

CHAPTER 3

RESPONSE TO THE QUESTIONS IN THE REQUEST FOR AN ADVISORY OPINION

QUESTION I: WHAT ARE THE OBLIGATIONS OF THE FLAG STATE IN CASES WHERE ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING ACTIVITIES ARE CONDUCTED WITHIN THE EXCLUSIVE ECONOMIC ZONE OF THIRD PARTY STATES?

I. The scope of the first question

70. This question concerns the obligations or duties of flag States, and not those of other States or of entities or persons having the nationality of the flag State and/or being under its jurisdiction or control. However, the obligations which Question 1 asks the Tribunal to identify and, as necessary, interpret are intertwined with IUU fishing activities, i.e., activities that are presumably carried out by private vessels registered in the flag State, and not by the flag State itself. In other words, the central issue in relation to Question 1 concerns obligations of “due diligence” on the part of the flag State.
71. In Question 1, the expression “obligations” refers to primary obligations, that is, to what flag States are obliged to do under the Convention and other sources or rules of international law not incompatible with the Convention. A violation of these obligations entails “liability,” which is addressed in Question 2.
72. Question 1 is not limited to the obligations of the 166 States Parties to the Convention, but refers generally to “the flag State.” Thus, the answer to the first question requires the identification and, as necessary, interpretation of the obligations of the flag State with respect to IUU fishing activities that result from the Convention, relevant instruments that have been adopted in accordance with the Convention, and other sources and rules of international law not incompatible with the Convention.
73. In the response to the first question, the identification and, as necessary, interpretation of the obligations of the flag State with respect to IUU fishing activities is limited to such activities that “are conducted within the Exclusive Economic Zone of third party States.” Therefore, the question is addressed to IUU fishing activities and flag State obligations in the exclusive economic zone (hereinafter “the EEZ”) only, and not on the high seas or in other maritime zones addressed in the Convention. Since these activities in the EEZ take place under the primary jurisdiction and control of the coastal State, legal obligations under the Convention that generally apply to activities under the jurisdiction and control of States Parties to the Convention are applicable to activities in the EEZ as well.

74. Since the purpose of the first question is to identify and, as necessary, interpret the *obligations* of the flag State in cases where IUU fishing activities are conducted by vessels flying its flag within the EEZ of third States, the Tribunal is not called upon to identify and interpret the *rights* of flag States under the Convention or general international law, although it may be useful in this context for the Tribunal briefly to address the basic rights of flag States as well. In this context, the CRFM notes that the Convention represents a balancing of rights and obligations of States.
75. Activities in the EEZ must be carried out in accordance with the Convention and otherwise must comply with international law. Within the EEZ, such activities are subject to a special, resource-oriented legal regime in order to protect the interests of the coastal State.⁷⁰ Exploration and exploitation of fish stocks in the EEZ are subject to the approval of the coastal State, which enjoys exclusive sovereign rights in the EEZ based on article 56, paragraph 1, of the Convention.
76. The owners, operators and crew of private vessels flying the flag of a certain State are not parties to the Convention and other treaty instruments, and hence the obligations set out in the Convention are not addressed to them directly, even though article 62, paragraph 4, provides that “[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.” Private actors are not, as such, bound by the provisions of treaty instruments. The rules of the Convention concerning activities in the EEZ are treaty law and thus binding only on the subjects of international law that have accepted them. Obligations under the Convention can nevertheless be imposed on non-State entities through the implementation of the Convention by the flag State in its domestic law, including in fulfilment of any “due diligence” obligations on the part of the flag State. Upon implementation, the rules applicable to non-State entities having the nationality, or being under the jurisdiction or control, of the flag State find their legal basis in domestic law.
77. The CRFM’s observations regarding Question 1 begin by setting out the various relevant definitions, including the classification of “IUU” fishing and what constitutes the territorial limitation of a State’s EEZ. The CRFM will then set out the obligations of the flag State in relation to IUU fishing activities conducted in the EEZ of another State pursuant to conventional law, namely, multilateral treaties (universal and regional), and under customary international law and general principles of law.

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

II. IUU Fishing

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

the actual or attempted searching for, catching, taking or harvesting of fisheries resources;

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

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

Article 4:

4.1 “Illegal fishing”: fishing activities:

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

⁷¹ See Annex 5 to this written statement.

