INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

WRITTEN STATEMENT OF THE CARIBBEAN REGIONAL FISHERIES MECHANISM

27 NOVEMBER 2013

CONTENTS

CHAPTER 1: INTRODUCTION 1

I. The Caribbean Regional Fisheries Mechanism 1

II. The request for an advisory opinion 5

III. Summary of argument 8

A. The ecosystem-based approach 8

B. The principle of sustainable development 11

C. Applicable rules 13

CHAPTER 2: JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW 17

I. Jurisdiction 17

II. Admissibility 24

III. Applicable Law 25

CHAPTER 3: RESPONSE TO THE QUESTIONS IN THE REQUEST FOR AN ADVISORY OPINION 28

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? 28

I. The scope of the first question 28

II. IUU Fishing 30

III. The Exclusive Economic Zone 32

IV. Due diligence obligations of flag States 32

V. Direct obligations of flag States 35

A. Flag State obligations under conventional law 35

1. The Precautionary Approach as a conventional duty 35

2. The UNCLOS 39

(a) Key provisions 39

(b) Conservation and management of living resources within the EEZ 40

3. The Fish Stocks Agreement 46

4. The FAO Compliance Agreement 49

5. FAO Agreement on Port Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009 50

6. Draft Agreement establishing the Caribbean Community Common Fisheries Policy 50
7. ASEAN Agreement on the Conservation of Nature and Natural Resources 53
8. European Union IUU Regulation 53
9. Bilateral treaties 54
B. Flag State obligations under customary international law 54
C. Flag State obligations derived from general principles of law 57
D. Subsidiary means: "Soft law" instruments 59

Question II: To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? 62

I. The scope of the second question 62
II. Flag State obligations regarding IUU fishing within the EEZ 63
III. Flag State obligations regarding IUU fishing on the high seas 63
A. Flag State obligations under conventional law 63
1. The UNCLOS 65
2. The Fish Stocks Agreement 69
3. The FAO Compliance Agreement 70
4. Regional Treaty Practice 71
B. Flag State obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to this aspect of Question 2 73
IV. Responsibility and Liability 73
A. Applicable UNCLOS provisions on liability 73
B. Extent of liability under the Convention 79
C. General rules of international law related to liability of States 81

Question III: *Une organisation internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l'Etat côtier par les bateaux de pêche bénéficiant desdites licences?* 87

I. The scope of the third question 87
II. The CRFM's preliminary response to the third question 89

Question IV: 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? 91

I. The scope of the fourth question 91

II. Coastal States' rights and obligations under conventional law to ensure the sustainable management of fish stocks 92

A. The Exclusive Economic Zone 92

B. The high seas 95

C. Coastal States' rights to prevent IUU fishing activities 95

1. Rights arising when the IUU fishng activities took place on the high seas 96

(a) On the high seas and in the coastal State's EEZ 96

(b) In the coastal State's territorial sea 97

(c) In ports 98

2. Rights arising when the IUU fishing activities took place in the coastal State's EEZ 100

D. Regional and bilateral treaties 101

III. Coastal States' rights and obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to Question 4 101

CHAPTER 4: CONCLUSIONS 102

ANNEXES

CHAPTER 1

INTRODUCTION

I. The Caribbean Regional Fisheries Mechanism

1. In its Order 2013/2 dated 24 May 2013, the International Tribunal for the Law of the Sea (hereafter "the Tribunal" or "ITLOS") invited the States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "UNCLOS"), the Sub-Regional Fisheries Commission (hereinafter "the SRFC" or "the requesting organization") and certain intergovernmental organizations and entities listed in an annex to the Order to present written statements on four questions in Case No. 21 pertaining to illegal, unreported and unregulated ("IUU") fishing activities offshore.[1]

2. The Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM" or "the Mechanism") is an intergovernmental organization for regional fisheries cooperation founded in 2002 pursuant to the Agreement Establishing the Caribbean Regional Fisheries Mechanism (hereinafter "the CRFM Agreement").[2] It has its headquarters in Belize. As the CRFM is listed in the Annex to the Tribunal's Order 2013/2, it wishes to avail itself of the opportunity afforded by the Order to make a written statement on the request by the SRFC for an advisory opinion of the Tribunal. This statement by the CRFM addresses the jurisdiction of the Tribunal to give an advisory opinion in response to the request by the SRFC and the questions put by the SRFC in that request.

