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***Amicus Curiae* brief from WWF International, submitted on 29 November 2013**



**In the International Tribunal for the Law of the Sea**

**Case No. 21**

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

**(Request for Advisory Opinion Submitted to the Tribunal)**

**MEMORIAL FILED ON BEHALF OF WWF**

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## Introduction

1. The Tribunal has been asked in this request for an Advisory Opinion to address the following four questions. The English translation by the Registry is followed by the original question in French:

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?

*(Quelles sont les obligations de l'Etat du pavillon en cas de pêche illicite, non déclarée, non réglementée (INN) exercée à l'intérieur de la Zone Economique Exclusive des Etats tiers?)*

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

*(Dans quelle mesure l'Etat du pavillon peut-il être tenu pour responsable de la pêche INN pratiquée par les navires battant son pavillon?)*

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?

*(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 navires de pêche bénéficiant desdites licences?)*

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?

*(Quelles sont les droits et obligations de l'Etat côtier pour assurer la gestion durable des stock partagés et des stocks d'intérêt commun, en particulier ceux des thonidés et des petits pélagiques?)*

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2. The questions posed to the Tribunal by the Sub-Regional Fisheries Commission (SRFC) seek guidance on a number of very important issues. This *amicus curiae* brief aims to provide assistance to the Tribunal on the substantive aspects of the issues raised by questions 1, 2 and 4. It does not submit an answer to question 3, choosing to focus its attention on the other answers. This *amicus curiae* brief does not address the procedural question of the jurisdiction of the Tribunal.
  
3. It is our submission that, in answering these questions consistently with international law, the Tribunal should have regard to the object and purpose of the 1982 United Nations Convention on the Law of the Sea (the “Convention”). Article 31(1) of the Vienna Convention on the Law of Treaties May 23, 1969, 1155 U.N.T.S. 331 (the “Vienna Convention”) states that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This provision of the Vienna Convention is to be considered as reflecting customary international law (see the Seabed Disputes Chamber’s Advisory Opinion of 1 February, 2011 in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (“*Seabed Mining Advisory Opinion*”), at paragraph 57) and the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention (*Seabed Mining Advisory Opinion*, at paragraph 58) and, we submit, to the 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 (“Fish Stocks Agreement”).

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4. This submission will first address the importance and relevance of the following: the protection of the marine environment; the ecosystem approach; the precautionary approach; and the concept of due diligence. It will then address the questions posed by the SRFC.

**The Protection of the Marine Environment**

5. It is our submission that the protection and preservation of the marine environment is an overarching object and purpose of the Convention. This is evidenced by the preamble to the Convention and by Part XII of the Convention, together with implied and express references to the protection and preservation of the marine environment that are found throughout the Convention's text. In particular: the goals of the Convention as declared in its preamble are "the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment"; article 192 of the Convention provides that "States have the obligation to protect and preserve the marine environment"; and article 193 provides that "States have the sovereign right to exploit their natural resources ... in accordance with their duty to protect and preserve the marine environment."
6. Fish stocks are part of the marine environment. This is self-evident in fact, but it is also clear in law as is evidenced by article 1.1(4) of the Convention. It has also been noted by the Tribunal when it stated in *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment." (Order of 27 August 1999, paragraph 70).

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7. In the light of the above, and with reference to the Introduction regarding the Vienna Convention, we submit that the Convention's provisions on conservation and management of fish stocks, together with the provisions of the Fish Stocks Agreement, should be interpreted in a manner that is fully consistent with the object and purpose of protection and preservation of the marine environment. All too often, fish stocks are being managed in a way that is inconsistent with the goal of environmental protection. In order to address this, the current proceedings before the Tribunal offer an important and timely opportunity to bring clarity to the nature, content and allocation of international obligations (and, in some cases, rights) for managing fish stocks. In answering the four questions, consistently with the object and purpose of the Convention, we respectfully submit that the Tribunal should bear in mind that the sum of the obligations on flag and coastal States is to protect and preserve the marine environment.
  
8. The International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (I.C.J. Reports 1997, p. 7) emphasized the importance of protection of the environment, and the importance of taking new norms into consideration and of giving new standards proper weight. The Court stated at paragraph 140 that:

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight,

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not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."

9. In the context of the oceans, new norms and standards have evolved, but so have new and intensified methods of fishing which have led to overfishing and destructive fishing, causing destruction of habitat, through driftnets, gillnets and bottom trawling, and the catching of by-catch such as cetaceans, sharks, turtles and seabirds. All these fishing methods and practices can damage, and have damaged, the environment of States' exclusive economic zones, as well as the environment of the high seas. They often occur in contravention of international and national law. As a result, fish stocks are in decline in most parts of the world, both in the high seas and in exclusive economic zones. The Food and Agriculture Organization of the United Nations (FAO) reported in 2012 that 29.9% of fish stocks worldwide are overexploited and 57% of stocks are fully exploited. (FAO, *The State of World Fisheries and Aquaculture 2012*, page 11.) This situation re-emphasises the importance and timeliness of the currently proceedings.
10. Protection and preservation of the marine environment and conservation of living resources are matters in which all States have a collective interest. Indeed, in the *Seabed Mining Advisory Opinion*, the Seabed Disputes Chamber stated that obligations relating to preservation of the environment of the high seas have an *erga omnes* character (paragraph 180), meaning that where a State breaches these obligations, each other State is entitled to invoke its responsibility (International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in the Report of the International Law Commission- 53rd session (23 April - 1 June and 2nd July - 10

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August 2001), UN Doc. (A/56/10) (hereinafter “the I.L.C. Articles on State Responsibility”), article 48).