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

4.2 “Unreported fishing”: fishing activities

- Which have not been reported or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported in contravention of the reporting procedures of that organization.

4.3 “Unregulated fishing”: fishing activities

- In the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
- In areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for conservation of living marine resources under international law.

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

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

⁷³ See *supra* note 1.

III. The Exclusive Economic Zone

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

Article 55: The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 57: The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

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

IV. Due diligence obligations of flag States

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

The expression “to ensure” is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

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

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

activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”⁷⁵

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

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

The notions of obligations “of due diligence” and obligations “of conduct” are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay*: “An obligation to adopt regulatory or administrative measures ... and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river” (paragraph 187 of the Judgment).⁷⁷

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

It is an obligation which entails not only the adoption of appropriate rules and measures, but also *a certain level of vigilance in their enforcement and the exercise of administrative control* applicable to public and private operators, such as the monitoring of activities undertaken by such operators⁷⁸ (Emphasis added)

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

⁷⁶ *Id.*, para. 110.

⁷⁷ *Id.*, para. 111.

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

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

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

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

The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to risks involved in the activity. ... The standard of due diligence has to be more severe for the riskier activities.⁸⁰

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

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

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

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

V. Direct obligations of flag States

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

A. Flag State obligations under conventional law

1. The Precautionary Approach as a conventional duty

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

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

⁸¹ Id., paras. 118-120.

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

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

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

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

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

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

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

95. Thus, article 5(c) of the Fish Stocks Agreement provides that coastal States and States fishing on the high seas shall “apply the precautionary approach in accordance with article 6.” According to article 6, paragraph 1, “States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.” It is recalled that article 192 of the Convention provides that all “States have the obligation to protect and preserve the marine environment.” Similarly, in article 14, paragraph 1, of the 1985 ASEAN Agreement on

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

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

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

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

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

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

97. The CRFM notes that IUU fishing activities in some parts of the oceans are of such a scale as to pose threats of serious or irreversible damage to the living resources of the marine environment, or of significant and harmful changes to that environment or the ecological balance. In this context, while being mindful of the fact that the precautionary principle “covers a wide range of possible obligations and actions,”⁸⁷ the CRFM invites the Tribunal to clarify which concrete measures are to be taken by States, especially flag States, in order to comply with their duty to apply the precautionary approach.
98. Similar to what the Chamber said with regard to sponsoring States in the Area in the Deep Seabed Mining Advisory Opinion,⁸⁸ it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of flag States, which is applicable even outside the scope of the aforementioned treaties. The due diligence obligation of flag States requires them to take all appropriate measures to prevent damage that might result from the activities of vessels flying their

⁸⁶ Id., para. 128.

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

⁸⁸ Deep Seabed Mining Advisory Opinion, para. 131.

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

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

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

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

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

⁸⁹ Id.

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

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

⁹³ Deep Seabed Mining Advisory Opinion, para. 132.

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

101. This provision applies to the flag State as the State with jurisdiction over the vessel that caused the damage, to the extent that such damage was caused by pollution of the marine environment. With regard to IUU fishing activities, the CRFM submits that dumping of fish and other waste or matter during such activities falls within the Convention's definition. The Convention contains a broad definition of "pollution,"⁹⁴ and dumping is defined as "any deliberate disposal of wastes or other matter from vessels."⁹⁵ The CRFM also refers to the intentional or accidental introduction of non-indigenous species to the wild through IUU fishing activities, which is causing especially devastating effects on fisheries and related ecosystems in the Caribbean region. Article 200 of the Convention is of particular importance in the prevention of pollution insofar as it requires the cooperation of States through the exchange of information and data about pollution to the marine environment.
102. By requiring the flag State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, article 235, paragraph 2, of the Convention serves the purpose of ensuring that the "[n]ationals of other States fishing in the exclusive economic zone ... of the coastal State" referred to in article 62, paragraph 4, of the Convention comply with "the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State."

2. *The UNCLOS*

(a) *Key provisions*

103. The Convention's provisions are part of a complex network of international laws, rules and regulations, but, in addition to setting forth specific rules, the UNCLOS also represents the general rules which serve as basic principles for the entire network of international public law of the sea.⁹⁶
104. The Convention has received 166 ratifications, including from the European Union, and is in force for all members of the SRFC and the CRFM.