3. The CRFM's status and mission are similar to the SRFC's, even though their regional sphere of influence differs and the CRFM's membership is more than double the SRFC's. The CRFM aims to promote the sustainable use of fisheries and aquatic resources in and among the Caribbean Community (CARICOM) Member States, by development, management and conservation of these resources in collaboration with stakeholders to benefit the people of the Caribbean region. It is beyond doubt that the fragile economies of the Member States of both organizations suffer serious damage

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1 IUU fishing is further defined in Chapter 3 of this written statement. In short, IUU fishing is "any fishing which undermines or disregards national, regional or international fisheries conservation and management arrangements and measures." Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing (hereinafter "the Castries Declaration"), first preambular paragraph, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia, on 28 July 2010 (see full text in Annex 1 to this written statement).

2 See full text in Annex 2 to this written statement. The text of the Agreement is also available from the CRFM's Web site, <www.crfm.net> (under tab "About the CRFM").

from IUU fishing activities, which also threatens border security of the countries affected by such activities.[3]

4. The combined land area of the CRFM Member States is 433,549 sq. km. and their coastal fronts extend over nearly 10,000 km. The CRFM Member States have an aggregate population of approximately 17 million, with annual per capita consumption of fisheries products estimated at 31 kg. The fisheries of CRFM Member States are an important foreign exchange earner and a primary contributor to income, employment, food security and social and economic stability, especially in coastal communities. In 2010, 62,217 persons were employed in direct production in the marine capture fisheries, with a total fleet of fishing vessels operating in the commercial capture fisheries of just under 25,000 vessels and some 40 foreign-owned and operated fishing vessels registered under open registry arrangements (Belize and St. Vincent and the Grenadines). The presence of transboundary fish stocks and fish stocks of common interest is of great benefit to the CRFM Member States, whose total marine capture fish production averaged 136,148 metric tons between 2006 and 2010. During the period 2008-2009, at ex-vessel prices the value of the marine capture fishery production for the region from domestic fleets was approximately USD 543,200,000.[4]

5. There are few large surplus stocks in the Caribbean region, with the exception of Guyana, Suriname and, to a lesser extent, Belize. The following categories of fisheries have traditionally been acknowledged by the CRFM region: small coastal pelagic fishery, small offshore pelagic fishery, large offshore pelagic fishery, shallow shelf and reef finfish fishery, shallow shelf and reef lobster fishery, shelf and deep slope fishery, shrimp fishery, conch fishery, echinoderms fishery (locally called the sea urchin or sea cucumber fishery), sea turtle fishery and fishery for sea mammals.[5]

6. The CRFM has two categories of membership, namely, Member States and Associate Members of CARICOM.[6] Most of the CRFM's 17 members are developing countries and small island developing States, or SIDS. They are listed in the table below.

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3 See, e.g., Ministry of Agriculture and Fisheries of Jamaica, "IUU Fishing and Border Security Issues in Jamaican Waters," Discussion Paper submitted at the Fourth Meeting of the Ministerial Council of the CRFM, 20 May 2011, St. John's, Antigua, text in Annex 3 to this written statement.

4 See J. Masters, *CRFM Statistics and Information Report – 2010* (2012), 65 pp., text available from the CRFM Web site, <http://www.crfm.net/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=33&Itemid=237>, accessed 7 November 2013.