**The Ecosystem Approach**

11. An important norm, which has developed considerably since the adoption of the Convention, is the ecosystem approach. The International Law Commission observed in 1994 (International Law Commission, Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May – 22 July 1994, Page 118, UN Doc. A/49/10) that an ecosystem has a relatively precise scientific and legal meaning, referring to “an ecological unit consisting of living and non-living components that are interdependent and function as a community.” Simply stated, we submit, the ecosystem approach requires consideration of the whole system rather than individual components. The FAO has developed Technical Guidelines (FAO Technical Guidelines for Responsible Fisheries 4, Supplement 2, Fisheries Management: The ecosystem approach to fisheries (2003)) which state at page 14 that:

“an ecosystem approach to fisheries ... strives to balance diverse societal objectives, by taking account of the knowledge and uncertainties of biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecological meaningful boundaries.”

12. The definition of the ecosystem approach has been stated as “the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity” (Statement on the Ecosystem Approach to the Management of Human



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Activities by first Joint Ministerial Meeting of the Helsinki and OSPAR Commissions, "Towards an ecosystem approach to the management of human activities," Bremen, 25-26 June 2003).

13. Although the Convention does not use the term "ecosystem approach", some of its provisions clearly reflect elements of the approach. Thus article 61.4 requires that in taking proper conservation and management measures in respect of the exclusive economic zone, the coastal State "shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened". Likewise, article 119.1(b) of the Convention establishes similar requirements with respect to the high seas. These provisions show the importance of the overall ecosystem, an approach elaborated by the Fish Stocks Agreement in, for example, article 5 (see, in particular, paragraphs (c), (d), (e), (f), (g) and (j)) and article 6 (see, in particular, paragraphs 1, 3(c) and (d) and 5).
  
14. Numerous later instruments have elaborated the ecosystem approach and ecosystem-based management, including the 1995 FAO Code of Conduct for Responsible Fisheries. The Code of Conduct includes many elements of the ecosystem approach, including the obligation to conserve aquatic ecosystems (paragraph 6.1), the obligation to minimise waste, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species (paragraph 6.6) and the obligation to protect and rehabilitate, as far as possible and where necessary, critical fisheries habitats (paragraph 6.8).

*Amicus Curiae Brief of WWF***The Precautionary Approach**

15. The Seabed Disputes Chamber stated in the *Seabed Mining Advisory Opinion* at paragraph 131 that “the precautionary approach is ... an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the [International Seabed Authority] Regulations.” That this also applies to fisheries can be seen in the observation of the Seabed Disputes Chamber at paragraph 132 that “[t]he link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal’s Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*. This emerges from the declaration of the Tribunal that the parties ‘should in the circumstances act with prudence and caution to ensure that conservation measures are taken ...’ (ITLOS Reports 1999, p. 274, at paragraph 77).”

**Due Diligence Obligations**

16. In the *Seabed Mining Advisory Opinion*, the Seabed Disputes Chamber highlighted the relevance of due diligence obligations in the context of the Convention. The Chamber made a distinction between obligations of “conduct” and obligations of “result”. The Chamber considered duties of sponsoring States in relation to contractors, under article 139.1 and Annex III, article 4, paragraph 4. It considered that those particular duties were ones of conduct and, within that, were duties of “due diligence”.
17. The Chamber held that an obligation of due diligence is one of the conduct that is necessary to achieve a result, rather than being an obligation to achieve, “in each and every case”, the result itself (paragraph 110). It summarised an obligation of due

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diligence as a duty to “to deploy adequate means, to exercise best possible efforts, to do the utmost” to achieve a given result (paragraph 110).

18. The Chamber did not state expressly that a duty of conduct automatically leads to or entails a duty of due diligence. Instead, it held that: “The notions of obligations ‘of due diligence’ and obligations ‘of conduct’ are connected.” (Paragraph 111.) However, it illustrated this point by reference to the case of *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment, I.C.J. Reports 2010*, p. 14 (20 April 2010) (“*Pulp Mills*”), in which the International Court of Justice stated, with reference to one of the provisions in question in that litigation, that: “An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are *therefore* called upon ... to exercise due diligence”. (*Pulp Mills*, paragraph 187, emphasis added.)
19. In our submission, whether a particular duty in the Convention is one of conduct or one of result will depend on, amongst other things, the wording of the duty and the context. We will consider this, and whether a duty of due diligence flows from any particular duty of conduct, in our response to Question 1 below.

*Amicus Curiae Brief of WWF***Question 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?**

20. In the exclusive economic zone, flag States of vessels engaged in fishing activities in another State's exclusive economic zone have obligations, as does the coastal State for that exclusive economic zone. The primary right and duty to protect and preserve the marine environment and conserve and manage the living resources rests with the coastal State pursuant to article 56 of the Convention, but flag States have a number of significant concurrent obligations. These will be discussed in the following paragraphs. These obligations may also be relevant to States whose nationals (whether natural persons or legal entities) engage in fishing activities.

