10 Code of Conduct. This is further specified in Article 7.1.7 Code of Conduct.

⁴² Article 6.11 Code of Conduct. Article 8.1.3 Code of Conduct provides that States should maintain statistical data on all fishing operations allowed by them.

⁴³ Article 7.6.2 Code of Conduct.

⁴⁴ Article 8.1.2 Code of Conduct.

⁴⁵ Article 8.2 Code of Conduct.

⁴⁶ Article 8.2.1 Code of Conduct.

⁴⁷ Article 8.2.2 Code of Conduct.

⁴⁸ Article 8.2.3 Code of Conduct.

⁴⁹ Article 8.3 Code of Conduct.

⁵⁰ Article 8.3.1 Code of Conduct. These measures should be established in their national legislation, be in accordance with international law, including applicable international agreements or arrangements, and applied indiscriminately. Details of such measures should be made known to other States.

⁵¹ Article 8.3.2 Code of Conduct.

31. The Code of Conduct contains a number of clauses that address cooperation in the management and conservation of fish stocks that apply to States in general. States should cooperate at subregional, regional and global levels through fisheries management organizations, other international agreements or other arrangements to promote conservation and management.⁵² Where transboundary fish stocks, straddling fish stocks, highly migratory fish stocks and high seas fish stocks are exploited by two or more States, the States concerned, including the relevant coastal States, should cooperate to ensure effective conservation and management of the resources and, where appropriate, establish a subregional or regional fisheries management organization or arrangement (“FMO/A”) to this end.⁵³ A State with a real interest in a fishery in respect of which a subregional or regional FMO/A has the competence to establish conservation and management measures should cooperate by becoming a member,⁵⁴ or at least cooperate by giving effect to conservation and management measures adopted by such a FMO/A.⁵⁵

32. The Code provides that States should cooperate to establish systems for monitoring, control, surveillance and enforcement of applicable measures with respect to fishing operations and related activities in waters outside their national jurisdiction, within the framework of subregional or regional FMO/As.⁵⁶ States that are members of or participants in subregional or regional FMO/As should implement internationally agreed measures adopted in the framework of such organizations or arrangements and consistent with international law to deter the activities of vessels flying the flag of non-members or non-participants which engage in activities that undermine the effectiveness of conservation and management measures established by such organizations or arrangements.⁵⁷

33. The Code sets forth a number of provisions related to legal frameworks that apply to States in general, and are thus addressed to States in their capacity of, for example, flag State, coastal State, port State and market State. States and all those involved in fisheries should, through an appropriate policy, legal and institutional framework, adopt conservation and management measures for fisheries resources.⁵⁸ States should ensure that an effective legal and administrative framework at the local and national level is established for fisheries resource conservation and management,⁵⁹ and that legal frameworks provide for sufficiently severe sanctions in respect of violations.⁶⁰ States should implement effective fisheries monitoring, control and surveillance and law enforcement measures.⁶¹

⁵² Article 6.12 Code of Conduct.

⁵³ Article 7.1.3 Code of Conduct.

⁵⁴ Article 7.1.4 Code of Conduct.

⁵⁵ Article 7.1.5 Code of Conduct. The cooperation includes, for example, as specified in Article 8.4.3 Code of Conduct, ensuring that documentation with regard to fishing operations, retained catch of fish and non-fish species and, as regards discards, the information required for stock assessment as decided by relevant management bodies, is collected and systematically forwarded to those bodies.

⁵⁶ Article 8.1.4 Code of Conduct. Article 7.7.3 Code of Conduct provides that States should implement effective fisheries monitoring, control, surveillance and law enforcement measures that should be promoted and, where appropriate, implemented by subregional or regional fisheries management organizations and arrangements in accordance with procedures agreed by such organizations or agreements.

⁵⁷ Article 7.7.5 Code of Conduct.

⁵⁸ Article 7.1.1 Code of Conduct.

⁵⁹ Article 7.7.1 Code of Conduct.

⁶⁰ Article 7.7.2 Code of Conduct.

⁶¹ Article 7.7.3 and Article 7.1.7 Code of Conduct.