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

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

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

105. As detailed above, the articles forming Part V of the UNCLOS lay down a specific legal regime in relation to the EEZ. While the coastal State's prior and preferential interests are recognized as sovereign rights by the Convention, the EEZ does not equate to State territory because the regime also specifies and protects important interests which all States must enjoy in the same waters.⁹⁷ Although the coastal State has extensive rights, the exclusivity is confined to the economic interests specified in the UNCLOS.⁹⁸
106. Pursuant to article 58, paragraph 2, of the Convention, articles 88 to 115 apply, along with other pertinent rules of international law, to the EEZ in so far as they are not incompatible with Part V. These articles 88 to 115 deal with rights and duties of States in relation to the high seas.
107. Article 91 of the Convention ("*Nationality of ships*") prescribes that each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Pursuant to article 91, paragraph 1, ships have the nationality of the State whose flag they are entitled to fly and that provision further prescribes that there must be a *genuine link* between the State and the ship.
108. The "*Duties of the flag State*" in relation to those ships which fly its flag are laid down in article 94 of the Convention but these duties principally concern ensuring seaworthiness of vessels, safe navigation and acceptable working conditions. They do not deal specifically with duties of a flag State when a vessel flying its flag is conducting IUU fishing activities within the EEZ of another State.
109. Other key provisions include articles 62, paragraph 4, 64, paragraph 1, 116-119, 192 and 217 of the Convention.

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

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

in the exclusive economic zone, the coastal State has (a) *sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters

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

⁹⁸ Id.

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

111. The specific obligations regarding the conservation and management of marine living resources within the EEZ are detailed within articles 61 to 64 of the Convention. With one or two exceptions (discussed below), these are all addressed to the coastal State. The CRFM submits, therefore, that the main competence for establishing legislative measures for the conservation and management of marine living resources in the EEZ falls on the coastal State.¹⁰⁰
112. By virtue of article 61 of the Convention, the coastal State must “determine the allowable catch of the living resources in its exclusive economic zone” and it has a duty to ensure that the living resources do not become endangered by over-exploitation. The same provision specifies that the coastal State and the competent international organizations, whether sub-regional, regional or global, have a duty to cooperate to this end. Furthermore, coastal States are to give due notice of conservation and management laws and regulations.¹⁰¹
113. The duty of the flag State as the State with the genuine link to the vessel is engaged by paragraph 4 of article 62 of the Convention in the sense that this paragraph imposes a duty on the “nationals of other States fishing in the exclusive economic zone”¹⁰² to “comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.” These laws and regulations may relate to aspects regulating fishing licences, the species which may be caught, fixing quotas of catch, regulating seasons and areas of fishing, the information

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

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

¹⁰¹ UNCLOS, article 62, paragraph 5.

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

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

114. Pursuant to article 64, paragraph 1, of the Convention (in conjunction with article 118), flag States have a duty to cooperate with the coastal State directly or through appropriate international organizations when nationals engage in fishing for highly migratory species that occur both within the EEZ and beyond. If there is no regional organization, the flag State whose nationals harvest such species and the coastal State must cooperate to establish an organization in the region and participate in its work. While States are negotiating to establish such an organization, the duty to act in good faith (see section V.C below) requires that the negotiating States “pay reasonable regard to each other’s rights and to conservation requirements pending the conclusion of the negotiations,”¹⁰⁷ which is in line with the precautionary approach discussed above.
115. The flag State’s duty to cooperate with the coastal State directly or through appropriate international organizations under these articles of the Convention was the subject of the *Southern Bluefin Tuna* cases.¹⁰⁸
116. The effect of Japan’s argument in response to the contention by Australia and New Zealand that Japan had failed to cooperate as required by the Convention was to say that becoming a State party to a regional agreement fulfilled and discharged its obligations regarding cooperation in the conservation of the relevant high seas resource.¹⁰⁹

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

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

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

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

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

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

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

Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;¹¹³

Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.¹¹⁴

118. In the view of the CRFM, the duty to cooperate under the pertinent provisions of the Convention is not discharged by the act of joining relevant regional fisheries organizations alone. Rather, actual good-faith cooperation within such mechanisms is required.¹¹⁵ Anything less is both a failure to cooperate in the manner required, and amounts to bad faith conduct. The meaning of the duty to cooperate is further discussed in section V.B below.
119. Further, in accordance with the established international law rule of “exclusive flag State jurisdiction,” the flag State is responsible for the implementation of conventions

¹¹⁰ Id.