5 Id., p. 15 and Tables 6-7.

6 Article 3, paragraph 1, of the CRFM Agreement provides that "[m]embership of the Mechanism shall be open to Member States and Associate Members of CARICOM." Thus, CARICOM Members and

Anguilla	Antigua and Barbuda	Bahamas
Barbados	Belize	Dominica
Grenada	Guyana	Haiti
Jamaica	Montserrat	St. Kitts and Nevis
Saint Lucia	St. Vincent and the Grenadines	Suriname
Trinidad and Tobago	Turks and Caicos Islands	

7. Similar to the SRFC, all of the Member States of the CRFM have ratified the UNCLOS (Jamaica, the Bahamas and Belize were among the first ten countries to have ratified the Convention).[7] There currently are no Associate Members. Observers of the CRFM include the following:

- CARICOM (Caribbean Community)
- CNFO (Caribbean Network of Fisherfolk Organizations)
- FAO (Food and Agriculture Organization of the United Nations)
- OECS (Organisation of Eastern Caribbean States)
- UWI (the University of the West Indies)
- Bermuda

8. The CRFM has entered into a partnering arrangement with the Dominican Republic's Ministerio de Medio Ambiente y Recursos Naturales and El Consejo Dominicano de Pesca y Acuicultura (CODOPESCA) through a memorandum of understanding.

9. The CRFM is composed of three organs: (a) the Ministerial Council, (b) the Caribbean Fisheries Forum, and (c) the Technical Unit.[8] The Ministerial Council, consisting of the Ministers of Fisheries of the Member States, determines the policy of the Mechanism. The Forum consists of representatives from Member States and Associate Members as well as observers from fisher folk, through the Regional Network of Fisherfolk Organizations (CNFO), and private companies, regional bodies and

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Associate Members may become members of the CRFM. Any other State or territory of the Caribbean region (i.e., States that are not CARICOM Members or Associate Members) may become an Associate Member of the CRFM.

7 Anguilla, Montserrat and the Turks and Caicos Islands are included in the United Kingdom's ratification of the Convention as overseas territories.

8 CRFM Agreement, articles 6-13.

institutions and non-governmental organizations. It determines the technical and scientific work of the Mechanism. The Technical Unit is the permanent secretariat of the Mechanism and is headed by the Executive Director. The Unit has capability for policy and planning, research and resource assessment, fisheries management and development, and statistics and information.

10. The objectives of the CRFM as enunciated by article 4 of its constituent instrument are threefold:

    (a) the efficient management and sustainable development of marine and other aquatic resources within the jurisdiction of Member States;

    (b) the promotion and establishment of co-operative arrangements among interested States for the efficient management of shared, straddling or highly migratory marine and other aquatic resources; and

    (c) the provision of technical advisory and consultative services to fisheries divisions of Member States in the development, management and conservation of their marine and other aquatic resources.

11. Article 5 of the CRFM Agreement provides that, in pursuance of its objectives, the CRFM shall be guided by the following principles:

    (a) maintaining bio-diversity in the marine environment using the best available scientific approaches to management;

    (b) managing fishing capacity and fishing methods so as to facilitate resource sustainability;

    (c) encouraging the use of precautionary approaches to sustainable use and management of fisheries resources;

    (d) promoting awareness of responsible fisheries exploitation through education and training;

    (e) according due recognition to the contribution of small scale and industrial fisheries to employment, income and food security, nationally and regionally; and

    (f) promoting aquaculture as a means of enhancing employment opportunities and food security, nationally and regionally.

12. These provisions clearly indicate that resource management constitutes the primary objective of the CRFM, the provision of technical and consultative services being its secondary objective. Since its creation in 2002, the CRFM has concentrated on the

following areas and activities: coordinating fisheries management activities in the Member States of the Mechanism; conducting research and resource assessments of national and shared fish stocks; strengthening fisher folk organizations and improving Community Participation; assisting in the development of fishing plans; developing strategic and work plans; securing, executing and managing externally financed programs and projects; networking with regional and international organizations; and representing CARICOM or the members of the CRFM at international fora.

13. To date, the CRFM has not been involved with the management of the exploitation of regional stocks. The region is in the process of determining suitable regional cooperation agreements for managing key shared fishery resources, including considering the need for establishing a regional fisheries management organization (hereinafter "RFMO") to address active management of all shared fishery resources in the region. The CRFM is not set up as an RFMO for the Caribbean Sea.