C. *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*

34. The IPOA-IUU was adopted by the Committee on Fisheries at its Twenty-fourth Session, held from 26 February to 2 March 2001⁶² and endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001.⁶³

35. The IPOA-IUU was developed against the background of an increasing concern about illegal, unreported and unregulated (IUU) fishing.⁶⁴ When the matter of IUU fishing was taken up at FAO, at the Twenty-third Session of the FAO Committee on Fisheries (COFI) in February 1999, the mandate and scope of IUU was not precisely defined in any instrument. As reflected in the Report of this Session:

“The Committee was concerned about information presented indicating increases in illegal, unreported and unregulated fishing, including fishing vessels flying ‘flags of convenience’. The Committee urged, as a priority, those countries which had not yet ratified the Compliance Agreement to consider doing so as soon as possible. It was generally agreed that pending the entering into force of the Agreement, additional steps might need to be considered and that FAO should undertake work in this regard. ... It was emphasized that due account should be taken of the rights and obligations of States under international law.”⁶⁵

36. Shortly thereafter, a FAO Ministerial Meeting on Fisheries in March 1999 declared that, without prejudice to the rights and obligations of States under international law, FAO

“will develop a global plan of action to deal effectively with all forms of illegal, unregulated and unreported fishing including fishing vessels flying “flags of convenience” ... through coordinated efforts by States, FAO, relevant regional fisheries management bodies and other relevant international agencies such as the International Maritime Organization (IMO), as provided in Article IV of the Code of Conduct”.⁶⁶

37. The outcome of this process is the IPOA-IUU which has the objective of preventing, deterring and eliminating IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate RFMOs.⁶⁷ The IPOA-IUU provides that States should embrace all measures to prevent, deter and eliminate IUU fishing, building on the primary responsibility of the flag State and using jurisdiction in accordance with international law, including port State measures, coastal State measures, market-related measures and measures to ensure that nationals do not engage in or support IUU fishing.⁶⁸

38. The IPOA-IUU provides that all States should give full effect to relevant norms of international law.⁶⁹ States should ensure that national legislation address all aspects of IUU fishing effectively.⁷⁰ Each State should ensure that sanctions for IUU fishing by vessels and,

⁶² Report of the Twenty-fourth Session of the FAO Committee on Fisheries, 26 February to 2 March 2001, paragraph 108.

⁶³ Report of the Hundred and Twentieth Session of the Council, Rome, 18 to 23 June 2001, paragraph 9.

⁶⁴ Introduction to the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paragraph 1.

⁶⁵ Report of the Twenty-third Session of the Committee on Fisheries, Rome, Italy, 15-19 February 1999, Paragraph 72

⁶⁶ The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, adopted by the FAO Ministerial Meeting on Fisheries, Rome, 10-11 March 1999, paragraph 12(j).

The FAO Council also “noted that illegal, unauthorized and unreported fishing (IUU), including fishing by vessels flying “flags of convenience”, undermined conservation and management measures in fisheries. The Council agreed that a global approach be taken by FAO to develop a strategy to address the problem of IUU, noting that this initiative should be carried forward through the development of an IPOA within the framework of the Code of Conduct. The Council urged countries that had not yet accepted the Compliance Agreement to do so as soon as possible.” Report of the Council, Hundred and Sixteenth Session, Rome, 14 - 19 June 1999, CL 116 REP, at paragraph 30.

⁶⁷ Paragraph 8 IPOA-IUU. The definition of IUU fishing is given in Paragraph 3 International Plan of Action.

⁶⁸ Paragraph 9.3 IPOA-IUU.

⁶⁹ Paragraph 10 IPOA-IUU. Paragraph 10 refers in particular to the United Nations Convention on the Law of the Sea.

⁷⁰ Paragraph 16 IPOA-IUU.

to the greatest extent possible, nationals under its jurisdiction be of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.⁷¹ States should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing.⁷² States should, furthermore, discourage nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities.⁷³ The IPOA-IUU provides that States should take all possible steps to prevent, deter and eliminate the activities of non-cooperating States to a relevant RFMO which engage in IUU fishing.⁷⁴ States should also undertake comprehensive and effective monitoring, control and surveillance of fishing from its commencement, through the point of landing, to final destination.⁷⁵ The IPOA-IUU establishes that States should coordinate their activities and cooperate directly, and as appropriate, through relevant RFMOs, in preventing, deterring and eliminating IUU fishing.⁷⁶