¹¹¹ Id., pp. 51-52.

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

¹¹³ Id., para. 90(1)(e).

¹¹⁴ Id., para. 90(1)(f).

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

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

120. Pursuant to article 91 of the Convention, “every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag ... [and]... there must exist a genuine link between the State and the ship.” The term “genuine link” is not defined by the Convention but it is said to be interpreted as a strong economic tie between nationals of the flag State and the vessel with regard to ownership, management and manning of the ship.¹²⁰
121. Article 94 of the Convention provides that “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The flag State’s initial obligation is to maintain a register of ships flying its flag, it is to assume jurisdiction under its internal law over each ship flying its flag (along with its master and crew) in respect of administrative, technical and social matters concerning the ship.¹²¹ A summary of the flag State duties in this respect can be found at Annex 7.¹²²
122. The CRFM submits that these conventional duties affirm the principle of exclusive flag State jurisdiction and it follows that when conducting fishing activities within the EEZ of a third State, flag State vessels and nationals must respect and comply with any such laws enacted by the coastal State in relation to fishing in its EEZ and the flag State has the responsibility to ensure that its vessels and nationals do comply with these laws, at least in so far as they constitute “conservation measures and ... other terms and

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

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

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

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

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

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

123. The CRFM notes that it has also been said that the “obligation to ensure” reflected in article 62 of the Convention extends further than merely a “due diligence” obligation¹²⁴ and that such an obligation might also be characterized as a “direct obligation” on a State. Article 94, paragraph 6, of the Convention might be said to bring in this concept of a direct obligation of the flag State in the sense that in circumstances where a coastal State has clear grounds to believe that proper jurisdiction and control have not been exercised with respect to a vessel, it may report the facts to the flag State and upon receiving such a report, the flag State is obliged to investigate the matter and to take any action necessary to remedy the situation.
124. The CRFM notes that, ultimately, it is primarily for the coastal State to take requisite enforcement action against a vessel which is carrying out IUU fishing activities in its EEZ. This is because the Convention gives the coastal State specific rights in this respect. These rights are found in article 73, paragraph 1, which entitles the coastal State to take “such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention” in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its EEZ. The fact that these powers are given to the coastal State and not the flag State flows from the rule, expressed in article 56, paragraph 1, of the Convention, that the coastal State has exclusive rights and jurisdiction over the living resources in its EEZ.
125. The CRFM submits that these articles demonstrate that pursuant to the Convention, it is primarily the coastal State which has the competence to regulate fishing in the EEZ and to take enforcement action against those that violate the laws and regulations it has adopted in conformity with its duties to conserve and manage living resources under the Convention. The flag State’s duties under the Convention are limited to a more general “responsibility to ensure” compliance with these laws and regulations and to assist and cooperate with the coastal State, to investigate where necessary and, if appropriate, take any action necessary to remedy the situation.¹²⁵
126. Moreover, the CRFM highlights the importance of article 217 of the Convention. Paragraph 1 of article 217 requires flag States to “ensure compliance by vessels flying

¹²³ UNCLOS, article 62, paragraph 4.

¹²⁴ Deep Seabed Mining Advisory Opinion, para. 121.

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

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

127. The CRFM’s position is that article 217, paragraph 1, contains the aforementioned general obligation, and also a distinct pollution-specific obligation (namely, to ensure compliance with a State’s “laws and regulations adopted in accordance with [the] Convention for the prevention, reduction and control of pollution of the marine environment from vessels”). This view is consistent with the position in a leading treatise that “[s]ome of the provisions in Section 6 [i.e. including article 217] are interesting not only for pollution problems, but also in relation to the general question of jurisdiction.”¹²⁶
128. A summary of the relevant articles in the Convention is provided in Annex 12:

3. The Fish Stocks Agreement

129. The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995 (hereinafter “the Fish Stocks Agreement”) has received 81 ratifications,¹²⁷ including by the European Union, compared to 166 for the UNCLOS.