**The obligation on the flag State to ensure that its vessels do not undertake IUU fishing in a foreign State's exclusive economic zone**

21. The commonly used definition of illegal, unreported and unregulated (IUU) fishing is that set out in paragraph 3 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001 ("IPOA-IUU"). That definition is also reflected in the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009. Paragraph 3 of the IPOA-IUU reads as follows:

- “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;

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- 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
  - 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
  - 3.2 Unreported fishing refers to fishing activities:
    - 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
    - 3.2.2 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.
  - 3.3 Unregulated fishing refers to fishing activities:
    - 3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
    - 3.3.2 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.”
22. Article 62 of the Convention relates to the granting by a coastal State to other States of access to fisheries in its exclusive economic zone, and provides in paragraph 4 that:
- “Nationals of other States fishing in the exclusive economic zone shall comply with the

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conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.”

23. Article 58.3 of the Convention provides that:

“[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and *shall comply with the laws and regulations adopted by the coastal State* in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.” [Emphasis added.]

24. Article 58.3 refers to third States “exercising their rights” in an exclusive economic zone. We submit that such rights include, for example, being granted access to any fishing surplus established by the coastal State, pursuant to article 62.2 of the Convention. Accordingly, we submit that article 58.3 requires flag States that wish to exercise such rights in the exclusive economic zone to comply with the coastal State’s laws and regulations.

25. So, under article 62.4, nationals of third States fishing in a coastal State’s exclusive economic zone must comply with the coastal State’s conservation and management measures and, under article 58.3, flag States that have been granted access to any fishing surplus established by the coastal State must comply with the coastal State’s laws and regulations. We submit that the combination of article 62.4 and article 58.3 represents an obligation on the flag State to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone.

26. Articles 62.4 and 58.3 are not the only relevant provisions of the Convention regarding the flag State obligation to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone. Article 94 of the Convention requires every

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State to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag” and, as part of this, to “assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew” in such matters. Article 94 is located in Part VII of the Convention. Part VII deals with the high seas. However, by virtue of article 58.2, article 94 is applicable to the exclusive economic zone “in so far as [it is] not incompatible” with Part V of the Convention. (Part V deals with the exclusive economic zone.)

27. We submit that article 94 requires every flag State to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag” for the purpose of ensuring that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone. We acknowledge that, pursuant to article 58.2, the application of article 94 to the exclusive economic zone must not be incompatible with Part V of the Convention. However, we submit that a range of appropriate measures and actions could be taken by the flag State, relevant to fulfilling its obligation of ensuring that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone, without any issue of incompatibility arising (see Conclusions below).
28. We note in passing that the duty on a flag State to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone is complemented in respect of the high seas by equivalent provisions of the Fish Stocks Agreement (article 18.1) and the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement; article III.1(a)).

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29. The legal landscape comprising articles 62.4, 58.3 and 94 of the Convention is supplemented by soft law instruments, which not only provide evidence as to how States Parties to the Convention have interpreted the Convention but also reflect the serious concerns of the international community at the negative effects of IUU fishing. For example:
- Paragraph 6.11 of the FAO Code of Conduct for Responsible Fisheries states that: “States authorizing fishing ... vessels to fly their flags should exercise effective control over those vessels so as to ensure the proper application of this Code. They should ensure that the activities of such vessels do not undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, subregional, regional or global levels.”
  - Paragraph 34 of the IPOA-IUU states that: “States should ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.”
30. A recent addition to the soft law on fisheries are the FAO Voluntary Guidelines for Flag State Performance (8 February 2013; the “Guidelines”). The Guidelines state that certain of their elements “are based on relevant rules of international law, including those reflected in [the Convention]” (paragraph 1). Their objective “is to prevent, deter and eliminate [IUU] fishing ... through the effective implementation of flag State responsibilities and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems” (paragraph 1).
31. The Guidelines “apply to fishing and fishing related activities in maritime areas beyond national jurisdiction” (paragraph 3, which also refers to possible wider application) although some provisions are clearly relevant to national jurisdiction. For example, one



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of the “performance assessment criteria” (at paragraph 8) reads as follows: “The flag State ensures that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States.” Thus, under this soft law instrument, the obligation on the flag State to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone is regarded as one of the criteria for measuring flag State performance.

32. In conclusion, we submit that the combination of article 62.4 and article 58.3 of the Convention represents an obligation on the flag State to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone. Article 94 of the Convention, when applied to the exclusive economic zone by virtue of article 58.2, provides the means for this obligation to be fulfilled. The existence of this obligation, which is mirrored in respect of the high seas by article 18.1 of the Fish Stocks Agreement and article III.1(a) of the FAO Compliance Agreement, is supported by several soft law instruments – including, most recently, the FAO Voluntary Guidelines for Flag State Performance.

**The duty to prevent participation in improperly regulated fisheries**

33. The IPOA-IUU definition of illegal fishing (see above) includes fishing in violation of not only national laws but also international obligations (paragraph 3.1.3). The following discussion explores what this can include.
34. We submit that flag States must ensure that their vessels do not participate in a fishery in the exclusive economic zone of another State if that fishery is not properly regulated in conformity with the Convention and other applicable international law (hereafter, “the duty to prevent participation in improperly regulated fisheries”).