14. By Order 2013/2, the Tribunal fixed 29 November 2013 as the time-limit within which written statements on the four questions in Case No. 21 may be presented to the Tribunal. This written statement is intended to support the SRFC's request for an advisory opinion and to assist the Tribunal in responding to the four questions addressed to it by the SRFC.

15. This written statement is arranged as follows:

Chapter 1 sets out the SRFC's request for an advisory opinion and provides a summary of the CRFM's views on the questions submitted by the SRFC.

Chapter 2 then briefly considers the Tribunal's jurisdiction to give the opinion, possible questions of admissibility and the applicable law.

Chapter 3 then addresses in turn each of the four questions put to the Tribunal in the light of the relevant legal provisions and other rules of international law.

Finally, **Chapter 4** sets out the Conclusions which the CRFM invites the Tribunal to reach.

II. The request for an advisory opinion

16. At its Fourteenth Extraordinary Session, held in Dakar, Republic of Senegal, from 25 to 29 March 2013, the seven-member Conference of Ministers of the SRFC, acting pursuant to Article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (hereinafter "the MCA

Convention"),[9] unanimously authorized the Permanent Secretary of the SRFC to submit a request for advisory opinion to the Tribunal. The MCA Convention deals with IUU fishing in Part IV comprising articles 25-30.

17. The English text of the decision of the Conference of Ministers authorizing the Permanent Secretary of the SRFC to request the Tribunal to render an advisory opinion reads as follows:

> ***Decides***, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:
>
> 1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
>
> 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
>
> 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
>
> 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

18. By letter dated 27 March 2013 and received in the Registry of the Tribunal the following day, the Permanent Secretary of the SRFC submitted a request asking the Tribunal to render an advisory opinion on the above questions (in French and based on the French text of the Conference of Ministers' resolution).[10]

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9 The MCA Convention repeals and replaces the Convention of 14 July 1993 on the Determination of Conditions for Access and Exploitation of Marine Resources Off the Coasts of SRFC Member States, which also regulated fishing activities within the maritime areas of SRFC Member States.

10 See ITLOS Order 2013/2 of 24 May 2013, p. 2, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

19. The CRFM will discuss in connection with Question 3 in Chapter 3 below how the discrepancy in the English and French texts of the Tribunal's Order 2013/2, which appears to have its origin in the ITLOS Registry's mistaken translation of the Permanent Secretary's letter, affects the reply to be given to Question 3.

20. As the March 2013 Technical Note from the Permanent Secretariat of the SRFC explains, the Member States of the SRFC are seeking to find out from the Tribunal exactly what their rights and obligations are in connection with IUU fishing with a view to "supporting the SRFC Member States to enable them, thanks to sensible and perceptive advice, to derive the greatest benefit from the effective implementation of the relevant international legal instruments and [to] ensuring that the challenges that they are facing from IUU fishing are better met."[11] Indeed, all similarly placed intergovernmental organizations for fisheries cooperation, including the CRFM, as well as all flag and coastal States stand to gain from the Tribunal's authoritative statements in response to the questions submitted by the SRFC.

21. The scale of the problem underlying the request of the SRFC is highlighted in a recent report of a ministerially-led task force on IUU fishing:

> Illegal, unreported and unregulated (IUU) fishing is a serious global problem. It is increasingly seen as one of the main obstacles to the achievement of sustainable world fisheries. Recent studies put the worldwide value of IUU catches at between USD 4 billion and USD 9 billion a year. While USD 1.25 billion of this comes from the high seas, the remainder is taken from the exclusive economic zones (EEZs) of coastal states.[12]

22. The Tribunal has been confronted with the problem of IUU fishing within the exclusive economic zone (hereinafter "the EEZ") or exclusive fishing zone of third party States in prior cases involving applications for prompt release. The aforementioned report singles out the case of the *Camouco*,[13] which was the subject of a 2000 decision of the Tribunal[14] before being re-named, re-flagged and re-arrested for IUU fishing, as "a

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11 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252>, accessed 7 November 2013.