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

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

130. The CRFM notes that while the Fish Stocks Agreement sets out principles for the conservation and management of straddling and highly migratory fish stocks only, its principles have been accepted to be applicable more broadly.¹²⁹ The CRFM also notes that the special interest of coastal States in the conservation of those stocks is underlined once again by this multilateral instrument. The Fish Stocks Agreement also elaborates on the inherent duties contained in the UNCLOS such as the duty to cooperate,¹³⁰ the duties of the flag State and the concept of “responsibility to ensure.” Further, it prescribes that conservation and management measures should be established on the basis of the precautionary approach¹³¹ by setting limit reference points for maximum sustainable yield.
131. The collection and exchange of data¹³² and the creation and use of regional fisheries management organizations are promoted by the Fish Stocks Agreement as a means of fulfilling the duty of States to cooperate in this way and are an essential element in the management procedures.¹³³
132. The CRFM submits that ensuring compliance with conservation and management measures is the collective responsibility of all States concerned in a particular stock. As Judge Rüdiger Wolfrum has pointed out in his capacity as President of the Tribunal, “the responsibility for the proper management of living resources is a shared one; it places not only coastal States but also flag States and – more recently – port States under an obligation.”¹³⁴ In a coastal State’s area of territorial sovereignty or sovereign rights, the competent and accountable authority is of course the coastal State and the provisions relating to responsibilities of the coastal State in its EEZ contained in Part V of the Convention are elaborated upon in the Fish Stocks Agreement.
133. The Fish Stocks Agreement provides an elaborate list of measures which the flag State is obligated to take in relation to the fishing of straddling and highly migratory fish stocks. While the majority of the obligations are in relation to fishing of these stocks

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

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

¹³¹ *Id.*, article 6.

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

¹³³ *Id.*, article 8.

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

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

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

	information to the investigating authority regarding and related to the vessel's fishing operations; (d) refer a case to its own authorities if there is sufficient evidence of a violation and where appropriate to detain the vessel.
<i>Article 20</i>	<p>Obligation to cooperate and assist either directly or through sub-regional or regional fisheries management organizations or arrangements to ensure compliance with the conservation and management measures for straddling and highly migratory fish stocks.</p> <p>States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of sub-regional regional or global conservation management measures.</p>
<i>Article 20(6)</i>	<p>“Where there are reasonable grounds for believing that a <i>vessel</i> on the high seas has been <i>engaged in unauthorized fishing within an area under the jurisdiction of a coastal state, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. The flag State shall cooperate with the coastal State</i> in taking appropriate enforcement action in such cases and may authorize the relevant authorities of the coastal State to board and inspect the vessel on the high seas.” (Emphasis added)</p>

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

4. The FAO Compliance Agreement

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

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

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

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

137. The CRFM refers to this agreement, adopted in 2009 but not yet in force, to highlight measures adopted by the FAO in relation to IUU fishing.
138. The primary purpose of this agreement is to prevent, deter and eliminate IUU fishing through the implementation of robust port State measures.¹³⁵ The agreement envisages that parties, in their capacities as port States, will apply the agreement in an effective manner to foreign vessels when seeking entry to ports or while they are in port.¹³⁶
139. The CRFM notes that this agreement is aimed at strengthening the international framework for combating IUU fishing by addressing port State responsibility. As such, it complements flag State responsibilities.

6. *Draft Agreement establishing the Caribbean Community Common Fisheries Policy*

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

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

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

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

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

141. The CRFM's "vision" is that there be effective cooperation and collaboration among participating parties in the conservation, management and sustainable utilization of the fisheries resources and related ecosystems in the Caribbean region. This is reflected at article 4.1 of the Draft CCCFP Agreement.
142. The CRFM refers in particular to the following specific objectives which it is hoped will be achieved through the implementation of the Draft CCCFP Agreement: "prevent, deter and eliminate illegal, unreported and unregulated fishing, including by promoting the establishment and maintenance of effective monitoring, control and surveillance systems."¹³⁹
143. It is intended that the Draft CCCFP Agreement, once in force, will apply "within areas under the jurisdiction of Participating Parties, on board fishing vessels flying the flag of a Participating Party and, subject to the primary jurisdiction of the flag State when fishing takes place on the high seas or the coastal State when fishing takes place in the waters of a Third State, to nationals of Participating Parties."¹⁴⁰
144. The Draft CCCFP Agreement therefore mirrors the principle canvassed in the Convention that the coastal State has primary jurisdiction over activities conducted in its EEZ and, hence, that efforts to control and combat IUU fishing are subject to that jurisdiction.
145. It is envisaged that each "Participating Party" will designate an organization to support that party in achieving the objectives of the agreement.
146. An important provision in the Draft CCCFP Agreement in relation to the obligations of the flag State is found at article 14, which reads in relevant part:

14.1 Each Participating Party, to the extent of its capabilities, shall develop, either directly or through cooperation with other Participating Parties or the Competent Agency, as appropriate, such inspection and enforcement measures as are necessary to ensure compliance with:

(a) the rules contained in and adopted pursuant to this Agreement;

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

¹⁴⁰ *Id.*, article 6.2.