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35. This obligation stems in part from what was described by the International Court of Justice as “[t]he general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control” and which “is now part of the corpus of international law relating to the environment.” (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29, and cited in part in paragraph 101 of *Pulp Mills*.)
36. The International Court of Justice referred to “activities within ... jurisdiction and control”. Article 94 of the Convention makes it clear that flag States must have jurisdiction and control over their vessels; this is implicit because article 94.1 requires them to exercise that jurisdiction and control for specified purposes. Therefore we submit that the obligation referred to by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons* must, in turn, apply to flag States in respect of their vessels. Flag States must therefore ensure that their vessels respect the environment of other States, including the marine environment of the exclusive economic zone.
37. In article 194.2 of the Convention, the obligation referred to by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons* is expressed in the context of pollution as follows:
- “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

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38. The obligation referred to by the International Court of Justice is also reflected in article 3 of the Convention on Biological Diversity, which provides that: “States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”
39. More specifically, the duty to prevent participation in improperly regulated fisheries follows from articles 61.2 and 58.3 of the Convention. The starting point is article 61.2, the first sentence of which requires that: “The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.”
40. The next step is article 58.3, which provides that: “In exercising their rights and performing their duties under this Convention in the exclusive economic zone, *States shall have due regard to the rights and duties of the coastal State* and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.” (Emphasis added.)
41. Article 58.3 refers to third States “exercising their rights” in an exclusive economic zone. We submit that such rights include, for example, being granted access to any fishing surplus established by the coastal State, pursuant article 62.2 of the Convention. Accordingly, we submit that article 58.3 requires flag States that wish to exercise such rights in the exclusive economic zone to have “due regard” not only to the coastal State’s rights but also its *duties*.

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42. Accordingly, a flag State whose vessels fish in a foreign exclusive economic zone pursuant to article 62.2 (or, arguably, a State whose nationals do so) must have “due regard” to whether the article 61.2 duty is being met by the coastal State. In our submission, this necessarily leads to a duty on the part of the flag State to prevent participation by its vessels in improperly regulated fisheries in the exclusive economic zone of a foreign State.
43. In this respect, by way of corroboration, we note that the FAO Voluntary Guidelines for Flag State Performance (8 February 2013) state the following:
  40. The flag State should only enter into fisheries access agreements with a coastal State when both are satisfied that such activities will not undermine the sustainability of living marine resources within the jurisdiction of the coastal State. The flag State should also be ready to cooperate with the coastal State in that regard.
  41. The flag State should only allow vessels flying its flag to acquire or utilize fishing authorizations outside of agreements referred to in paragraph 40 for activities in the maritime areas under the jurisdiction of a coastal State when both are satisfied that such activities will not undermine the sustainability of living marine resources of that coastal State, taking into account the best scientific evidence available and the precautionary approach.
44. Whether the coastal State’s conservation and management regime is indeed “proper” under article 61.2 of the Convention requires an assessment of both the legal framework and the coastal State’s capacity to uphold it. It is beyond the scope of the question to give an exhaustive description of what constitutes a proper legal framework for conservation and management, but the following provisions give an indication.

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45. Under article 62.4 of the Convention, the coastal State's legal regime must be consistent with the Convention and "may relate, *inter alia*, to" the listed items (a) through (k) in that provision. The list is not exhaustive. A coastal State must also:
- ensure that the maintenance of the living resources in its exclusive economic zone is not endangered by over-exploitation (article 61.2 of the Convention);
  - take into account the best scientific evidence available to it (article 61.2 of the Convention);
  - take into account fishing patterns and the interdependence of stocks (article 61.3 of the Convention); and
  - take into account the effects on species associated with or dependent upon harvested species (article 61.4 of the Convention).
46. In addition, articles 5–7 of the Fish Stocks Agreement establish further criteria for what is required for a proper conservation and management regime pursuant to article 61.2 of the Convention. Generally the Fish Stocks Agreement applies only to areas beyond national jurisdiction. However, under article 3, the coastal "shall apply *mutatis mutandis* the general principles enumerated in article 5" in its exclusive economic zone; and articles 6 and 7 apply to conservation and management "within areas under national jurisdiction", subject to the legal regimes that apply within such areas. The Fish Stocks Agreement applies only to straddling stocks and highly migratory stocks. However, as noted below, we submit that the general principles set out in article 5 of the Fish Stocks Agreement, together with provisions of article 6, should now be regarded as generally accepted practices amongst States and so applicable to all stocks rather than just highly migratory and straddling stocks.

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47. Some key requirements under the Fish Stocks Agreement that should be a part of any conservation and management regime pursuant to article 61.2 are as follows:
- the objective of the measures taken should be to “ensure long-term sustainability” (article 5(a) of the Fish Stocks Agreement);
  - the regime should apply the precautionary approach widely (articles 5(c) and 6 of the Fish Stocks Agreement);
  - the regime should take an ecosystem-based approach rather than managing stocks in isolation (article 5(d), (e), (f) and (g) of the Fish Stocks Agreement); and
  - the interests of artisanal and subsistence fishers should be taken into account (article 5(i) of the Fish Stocks Agreement).
48. In addition, the coastal State should have a credible monitoring, control and surveillance (MCS) programme to help enforce its legal framework. The obligation in article 61.2 of the Convention to “ensure ... that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation” implies a duty not just to adopt legislation, but also to secure compliance by investing in adequate MCS resources.
49. It should be acknowledged that the capacity of States to deploy MCS resources varies, and that small developing countries with large exclusive economic zones in particular face challenges. This fact does not alter the conclusions above. Flag States should refrain from allowing their vessels to participate in any fishery whose sustainability is not ensured in law and in fact, and where the marine environment may be damaged, such as by overfishing, or excessive catching of by-catch or destructive fishing. The

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solution to low capacity lies not in a relaxing of the standards intended to prevent illegal exploitation of the resources of small developing countries' exclusive economic zones, but in international cooperation to increase their capacity. This could be accomplished, for example, by bilateral or multilateral agreements between coastal and flag States to invest in the development of MCS capability and by regional and international agreements to enhance MCS.