39. The IPOA-IUU addresses a number of flag State responsibilities related to fishing vessel registration, records of fishing vessels, and the authorization to fish. States should ensure that vessels entitled to fly their flag do not engage in or support IUU fishing.⁷⁷ A flag State should, prior to registering a fishing vessel, ensure that it can exercise its responsibility to ensure that the vessel does not engage in IUU fishing.⁷⁸ The IPOA-IUU establishes that issuing a flag to fishing vessels with a history of non-compliance should be avoided.⁷⁹ The IPOA-IUU provides that all States involved in a chartering arrangement, including flag States and other States, should take measures to ensure that chartered vessels do not engage in IUU fishing.⁸⁰ Flag States should deter vessels from reflagging for the purpose of non-compliance with conservation and management measures or provisions adopted at national, regional or global level.⁸¹ States should take all practical steps to prevent a vessel from “flag hopping”.⁸² Flag States should consider making the registration of a fishing vessel, for the purpose of obtaining a flag, conditional upon the fishing vessel obtaining an authorization to fish.⁸³

40. The IPOA-IUU provides that each flag State should maintain a record of fishing vessels entitled to fly its flag and specifies the information that States should include in the record in respect of vessels authorized to fish on the high seas.⁸⁴ Flag States should adopt

⁷¹ Paragraph 21 IPOA-IUU.

⁷² Paragraph 18 IPOA-IUU.

⁷³ Paragraph 19 IPOA-IUU.

⁷⁴ Paragraph 22 IPOA-IUU. Reference is made to non-cooperating States, not to vessels of non-cooperating States.

⁷⁵ Paragraph 24 IPOA-IUU. Reference is made to, *inter alia*: maintenance of records; implementing vessel monitoring systems; implementing observer programmes; providing training; support internationally agreed boarding and inspection schemes.

⁷⁶ Paragraph 28 IPOA-IUU. Reference is made to, *inter alia*: exchange of data or information; cooperation in acquisition, management and verification of data; cooperation in transferring expertise and technology; and cooperation in monitoring, control, surveillance.

⁷⁷ Paragraph 34 IPOA-IUU.

⁷⁸ Paragraph 35 IPOA-IUU.

⁷⁹ Paragraph 36 IPOA-IUU. An exception is made in where the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel (Paragraph 36.1 IPOA-IUU). A further exception is made where the flag State determines that flagging the vessel would not result in IUU fishing, having taken into account all relevant facts (Paragraph 36.2 IPOA-IUU).

⁸⁰ Paragraph 37 IPOA-IUU.

⁸¹ Paragraph 38 IPOA-IUU.

⁸² Paragraph 39 IPOA-IUU. This practice is defined in Paragraph 39 IPOA-IUU as “the practice of repeated and rapid changes of a vessel’s flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.”

⁸³ Paragraph 41 IPOA-IUU.

⁸⁴ Paragraph 42 IPOA-IUU. The information includes *inter alia*: previous names of the vessel; name, address and nationality of natural or legal person in whose name the vessel is registered; name, street and mailing address and nationality of natural or legal person responsible

measures to ensure that no vessel be allowed to fish unless so authorized.⁸⁵ In particular, the IPOA-IUU provides that a flag State should ensure that each of the fishing vessels entitled to fly its flag that operates in waters outside the sovereignty of the flag State, holds a valid authorization to fish issued by its flag State.⁸⁶ The IPOA-IUU specifies minimum information that should be included in the authorization,⁸⁷ which may be issued under conditions such as the condition to comply with applicable international conventions and national laws and regulations as well as conservation and management measures or provisions adopted at a national, regional or global level.⁸⁸ The IPOA-IUU also addresses activities in support of IUU fishing by providing that States should ensure that their fishing, transport and support vessels do not support or engage in IUU fishing.⁸⁹ Flag States should furthermore ensure that, to the greatest extent possible, fishing, transport and support vessels entitled to fly their flag involved in transshipment at sea, have a prior authorization to transship issued by the flag State.⁹⁰ The IPOA-IUU provides that flag States should make information from catch and transshipment reports available to relevant national, regional and international organizations, including FAO.⁹¹

41. The IPOA-IUU establishes measures to prevent deter and eliminate IUU fishing that coastal States should consider, consistent with national legislation and international law, and to the extent practicable and appropriate.⁹² A coastal State should provide for effective monitoring, control and surveillance of fishing activities in its exclusive economic zone,⁹³ cooperate and exchange information,⁹⁴ subject all fishing activities in waters under national jurisdiction to obtaining a coastal State authorization to fish,⁹⁵ issue authorizations only to those fishing vessels entered in a record of fishing vessels,⁹⁶ ensure maintenance of log books by vessels in waters under national jurisdiction,⁹⁷ subject transshipment at-sea to obtaining an authorization or to complying with regulations,⁹⁸ regulate access to waters under national jurisdiction,⁹⁹ and avoid licensing vessels with a history of IUU fishing.¹⁰⁰

for managing the operations of the vessel and of the natural or legal person with beneficial ownership of the vessel; name and ownership of vessel; history of non-compliance by the vessel; vessel dimension and photographs. Paragraph 43 IPOA-IUU provides that States may also require the information to be included in respect of vessels authorized to fish on the high seas, to be included for those vessels that are not authorized to fish on the high seas.