12 *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, p.3, text available at <http://www.oecd.org/sd-roundtable/aboutus/stoppingillegalfishingonthehighseas.htm>, accessed 7 November 2013.

13 Id., p. 33.

14 *The "Camouco" Case (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 10.

graphic illustration of what can happen" when vessels engaged in IUU fishing activities game the prevailing system and take advantage of the inability or unwillingness of the responsible States to prevent, deter and eliminate IUU fishing.

III. Summary of argument

23. The Caribbean Regional Fisheries Mechanism appreciates the opportunity to submit this written statement, and to present its position in respect of the four questions to be considered by the Tribunal. Before addressing those questions, the CRFM wishes to make the following general observations.

A. The ecosystem-based approach

24. In responding to the four questions submitted to it by the SRFC, the CRFM invites the Tribunal to affirm the link between all States' "sovereign right to exploit their natural resources" with "their duty to protect and preserve the marine environment,"[15] to acknowledge the economic, social and environmental impacts of IUU fishing, and to apply the ecosystem-based approach to fisheries for a sustainable management of living marine resources and their ecosystems, as recognized in the Preamble to the MCA Convention[16] and other relevant regional and international instruments and documents. At its Seventh Meeting held in May 2013, the Ministerial Council of the CRFM "**[r]eaffirmed and declared** the ecosystem approach to fisheries and aquaculture as a key guiding principle for the CRFM, … , to ensure the long-term conservation and sustainable use of aquaculture and marine living resources."[17] The key features of this

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15 UNCLOS, article 193. See also R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 820; Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the International Law Commission, Geneva, 31 July 2008, p. 10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013 ("Article 192 places upon all States a duty to protect and preserve the marine environment and article 193 provides for a sovereign right to exploit natural resources only in accordance with such duty.").

16 The preamble to the MCA Convention reads, in relevant part: "taking into account the ecosystem-based approach to fisheries for a sustainable management of resources, and the fight against illegal, unreported and unregulated fishing, in accordance with international law." It has been pointed out that "[t]he living resources (i.e., fish, shellfish, sea turtles, and marine mammals) provisions of the LOS Convention recognize international interdependence on these resources" and "attention to ocean ecosystems would reflect the highly complex web of biological relationships where food chain and commensal associations create intricate interdependencies." See Eugene H. Buck, "U.N. Convention on the Law of the Sea: Living Resources Provisions," pp. 2, 4, CRS Report for Congress, Order Code RL32185 (Feb. 2008).

17 See text in Annex 4 to this written statement.

approach are maintaining ecosystem integrity[18] while improving human well-being and equity and promoting an enabling governance.

25. The MCA Convention defines the term "Ecosystem Approach" as follows:

> The ecosystem-based approach to fisheries is a means of ensuring the sustainable development of the fisheries sector. It is based on current fisheries management practices and explicitly acknowledges the interdependence between human well-being and that of the ecosystem. This approach places particular emphasis on the need to maintain the ecosystem in a good state and improve its productivity so that the level of fisheries production is maintained or improved for the benefit of current and future generations.[19]

26. This definition affirms the link between the ecosystem-based approach and the principle of sustainable development (see paras 32 to 35 below). Similarly, in adopting resolution 65/155 of 25 February 2011 entitled "Towards the sustainable development of the Caribbean Sea for present and future generations," the United Nations General Assembly reaffirmed "that the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach."[20] In this context, IUU fishing issues should be addressed in a holistic manner and against the background of the principle of sustainable development.

27. The same resolution noted "the heavy reliance of most of the Caribbean economies on their coastal areas, as well as on the marine environment in general, to achieve their

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18 See also 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. 55 ("An external impact affecting one component of an ecosystem may cause reactions among other components and may disturb the equilibrium of the entire ecosystem, resulting in impairing or destroying the ability of an ecosystem to function as a life-support system.").