- (b) national regulations relating to fisheries; and
- (c) rules of international law, binding on the Participating Party concerned.

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

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

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

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

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

150. Much like the Fish Stocks Agreement, there is an obligation among the States parties to share information between them¹⁴² and the agreement also requires that the Competent

¹⁴¹ Id., article 14.3(a).

¹⁴² Id., article 16.

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

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

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

8. *European Union IUU Regulation*

152. The CRFM notes that the European Union’s IUU Regulation, Council Regulation 10005/2008, 2008 O.J. (L. 286) 1(EC), establishes a system to prevent, deter and eliminate IUU fishing for the Member States of the European Union, a supranational organization. Obligations of the flag State under this regulation, which is binding on all EU Member States, appear to be limited to validating a “catch certificate” for the vessel flying its flag from which catches of fishery products have been made.¹⁴⁵ Moreover, flag States must have in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by their vessels.¹⁴⁶ This catch certificate is used to certify that catches made by the vessel have been made in accordance with applicable laws, regulations and international conservation and management measures.
153. Pursuant to article 17, paragraph 6, of the IUU Regulation, the flag State may be required to assist a Member State in order to help with verification. Verification of the catch certificate may be required, *inter alia*, when vessels have been reported in connection with IUU fishing.¹⁴⁷ Further, if “presumed IUU fishing” has taken place, the European Commission may: (a) warrant an official enquiry with the flag State requesting it to investigate; (b) share the results of the investigation; (c) request the flag State to take immediate enforcement action should the allegation formulated against the

¹⁴³ Id., article 21.

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

¹⁴⁶ Id., article 20.

¹⁴⁷ Id., article 17, paragraph 4.

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

9. *Bilateral treaties*

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

B. Flag State obligations under customary international law

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

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

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

¹⁴⁸ Id., article 26.

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

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

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

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

157. As mentioned above, States are under a general obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control."¹⁵⁴ The ICJ has established that this general obligation of States "is now part of the corpus of international law relating to the environment."¹⁵⁵
158. The CRFM also refers to its observations on "due diligence" obligations in section IV above.
159. The CRFM observes that flag States are also obliged under customary international law to apply the precautionary approach, as reflected in Principle 15 of the Rio Declaration on Environment and Development¹⁵⁶ and expressed in a series of treaty and other instruments.
160. A further customary international law obligation of great importance is the duty to cooperate. In its Judgment in *Pulp Mills on the River Uruguay*, the ICJ observed that shared resources¹⁵⁸ "can only be protected through close and continuous cooperation

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

¹⁵³ Id., p. 5.

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

¹⁵⁵ Id.

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

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

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

161. The CRFM’s position is that cooperation between States having jurisdiction over fishing from shared stocks and stocks of common interest, particularly straddling fish stocks and highly migratory fish stocks, lies at the core of their international obligations.¹⁶² This duty requires actual engagement¹⁶³ and colors the interpretation of all other obligations and rights with respect to the utilization of shared resources.
162. One aspect of the duty to cooperate is a requirement that States exchange data and information in relation to conservation and IUU activities on a regular basis. The ILC has described such exchange as “the first step for cooperation,”¹⁶⁴ and one that requires “effective monitoring” by the relevant States.¹⁶⁵ The ILC has further stated that this aspect of the duty to cooperate is “designed to ensure that ... States will have the facts necessary to enable them to comply with their obligations.”¹⁶⁶

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

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

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

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

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

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

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

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

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

C. Flag State obligations derived from general principles of law

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

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

¹⁶⁸ *Id.*, pp. 601-602.