⁸⁵ Paragraph 44 IPOA-IUU. Reference is made to fishing activities on the high seas, which should be authorized in accordance with international law for the high seas, in particular the rights and duties set out in articles 116 and 117 United Nations Convention on the Law of the Sea. Reference is furthermore made to fishing activities in areas under national jurisdiction, which should be authorized in conformity with national legislation.

⁸⁶ Paragraph 45 IPOA-IUU provides that Coastal States should ensure that no fishing authorization for fishing in coastal waters be issued to vessels without an authorization to fish issued by the flag State of the vessel.

⁸⁷ Paragraph 46 IPOA-IUU refers to, *inter alia*: name of the vessel; areas, scope and duration of the authorization; species, fishing gear.

⁸⁸ Paragraph 47 IPOA-IUU. The conditions furthermore relate to, *inter alia*: catch reporting conditions; transshipping conditions; observer coverage; maintenance of log books; navigational equipment to ensure compliance; vessel markings; vessel identification numbers.

⁸⁹ Paragraph 48 IPOA-IUU.

⁹⁰ Paragraph 49 IPOA-IUU. Flag States should furthermore ensure that in these cases, report is made to the national fisheries administration or other designated institution of certain details of the transshipment.

⁹¹ Paragraph 50 IPOA-IUU. Applicable confidentiality requirements should be observed and data should be aggregated according to areas and species.

⁹² Paragraph 51 IPOA-IUU.

⁹³ Paragraph 51.1 IPOA-IUU.

⁹⁴ Paragraph 51.2 IPOA-IUU.

⁹⁵ Paragraph 51.3 IPOA-IUU.

⁹⁶ Paragraph 51.4 IPOA-IUU.

⁹⁷ Paragraph 51.5 IPOA-IUU.

⁹⁸ Paragraph 51.6 IPOA-IUU.

⁹⁹ Paragraph 51.7 IPOA-IUU.

42. Within the provisions related to port State responsibilities, the IPOA-IUU also addresses the role of the flag State. Where the port State has clear evidence that a vessel having been granted access to its ports¹⁰¹ has engaged in IUU fishing activity, the port State should not allow the vessel to land or transship fish in its ports and should report the matter to the flag State.¹⁰² In carrying out port inspections, port States should collect information on the vessel and forward it to the flag State and, where appropriate, to the relevant RFMO.¹⁰³ If, based on the inspections, the port State has reasonable grounds to suspect that the vessel has engaged in or supported IUU fishing in areas beyond the jurisdiction of the port State, the port State may take action and report the matter to the flag State of the vessel and, if appropriate, to the relevant coastal State and RFMO.¹⁰⁴

43. The IPOA-IUU sets forth measures in respect of RFMOs, which are directed to all States. It provides that States, including flag States, should ensure compliance with and enforcement of policies and measures having a bearing on IUU fishing adopted by relevant RFMOs and by which they are bound.¹⁰⁵ States not members of an RFMO are not discharged from their obligation to cooperate, in accordance with international obligations, with the RFMO.¹⁰⁶ The IPOA-IUU provides a number of measures that States, through relevant RFMOs, should take to prevent, deter and eliminate IUU fishing.¹⁰⁷ States, acting through relevant RFMOs, should encourage non-contracting Parties with a real interest in the fishery concerned to join those organizations and to participate fully in their work.¹⁰⁸ The IPOA-IUU provides that, when a State fails to ensure that fishing vessels entitled to fly its flag, or to the greatest extent possible, its nationals, do not engage in IUU fishing activities that affect the fish stocks covered by a relevant RFMO, the member States, acting through the RFMO, should draw the problem to the attention of the State. If the problem is not rectified, members of the RFMO may agree to adopt appropriate measures.¹⁰⁹

D. Port State Measures Agreement

44. The Port State Measures Agreement was approved by the FAO Conference during its Thirty-Sixth Session, held from 18 to 23 November 2009.¹¹⁰ It has not entered into force.¹¹¹

¹⁰⁰ Paragraph 51.8 IPOA-IUU.