50. This is seen in article 24 of the Fish Stocks Agreement, which gives recognition to the special requirements of developing States. Paragraph 2 of article 24 reads:

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

- (a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;
- (b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; and
- (c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States.”

51. One implication of paragraph (c), for example, is that where MCS measures are required to enforce conservation and management measures, the burden may have to be met by the fishing States.

*Amicus Curiae Brief of WWF***Conclusions**

52. We submit that: (a) a flag State has an obligation to ensure that its vessels do not undertake IUU fishing in a foreign State's exclusive economic zone; and (b) a flag State has an obligation to ensure that its vessels do not participate in a fishery in the exclusive economic zone of another State if that fishery is not properly regulated in conformity with the Convention and other applicable international law.
53. As to what constitutes a properly regulated fishery in the exclusive economic zone, article 61.2 of the Convention sets out some important requirements and articles 5–7 of the Fish Stocks Agreement establish further criteria. In our submission, the general principles set out in article 5 of the Fish Stocks Agreement, together with provisions of article 6, should now be regarded as generally accepted practices amongst States and so applicable to all stocks rather than just highly migratory and straddling stocks. A credible monitoring, control and surveillance (MCS) programme is also essential.
54. It is our submission that the duties of the flag State referred to above are obligations of conduct and, within that, are obligations of due diligence. (Due diligence obligations in general have been considered above in the Introduction.) This is for the same reason that the Seabed Disputes Chamber in paragraph 110 of the *Seabed Mining Advisory Opinion* considered that duties of sponsoring States to ensure compliance by their sponsored contractors are duties of due diligence.
55. Adapting the content of paragraph 110 of the *Seabed Mining Advisory Opinion* to flag States, the flag State's duties "to ensure" that its vessels do not undertake IUU fishing in a foreign State's exclusive economic zone and do not participate in improperly regulated fisheries in the exclusive economic zone of another State are not duties to



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achieve, “in each and every case”, the result that the vessels do not undertake IUU fishing or do not participate in improperly regulated fisheries. Instead, they are obligations “to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”.

56. Such means and efforts to be deployed by flag States, to the utmost, should include, amongst others, the following: not authorising vessels to participate in improperly regulated fisheries in the exclusive economic zone of another State; in the case of properly regulated fisheries, imposing an obligation on its vessels to comply with the coastal State’s laws and regulations; establishing administrative control over its vessels, including implementing appropriate MCS measures such as vessel monitoring systems; not allowing its vessels to operate where it cannot properly exercise such control; creating appropriate offences in its national legislation and properly investigating violations, imposing penalties of sufficient severity.
57. The Tribunal may wish to recommend the development of global or regional instruments that provide guidance to coastal States on what constitutes a properly regulated fishery and, linked to that, criteria to assist flag States in meeting their due diligence obligation to avoid participation by their vessels in a fishery that is not properly regulated.

*Amicus Curiae Brief of WWF***Question 2: To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?**

58. Question 2 is concerned with the liability towards other States that may arise when such activities occur. We note that Question 2, unlike Question 1, is not confined to the exclusive economic zone so is therefore also to be answered in the context of the high seas.
59. Article 235.1 of the Convention provides that: "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law." In referring to protection and preservation of the marine environment, Article 235(1) is clearly applicable to obligations concerning conservation of living resources.
60. Question 2 raises the issue of the consequences of failure by States to fulfil their international obligations, and what issues of liability can arise, particularly in light of the difficulties associated with reparation of environmental damage. The International Court of Justice in the *Gabčíkovo-Nagymaros case* stressed the "great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind" (paragraph 53) and stated that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (paragraph 140).

**State Responsibility**

61. The term used in Question 2 is "liable". In the *Seabed Mining Advisory Opinion*, the Seabed Disputes Chamber held that the term "liability" refers to the consequences of a

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breach of a State's obligations (paragraph 70). The Chamber observed, in paragraph 176, in the context of article 139.2 of the Convention on seabed mining, that there are two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities and the occurrence of damage.

62. An internationally wrongful act of a State entails the international responsibility of that State (see I.L.C. Articles on State Responsibility, article 1). A State commits an internationally wrongful act when an act or omission that is attributable to it under international law constitutes a breach of its international obligations (see I.L.C. Articles on State Responsibility, article 2). In turn, a breach of international responsibility leads to liability as to its consequences. This is discussed further below.