19 MCA Convention, article 2.1. See also article 2 of the Convention on Biological Diversity (1760 UNTS 79), which defines "ecosystem" as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unti." See also <http://www.cbd.int/ecosystem/default.shtml>, accessed 7 November 2013,

20 UN Doc. A/RES/65/155 (25 February 2011). The UN General Assembly's recognition of the importance of the Caribbean region is underscored by a series of resolutions promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development. See, e.g., UN Doc. A/RES/59/230 (22 December 2004); UN Doc. A/RES/61/197 (20 December 2006); UN Doc. A/RES/63/214 (19 December 2008); UN Doc. A/RES/65/155 (20 December 2010); and UN Doc. A/RES/67/205 (21 December 2012).

sustainable development needs and goals."[21] IUU fishing activities constitute a direct threat to those needs and goals both within and without the Caribbean region.

28. In the preamble to the Draft Agreement establishing the Caribbean Community Common Fisheries Policy, which has been approved by the competent ministers of CARICOM and is accepted as a policy statement pending final signature and ratification, the Participating Parties express their commitment to "fostering cooperation and collaboration among Participating Parties in the conservation, management and sustainable utilization of fisheries resources and related ecosystems for the welfare and well-being of the peoples of the Caribbean."[22] This regional instrument defines the "ecosystem approach to fisheries management" as follows in article 1(g):

> the balancing of diverse societal objectives, by taking account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.[23]

29. Similarly, the preamble to the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, while recognizing "the interdependence of living resources, between them and with other natural resources, within ecosystems of which they are part," states that "the inter-relationship between conservation and socioeconomic development implies both that conservation is necessary to ensure sustainability of development, and that socioeconomic development is necessary for the achievement of conservation on a lasting basis."[24]

30. Several provisions of the UNCLOS reflect the ecosystem-based approach. For example, article 194, paragraph 5, of the Convention provides that the measures taken in accordance with Part XII of the Convention must include those "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or

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21 Id.

22 See text in Annex 5 to this written statement.

23 According to article 1(f), "ecosystem" means "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit."

24 Agreement on the Conservation of Nature and Natural Resources, adopted by the Foreign Ministers at the 18th ASEAN Ministerial Meeting in Kuala Lumpur, Malaysia, on 9 July 1985, text available at <http://cil.nus.edu.sg/rp/pdf/1985%20Agreement%20on%20the%20Conservation%20of%20Nature%20and%20Natural%20Resources-pdf.pdf>, accessed 7 November 2013.

endangered species or other forms of marine life." Article 234 of the Convention, dealing with vessel-based marine pollution in ice-covered areas, refers to "irreversible disturbance of the ecological balance."

31. Finally, as Judge Dolliver Nelson has pointed out in respect of the maritime zones featured in the instant case:

> there exists a biological unity among most species to be found in both the EEZ and in the high seas. As a result the fisheries management regime for the EEZ and that for the high seas should necessarily be concordant.[25]

B. The principle of sustainable development

32. The principle of sustainable development was referenced in the preceding paragraphs. The status and content of this concept has been considered extensively by three committees of the International Law Association (hereinafter "the ILA"):

- the Committee on the Legal Aspects of Sustainable Development (1992 - 2002);[26]
- the Committee on International Law on Sustainable Development (2003 - 2012);[27] and
- the Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present).[28]

33. Of the various committees' work, the CRFM refers particularly to the Committee on the Legal Aspects of Sustainable Development's New Delhi Declaration[29] in addition to

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25 Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012) p. 1035, 1046.

26 For the Web site of the ILA's Committee on the Legal Aspects of Sustainable Development (1992 - 2002), see <http://www.ila-hq.org/en/committees/index.cfm/cid/25>, accessed 7 November 2013.

27 For the Web site of the ILA's Committee on International Law on Sustainable Development (2003 - 2012), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>, accessed 7 November 2013.

28 For the Web site of the ILA's Committee on the Role of International Law in Sustainable Natural Resource Management for Development (2012 - present), see <http://www.ila-hq.org/en/committees/index.cfm/cid/1044>, accessed 7 November 2013.