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

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

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

165. This duty is expressed in article 26 of the Vienna Convention on the Law of Treaties,¹⁷¹ which is generally regarded as being reflective of customary international law binding on all States that have not consistently objected to it. Moreover, States Parties to the UNCLOS¹⁷² and the Fish Stocks Agreement¹⁷³ are expressly obliged to fulfil their obligations in good faith. The CRFM notes the statement of the Sea-Bed Disputes Chamber in *Case No. 17* to the effect that the duty to act in good faith is especially important when a State’s action “is likely to affect prejudicially the interests of mankind as a whole,”¹⁷⁴ as is the case in relation to IUU fishing of shared resources. Further, the CRFM takes the view that the general obligation of good faith includes the obligation incumbent on States having signed and/or ratified international agreements,

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

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

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

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

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

¹⁷⁴ Deep Seabed Mining Advisory Opinion, para. 230.

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

166. The Tribunal has repeatedly stated that “the duty to cooperate is *a fundamental principle* in the prevention of pollution of the marine environment under Part XII of the Convention and general international law¹⁷⁶ (Emphasis added).
167. Finally, the CRFM notes that, pursuant to article 74 of the UN Charter and as expressed in that instrument’s preamble, all UN Member States (currently numbering 193) have undertaken to abide by “the general principle of good-neighborliness, due account being taken of the interests, and well-being of the rest of the world, in social, economic, and commercial matters.”

D. Subsidiary means: “Soft law” instruments

168. The CRFM refers to the FAO Code of Conduct for Responsible Fisheries of 1 November 1995¹⁷⁷ as an example of a “soft law” instrument providing guidance for flag States, which may be of relevance to the Tribunal’s response to the first question submitted by the SRFC.
169. The CRFM refers in particular to article 8 of the FAO Code of Conduct which sets out a number of flag State duties that have the aim of promoting the “principles” of the code of conduct. These principles include “fishing in a responsible manner” as well as the general principle that a flag State should exercise effective control over vessels flying its flag so as to ensure the proper application of the Code of Conduct.
170. The CRFM notes in particular that, in accordance with the FAO Code of Conduct, flag States should ensure that the activities of vessels flying their flag do not undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, sub-regional, regional or global levels. States should also ensure that vessels flying their flag fulfil their obligations concerning the collection and provision of data relating to their fishing activities.¹⁷⁹

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

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

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

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

171. The CRFM also refers to the Castries Declaration.¹⁸⁰ In its preamble, the Castries Declaration notes “the responsibility of flag States under international law to effectively control and manage vessels flying their flags, as well as the responsibilities of port and coastal States in controlling IUU fishing in waters under their jurisdictions and on the High Seas.” The CRFM’s view is therefore that controlling IUU fishing within third States’ EEZ is the collective responsibility of the flag States with the port and coastal States concerned.¹⁸¹
172. The Castries Declaration also refers in paragraph 6(v) to the need for further international action “to require that a ‘genuine link’ be established between states and fishing vessels flying their flags in the Region and on the high seas.”
173. The CRFM further refers to the following other soft law instruments as examples of non-legally binding guidelines as being demonstrative of other institutional/regional practice:
- (a) Rome Declaration on Implementation of the Code of Conduct (1999);¹⁸²
 - (b) FAO 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (“IPOA-IUU”);¹⁸³
 - (c) FAO technical guidelines;¹⁸⁴
 - (d) FAO Voluntary Guidelines for Flag State Performance (February 2013),¹⁸⁵ in particular see list of flag State responsibilities relating to IUU fishing;
 - (e) International Conference on Responsible Fishing, Declaration of Cancun;¹⁸⁶

¹⁸⁰ See Annex 1 to this written statement.

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

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

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

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

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

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

- (f) Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (2001);¹⁸⁷
- (g) Johannesburg Declaration on Sustainable Development (2002);¹⁸⁸
- (h) Kyoto Declaration and Preface (9 December 1995);¹⁸⁹
- (i) UNCED, Rio Declaration on Environment and Development (1992);¹⁹⁰
- (j) UN General Assembly resolution 62/177 (2008) (UN Doc. A/RES/62/177) (28 February 2008) which urges States to exercise “effective control” over vessels flying their flag “to prevent and deter” IUU fishing;
- (k) UN General Assembly resolution 65/155 (2011) (UN Doc. A/RES/65/155) (25 February 2011) in which it is recognized “that the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach;” and
- (l) Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston 1990 (SPAW Protocol).¹⁹¹

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

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

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

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

¹⁹¹ See Annex 11 to this written statement.