¹⁰¹ "Port access" is defined in Paragraph 53 IPOA-IUU as "admission for foreign fishing vessels to ports or offshore terminals for the purpose of, *inter alia*, refueling, re-supplying, transshipping and landing, without prejudice to the sovereignty of a coastal State in accordance with its national law, article 25.2 of the 1982 UN Convention and other relevant international law."

¹⁰² Paragraph 56 IPOA-IUU.

¹⁰³ Paragraph 58 IPOA-IUU. The information should relate to *inter alia*: the flag State of the vessel and identification details; name, nationality and qualifications of the master; fishing gear on board; catch on board; other information required by a relevant RFMO or other international agreement; total landed and transshipped catch.

¹⁰⁴ Paragraph 59 IPOA-IUU.

¹⁰⁵ Paragraph 78 IPOA-IUU.

¹⁰⁶ Paragraph 79 IPOA-IUU.

¹⁰⁷ Paragraph 80 IPOA-IUU. These measures include, *inter alia*: institutional strengthening of RFMOs; developing compliance measures; developing and implementing mandatory reporting arrangements; exchange of information on vessels engaged in or supporting IUU fishing; development and maintenance of records on fishing vessels operating in an RFMO competence area; development of monitoring, control and surveillance; development of boarding and inspection regimes and observer programmes; market related measures; development of public awareness programmes.

¹⁰⁸ Paragraph 83 IPOA-IUU.

¹⁰⁹ Paragraph 84 IPOA-IUU.

¹¹⁰ FAO Conference Resolution 12/2009, adopted during the Thirty-Sixth Session of the FAO Conference, C 2009/REP, paragraph 147.

¹¹¹ Article 29(1) Port State Measures Agreement establishes that the Port State Measures Agreement enters into force thirty days after the date of deposit with the Depository of the twenty-fifth instrument of ratification, acceptance, approval or accession in accordance with article 26 and 27 of the Agreement. Currently eight instruments have been deposited.

The Agreement shall enter into force thirty days after the date of deposit of the twenty-fifth instrument of ratification, acceptance, approval or accession. As at 6 November 2013, eight instruments have been deposited. The Port States Measures Agreement builds on the non-binding *FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* of 2005.¹¹²

45. The objective of the Port State Measures Agreement is to prevent, deter and eliminate IUU fishing through the implementation of port State measures, ensuring the long-term conservation and sustainable use of living marine resource and marine ecosystems.¹¹³ The Port State Measures Agreement introduces measures that provide a cost effective tool¹¹⁴ for States to prevent IUU caught fish to enter the market,¹¹⁵ based on the sovereignty a port State exercises over its internal waters, including its ports.¹¹⁶ It applies to foreign-flagged fishing vessels that are seeking entry into the ports of a Party or are in its ports¹¹⁷ and to fishing activities that are illegal, unreported or unregulated and to fishing related activities in support of such fishing, irrespective of where these activities take place.¹¹⁸ The Port State Measures Agreement states that the Agreement is global in scope and applies to all ports.¹¹⁹

46. The Port State Measures Agreement establishes primarily obligations for States in their capacity as port State. However, the Port State Measures Agreement also provides for flag State responsibilities, most notably in Article 20, dedicated to the “Role of flag States”. In addition, the role of the flag State is addressed in a number of provisions that require that the port State provide information to the flag State on actions taken,¹²⁰ and in the requirement to invite the flag State to take part in port inspections, where appropriate arrangements between the flag State and port State exist.¹²¹

47. Parties must require that vessels entitled to fly their flag cooperate with the port inspections carried out pursuant to the Agreement.¹²² A flag State Party is required to request

¹¹² *Model Scheme on Port State Measures to Combat IUU fishing*, adopted by the FAO Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August – 2 September 2004. The FAO Committee on Fisheries at its Twenty-sixth Session, held from 7 to 11 March 2005, endorsed the report of the Technical Consultation.

¹¹³ Article 2 Port State Measures Agreement.

¹¹⁴ Preamble of the Port State Measures Agreement and the Report of the Twenty-ninth Session of the FAO Committee on Fisheries, FAO, 2009, FIPI/R973(EN), p. 31

¹¹⁵ The State of the World Fisheries and Aquaculture 2008, FAO, 2009, p. 72.