29 ILA, *Committee on the Legal Aspects of Sustainable Development: New Delhi Declaration* (2002) Resolution No. 3/2002, available at <http://www.ila-hq.org/download.cfm/docid/65DD8DEF-E74D-4ED5-925EBC6D73F19C97>, accessed 7 November 2013.

the latest resolution[30] of the Committee on International Law on Sustainable Development, which was adopted at the 75th Conference of the ILA in 2012, and the report of that Conference.[31]

34. The CRFM agrees with the New Delhi Declaration's preambular statement that:

> the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.[32]

35. The CRFM regards the principle of sustainable development so formulated, in addition to the precautionary approach[33] and the ecosystem-based approach,[34] as guiding the exercise of the rights and compliance with the obligations of both flag States and coastal States in ensuring the sustainable management of shared resources,[35] including straddling fish stocks and highly migratory fish stocks.

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30 ILA, *Committee on International Law on Sustainable Development: Sofia Guiding Statement* (2012) Resolution No. 7/2012, available at <http://www.ila-hq.org/download.cfm/docid/BE9EAAD7-1C34-431E-BE5C21DE11021910>, accessed 7 November 2013.

31 ILA, *Committee on International Law on Sustainable Development: Final Report of the Sofia Conference* (2012), available at <http://www.ila-hq.org/download.cfm/docid/7C2F958B-C576-4C55-94F79F50A87AE74D>, accessed 7 November 2013.

32 See *supra* note 29.

33 See section V.A.1 under Question 1 below.

34 See section A. above.

35 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 (see *supra* note 24). According to that provision, 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. This Agreement, which has not yet entered into force but is nevertheless of relevance for definitional purposes.

C. Applicable rules

36. As a matter of general principle, it is the CRFM's view that there should be no lacunae in the obligations and responsibility of States for IUU fishing activities conducted by entities within their jurisdiction or control. Under international law, the responsibility of States can be engaged in situations where there is no damage. If damage is caused by IUU fishing activities, particularly to the living resources of the marine environment, there should always be an entity which bears responsibility and liability for that damage.

37. The obligations of flag States and coastal States are complementary. In the EEZ, the primary jurisdiction and responsibility to prevent, deter and eliminate IUU fishing rest with the coastal State. When fishing takes place on the high seas, the primary, and in many respects exclusive, jurisdiction and responsibility lie with the flag State based on its responsibility to exercise effective jurisdiction and control over vessels entitled to fly its flag in accordance with international law, with certain general obligations applying to all States and subject to the possibility of concurrent jurisdiction existing in certain circumstances.[36]

38. The rights enjoyed by flag States and coastal States under the Convention and other law of the sea sources are coupled with obligations. The Convention reflects a balancing of rights and obligations of States and the same applies to the legal regime governing IUU fishing activities.

39. The principal sources of international obligations and rules of international law are treaties, customary international law and general principles of law. In the context of IUU fishing, the rules emanating from those sources include:

40. ***(I)* The obligation to protect and preserve the marine environment**, which is expressed as a general responsibility of all States under article 192 of the Convention. The Tribunal has recognized that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."[37] This general obligation is accompanied by a number of more specific obligations in relation to the EEZ and high seas.

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[36] The primacy of the flag State is recognized in a number of provisions in the Convention, notably articles 91-92, 94, 209, paragraph 2, 211, paragraphs 2 and 3, 212, 216, 218, 222, 223, 228, 231, and 292. See also M. Nordquist, S. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982* (Brill, 2011), Vols. I-VII, , Part XII, p. 255, para. 217.8(a) (hereinafter the "Virginia Commentary").

[37] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70. See also Virginia Commentary, Part XII, p. 43, para. 192.11(a).