**The content of flag State responsibility**

63. The international obligations that States have with regard to vessels that fly their flag and operate in foreign exclusive economic zones have been discussed under Question 1. Due to the nature of the obligations in question, any breach will generally be attributable to the flag State and thus give rise to liability: as noted by the Seabed Disputes Chamber, the term “responsibility” refers to the primary obligation whereas the term “liability” refers to the secondary obligation, namely, the consequences of a breach of the primary obligation (*Seabed Mining Advisory Opinion*, para. 66).
64. The international obligations of flag States with regard to IUU activities on the high seas are derived from articles 116-120 of the Convention, the general provisions of Part XII of the Convention, the FAO Compliance Agreement, the Fish Stocks Agreement and customary international law. The detailed content of these obligations is beyond the scope of the question, but we note in particular that all States “have the duty to take,

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or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas” under article 117 of the Convention. Failure by a flag State to adhere to its international obligations with regard to IUU activities in the high seas entails international responsibility. In addition, we submit that failure to comply with binding measures adopted by regional fisheries management organisations or arrangements can likewise give rise to international responsibility.

**The form of reparations in the context of fisheries**

65. Liability consequent on a breach of a primary obligation gives rise to the requirements to cease the internationally wrongful act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require (article 30 I.L.C. Articles on State Responsibility), and to make full reparation for the injury caused by the act (article 31 I.L.C. Articles on State Responsibility).
66. The Tribunal in the *Saiga* case (*The M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at paragraph 170) stated that: “It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’ (*Factory at Chorzów, Merits, Judgment No.13, 1928, P.C.I.J., Series A, No.17, p. 47*).”

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67. Compensation for harm to the environment resulting from a wrongful act is well recognised in international law and practice. The Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (Lugano Convention) (article 2.7(c)), the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (article 1.6(c)) and the 1999 Basel Protocol on Liability for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (article 2.2(c)) provide for compensation for damage caused by damage to or impairment of the environment. Article 14.2 of the 1992 Convention on Biological Diversity recognizes “the issue of liability and redress, including restoration and compensation, for damage to biological diversity”.
68. The International Court of Justice in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, at page 43, confirmed at paragraph 460 that the principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Chorzów Factory* case. The Permanent Court in *Chorzów Factory* stated at paragraph 73 that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”. Reparation “shall take the form of restitution, compensation and satisfaction, either singly or in combination...,” according to article 34 of the I.L.C. Articles on State Responsibility.
69. The most appropriate form of reparation may be restitution in order to re-establish the situation existing before the wrongful act was committed: see article 35 of the I.L.C.

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Articles on State Responsibility. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. However often environmental restoration may be materially impossible. If restitution is not possible, or can only partly recover the material damage, then the State is under an obligation to compensate for the damage caused: Article 36 of the I.L.C. Articles on State Responsibility.

70. The steps required to make restitution, if possible, or make compensation, if not, would depend on the particular circumstances of the case. Even if, for instance, the responsible State were to ensure a reduction in fishing effort by vessels flying its flag (or by its nationals) sufficient to allow the affected stocks to recover, this would only be effective if the reduction in effort was not matched by an increase in fishing effort on the same stocks by other States. In addition, with respect to vessels flagged to that State, appropriate steps should be taken to avoid the measures taken from being circumvented by the practice of reflagging. Measures to switch to less harmful fishing techniques may also be necessary. Where there is a regional fisheries management organisation with competence over the stock and area in question, conservation and management measures by that organization may be a way of addressing the damage. A State responsible for a vessel which has carried out IUU fishing, for example, by way of restitution should facilitate and not block the listing of that vessel in a blacklist of a regional management fisheries organization.

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71. Similarly, when there is no relevant regional fisheries management organization but the damage is within the jurisdiction of a coastal State, measures to be adopted by that State, such as restriction on fishing opportunities, may be a suitable method of restitution.
72. In many cases, only compensation may be effective: compensation is the appropriate remedy where the wrongful act causes damage that cannot be made good by restitution and is financially assessable (see article 36 of the I.L.C. Articles on State Responsibility). This may be the case where the wrongful act arises from IUU activities in an exclusive economic zone; in such instances the responsible State is liable to compensate the coastal State for the income it forewent as a result. Where the injured State has contributed to the IUU incident through willful or negligent action or omission, such as, for example, a contribution by a flag and/or Member State to a failure by a regional fisheries management organization to adopt proper conservation and management measures, this shall be taken into account in assessing the amount of reparation (see article 39 of the I.L.C. Articles on State Responsibility).
73. The other form of reparation, satisfaction, may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality (I.L.C. Articles on State Responsibility, article 38.2), and is an additional form of reparation: the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation (article 38.1 of the I.L.C. Articles on State Responsibility).

*Amicus Curiae Brief of WWF***Invocation of State responsibility**

74. It was submitted in the Introduction that obligations relating to protection and preservation of the environment of the high seas have an *erga omnes* character, meaning that where a State breaches these obligations, each other State is entitled to invoke its responsibility. This includes the conservation of living resources, which are an integral part of the marine environment. Accordingly, any State, regardless of whether or not it has been injured, is entitled to invoke the responsibility of a State that breaches its obligations relating to protection and preservation of the marine environment of the high seas, including conservation of high seas living resources, and demand cessation, assurances and guarantees of non-repetition and performance of the obligation, or can claim reparation: see article 48 of the I.L.C. Articles on State Responsibility. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act: see article 47.1 of the I.L.C. Articles on State Responsibility. This would, for example, be the case where a number of States are involved in illegal fishing activities. It could also be the case where there is a failure to cooperate in the conservation and management of living resources in the areas of the high seas contrary to article 118 of the Convention, or a breach of article 119 of the Convention.
75. With respect to damage occurring within exclusive economic zones, such as to fish stocks or habitat there, a coastal State may be able to invoke the responsibility of a flag State, under the terms of article 42 of the I.L.C. Articles on State Responsibility, with the obligation being owed to the coastal State. Where there are two or more coastal States involved, such as in the situation described in article 63.1 of the Convention - where the same stock or stocks of associated species occur within the exclusive