¹¹⁶ The Agreement reflects customary international law in respect of access to ports, insofar as Article 4 provides that nothing in the Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. Article 10 provides that nothing in the Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress and Article 4(5) provides that “Parties shall fulfil in good faith the obligations assumed pursuant to this Agreement and shall exercise the rights recognized herein in a manner that would not constitute an abuse of right.” In addition, Article 3(4) Port State Measures Agreement provides that the Agreement must be applied in a fair, transparent and non-discriminatory manner, consistent with international law.

¹¹⁷ Article 3(1)(a) and (b) Port State Measures Agreement determine that the Agreement does not apply to certain artisanal fishing vessels used for subsistence and to container vessels that are not carrying fish, or, if carrying fish, only fish that have been landed previously. Article 3(2) Port State Measures Agreement determines that Parties may decide not to apply the Agreement to vessels chartered by its nationals exclusively for fishing in areas under national jurisdiction and operating under its authority in these waters.

¹¹⁸ Article 3(1) and 3(3) Port State Measures Agreement.

¹¹⁹ Article 3(5) Port State Measures Agreement.

¹²⁰ The Port State Measures Agreement provides for flag State involvement in the following cases: In case of denial of entry, the Party is required to communicate the decision to the flag State of the vessel and, as appropriate, to relevant coastal States, RFMOs and other international organizations (Article 9(3)); Parties that have denied the use of its ports are required to promptly notify the flag State and, as appropriate, relevant coastal States, RFMOs and other relevant International Organizations of its decision (Article 11(3)); inspection reports are transmitted to the flag State and, as appropriate, to other relevant Parties and States (Article 15); Where, following inspection, there are clear grounds for believing the vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the inspecting Party is required to notify the flag State and, as appropriate, relevant coastal States, RFMOs, other international organizations, and the State of which the master is a national (Article 18(1)(a) and (b)).

¹²¹ Article 13(2)(e) Port State Measures Agreement.

¹²² Article 20(1) Port State Measures Agreement.

a port State to carry out port inspections or to take other measures consistent with the Agreement in respect of the vessel entitled to fly its flag, of which the flag State has clear grounds to believe that it has engaged in IUU fishing or fishing related activities in support of such fishing, and that seeks entry to or is in the port of the port State.¹²³ Each Party is required to encourage vessels entitled to fly its flag to land, transship, package and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with this Agreement.¹²⁴ Flag States are required to immediately and fully investigate and, where appropriate take enforcement actions, when an inspection report transmitted to the flag State indicates clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing.¹²⁵ A Party in its capacity as flag State is required to report on actions taken in respect of vessels entitled to fly its flag that, as a result of port State measures, have been determined to have engaged in IUU fishing or fishing related activities in support of such fishing.¹²⁶ A Party in its capacity as flag State is required to ensure that measures applied to vessels entitled to fly its flag are at least as effective as those applied to vessels entitled to fly the flag of a foreign State.¹²⁷

48. The Port State Measures Agreement requires that Parties encourage non-Parties to become Parties and or to legislate and implement measures consistent with the provisions of the Agreement.¹²⁸ Parties are furthermore required to take fair, non-discriminatory and transparent measures to deter activities of non-Parties that undermine the effective implementation of the Agreement.¹²⁹

III. Conclusion

49. The instruments set out above reflect FAO's contribution to efforts to address concerns related to the flag State's control over the activities of vessels on the high seas and flying its flag. The resolutions and decisions of the FAO Committee on Fisheries, the FAO Council and the approaches of regional fisheries bodies are starting points to address these concerns. The instruments set out above provide a regulatory framework for States to ensure conservation and management of marine living resources, and, in particular, to address IUU fishing in their capacity as flag State, coastal State, port State and market State. FAO considers these instruments to be relevant for the Tribunal in its consideration of the four questions addressed to it by the Permanent Secretary of the Sub Regional Fisheries Commission.

¹²³ Article 20(2) Port State Measures Agreement.

¹²⁴ Article 20(3) Port State Measures Agreement.

¹²⁵ Article 20(4) Port State Measures Agreement.

¹²⁶ Article 20(5) Port State Measures Agreement. The flag State is required to report to other Parties, relevant port States and, as appropriate, other relevant States, RFMOs and FAO.

¹²⁷ Article 20(6) Port State Measures Agreement.

¹²⁸ Article 23(1) Port State Measures Agreement.

¹²⁹ Article 23(2) Port State Measures Agreement, requires that these measures should be consistent with the Agreement and other applicable international law.