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economic zones of two or more coastal States – the obligation may be owed to both or all States, or, in the case of highly migratory stocks, for example, to the international community as a whole. In such a case, a coastal State could invoke a flag State's responsibility where the breach of the obligation specially affects that State or is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation (I.L.C Articles on State Responsibility, article 42(b).) This situation could apply if a stock was overfished in one State's waters but not another, for example.

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**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?**

76. WWF has not provided a response to this question, having decided to focus its efforts on responses to Questions 1, 2 and 4.

*Amicus Curiae Brief of WWF***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?**

77. The coastal and other States should be mindful of the general obligation under article 192 of the Convention, namely the “obligation to protect and preserve the marine environment”. Other articles of the Convention, including articles 61 and 62, should be read in light of article 192 of the Convention. Some key issues will be addressed in this answer to Question 4.

**Optimum Utilization and Conservation**

78. The coastal State is required by article 61.1 of the Convention to determine the allowable catch of the living resources in its exclusive economic zone. It is also, taking into account the best scientific evidence available to it, required to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation; as appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall cooperate to this end (article 61.2). The latter cooperation duty is particularly relevant when dealing with highly migratory stocks, straddling stocks and shared stocks (see below).
79. Commentators have noted that the objective of optimum utilization of the living resources in the exclusive economic zone under art 62.1 does not require full utilization: “the coastal state is not tied to any specific level and could hold back on full exploitation in the interests of conservation”. (P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, Oxford University Press, 3rd edition (2009),

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page 717). Therefore, other States cannot insist on access to a surplus in such circumstances. Article 297.3(a) provides that a coastal State is not obliged to accept the submission to settlement by way of compulsory procedures entailing binding decisions of disputes relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise.

80. “Proper measures” under article 61.2 have been discussed in the context of Question 1. Only after this consideration is addressed, does the requirement under article 61.3 to also design the measure to produce maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors, arise. Article 61.3 provides that MSY can be qualified by “relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.”
81. Relevant environmental and economic factors can qualify the MSY. We submit that these factors can include:
- Depletion of fish stocks occurring in the coastal State's exclusive economic zone by foreign fishing vessels, from which the coastal State may receive relatively little revenue in proportion to the value of the asset. This is a relevant economic factor.
  - Overfishing, which has damaged the asset. This is both an environmental and economic factor.

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- The negative impact of the fishing vessels on the coastal State's environment because of destructive fishing practices such as bottom trawling, or their discharge of waste and other pollutants. This is both an economic factor.
82. Economic factors are clearly relevant. Economic reports (such as G.M.S. Vianna, M.G. Meekan, D. Pannell, S. Marsh and J.J. Meeuwig, "Wanted Dead Or Alive? The relative value of reef sharks as a fishery and an ecotourism asset in Palau," (2010) and G.M.S. Vianna, J.J. Meeuwig, D. Pannell and H. Sykes, "The socio-economic value of the shark-diving industry in Fiji," (2011)) have estimated that the value of live sharks, for instance, to the Palauan economy to the tourism industry to be far greater than the value of dead sharks killed for meat or fins. Economic and environmental considerations are valid considerations under article 61 of the Convention. This also shows that "optimum utilization" in article 62.1 does not necessarily entail mortality or capture of the marine species in question or licensing others to do so: the importance of conservation values and of protecting the fisheries is also important. We submit that tourism, conservation, and other intangible benefits of protecting the marine environment policy are ways of promoting the objective of optimum utilization.
83. The coastal State is required under article 62 of the Convention to determine its capacity to harvest the living resources of its exclusive economic zone. However, the obligation to give other States access "to the surplus of the allowable catch" is contingent on there being such a surplus: an incapacity to harvest the entire allowable catch. As noted earlier, it is the coastal State that must determine the allowable catch, subject to its obligation under article 61.2 to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

*Amicus Curiae Brief of WWF***The Fish Stocks Agreement**

84. The Fish Stocks Agreement provides in article 3 that articles 6 and 7 apply not only beyond areas under national jurisdiction but also to the conservation and management of straddling stocks and highly migratory fish stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention. Article 6, on the precautionary approach, and article 7, on compatibility of conservation and management measures, therefore have an important bearing on the answer to this question.
85. Under article 3.2 of the Agreement, the coastal State shall apply *mutatis mutandis* the general principles enumerated in article 5 in the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction. Therefore article 5 of the Agreement likewise has an important bearing on the answer to this question.
86. Coastal States shall under article 5(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization; and under article 5(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global. Article 5(b) closely follows article 61.3 of the Convention, although

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the former calls for measures to be “based on” the best scientific evidence available whereas article 61.3 is silent in that regard and article 61.2 calls for merely the “taking into account” of the best scientific evidence available.

87. Coastal States must, under article 5(c) apply the precautionary approach in accordance with article 6. The precautionary approach is formulated in article 6.2 of the Fish Stocks Agreement as “States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”
88. Article 61.3 of the Convention requires coastal States to take into account “any generally recommended international minimum standards, whether subregional, regional or global”, when designing their proper conservation and management measures. We submit that such standards include those found in articles 5 and 6 of the Fish Stocks Agreement, as well as ones found in “soft law” instruments such as the FAO Code of Conduct for Responsible Fisheries. The United Nations General Assembly Resolution 67/79 (2012) on Sustainable Fisheries, which was adopted by consensus, described the Code of Conduct in its preamble as an instrument that sets out “principles and global standards of behaviour for responsible practices for conservation of fisheries resources and the management and development of fisheries.”
89. We specifically submit that the general principles set out in article 5 of the Fish Stocks Agreement together with provisions of article 6 of that Agreement, including article 6.2 should now be regarded as generally accepted practices amongst States and so are applicable to all stocks rather than just highly migratory and straddling stocks. The precautionary approach itself was described by the Seabed Disputes Chamber (*Seabed*

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*Mining Advisory Opinion*, paragraph 135) as having been “incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration”. The Chamber noted “[i]n the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.”

90. In addition to paragraphs (a), (b) and (c) of article 5, paragraphs (d) to (l) of article 5 are likewise applicable to straddling and highly migratory stocks in the exclusive economic zone. Without detracting from the importance of other paragraphs, the following paragraphs are important duties associated with the ecosystem approach, mentioned earlier:

(d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;

(e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species (non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(g) protect biodiversity in the marine environment; and

(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not



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exceed those commensurate with the sustainable use of fishery resources.

Also important is paragraph (i): take into account the interests of artisanal and subsistence fishers, since that is important in the context of West Africa.

**Limit and Target Reference points**

91. One of the important obligations of the coastal State under article 6 and Annex II of the Fish Stocks Agreement is to set limit reference points and target reference points. Article 6.3(b) requires States to apply the guidelines set out in Annex II of the Agreement and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded.
92. Annex II of the Fish Stocks Agreement sets out guidelines for the application of precautionary reference points. In the light of the of overfishing referred to earlier, regional fisheries management organisations have increasingly emphasised the importance of setting these reference points and managing the fisheries accordingly. The FAO Code of Conduct for Responsible Fisheries states at paragraph 7.5.3 that “States and subregional or regional fisheries management organisations and arrangements should, on the basis of the best scientific evidence available, *inter alia*, determine: (a) stock specific target reference points, and, at the same time, the action to be taken if they are exceeded; and (b) stock specific limit reference points, and, at the same time, the action to be taken if they are exceeded; when a limit reference point is approached, measures should be taken to ensure that it will not be exceeded.”
93. Annex II, paragraph 2, of the Fish Stocks Agreement makes it clear that two types of precautionary reference points should be used: conservation, or limit, reference points

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and management, or target, reference points. Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. Target reference points are intended to meet management objectives.

94. The way reference points are to be used is also specified in paragraph 4 of Annex II of the Fish Stocks Agreement: “Management strategies shall seek to maintain or restore populations of harvested stocks, and where necessary associated or dependent species, at levels consistent with previously agreed precautionary reference points. Such reference points shall be used to trigger pre-agreed conservation and management action. Management strategies shall include measures which can be implemented when precautionary reference points are approached.”
95. The relationship to maximum sustainable yield is specified in paragraph 7 of Annex II:
- “The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target.”

**The Obligation to Cooperate**

96. An important obligation of coastal States under article 61.2 of the Convention is to cooperate: as appropriate, the coastal State and competent international organisations, whether subregional, regional or global, are to cooperate to the end of ensuring that the maintenance of the living resources in the exclusive economic zone is not endangered

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by over-exploitation. As noted above, this duty is particularly relevant when dealing with highly migratory stocks, straddling stocks and shared stocks.

97. Shared stocks are dealt with by article 63.1 of the Convention:

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

98. Except to the extent that shared stocks are also straddling stocks or highly migratory stocks and managed as such by a regional or sub-regional fisheries management organization or arrangement, we submit that, pursuant to Article 63.1, coastal States should have a cooperative management arrangement in place between themselves before they issue access permits for the shared stocks – whether to their own fishers or other States. In practical terms, this would mean firstly putting into place such cooperative arrangements, then designing and implementing their proper conservation and management measures, before permitting their own nationals to exploit identified fishing opportunities, or granting other States access to any identified surplus pursuant to article 62.2 of the Convention.

99. Straddling stocks are dealt with by article 63.2 of the Convention: “Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures

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necessary for the conservation of these stocks in the adjacent area.” This provision is implemented by the Fish Stocks Agreement.

100. Highly migratory stocks are dealt with by article 64(1) of the Convention: “The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I [of the Convention] shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.” Article 64(2) adds that: “The provisions of paragraph 1 apply in addition to the other provisions of this Part.” Article 64 is implemented by the Fish Stocks Agreement.
101. The Fish Stocks Agreement similarly provides, in article 7.1(a), that “with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III [of the Fish Stocks Agreement], to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area”; and, in article 7.1(b), that “with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III [of the Fish Stocks Agreement], with a view to ensuring conservation and promoting the objective of optimum

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utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction”.

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