41. **(2) The principle of *prevention***, which is a customary rule having its origins in the due diligence that is required of a State in its territory and imposes on States the duty to adopt preventative measures in its sphere of exclusive control when international law is breached by private actors. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[38] Thus, 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."[39] The International Court of Justice (hereinafter "the ICJ") has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[40] Accordingly, flag States are bound to make the best possible effort to secure compliance by vessels flying their flag. This requires the implementation and enforcement[41] of appropriate measures within the flag State's legal system for the prevention, reduction and control of IUU fishing so as to ensure the sustainable development of the shared living resources of the oceans and the coastal State's exclusive sovereign right over the living resources in areas within its jurisdiction.

42. **(3) The duty of *cooperation***, which is especially required where the nationals of multiple States fish from the same shared stocks, being stocks comprising highly migratory species of fish and stocks that straddle EEZs or the divide between an EEZ and the high seas (UNCLOS, articles 63 and 64). The duty to cooperate also applies in

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

39 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29. See also article 3 of the 1992 Convention on Biological Diversity, 1760 UNTS 142, pursuant to which States have "the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;" and Principle 2 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992), pursuant to which "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and 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 national jurisdiction."

40 Id.

41 It has been held that the obligation to prevent pollution of the marine environment, which is analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans, "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:" *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."). The CRFM considers that the same requirement of vigilance in enforcement is required in respect of measures adopted to prevent and combat IUU fishing activities.

respect of all fishing on the high seas so as to properly conserve and manage the living resources available (UNCLOS, article 118).[42] The duty to cooperate in good faith requires more than mere membership of relevant regional fisheries organizations; actual, good-faith cooperation within such mechanisms is required.[43]

43. ***(4)* The obligation to apply a *precautionary approach***, as reflected in Principle 15 of the 1992 Rio Declaration on Environment and Development and expressed in a number of treaty and other instruments. Principle 15 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.[44]

44. ***(5)* The coastal State's duty to *manage fishing in the EEZ***. Under article 56 of the Convention, coastal States have sovereign rights for the exploitation of fish stocks within their EEZ and jurisdiction over the protection and preservation of the marine environment. The Convention obliges coastal States to ensure that fish stocks within the EEZ are preserved while enabling the fishing of the "maximum sustainable yield." The coastal State's duty to manage fish stocks extends to shared stocks (i.e., those that straddle EEZs or the EEZ and the high seas, and highly migratory fish stocks), which requires actual good-faith cooperation between the States whose nationals and vessels fish from such stocks.

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42 See also the second preambular paragraph of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas: "Considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned." Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958, entered into force on 20 March 1966, 559 UNTS 285.

43 See the discussion of the *Southern Bluefin Tuna* cases in section V.A.2 of Question 1 below. Further, the CRFM notes the Tribunal's statement 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 law," which the CRFM regards as analogous in effect to the prevention of IUU fishing of the shared living resources of the oceans: see *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.

44 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.

45. **(6) The coastal State's *rights to prevent IUU fishing of its resources***, which are extensive and exist concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. In particular, coastal States may:

(a) legislate and enforce such laws as required to ensure the sustainable development of fish stocks within their EEZ, in accordance with Part V of the Convention.

(b) take all necessary steps to prevent IUU fishing activities (including at-sea transhipment and transporting of IUU fish hauls) within their territorial seas;

(c) make effective use of port State jurisdiction over vessels voluntarily within their ports which have engaged in IUU fishing activities affecting them. The CRFM notes that article 23, paragraph 1, of the 1995 UN Fish Stocks Agreement confirms that port States have the right "and the duty" to take such measures where international rules for the conservation and management of fish stocks have been breached.

(d) enter into regional and bilateral agreements with flag States to permit the exercise of coastal State jurisdiction on the high seas in respect of vessels flying the flags of other States.

CHAPTER 2

JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

46. As this is the first occasion on which the Tribunal has been requested to render an advisory opinion under article 138 of its Rules,[45] the Tribunal is called upon to examine questions of jurisdiction and admissibility that may arise in the exercise of this important function. The present chapter deals first with the jurisdiction of the Tribunal to give the advisory opinion requested (section I), second with possible issues of admissibility (section II), and third with the applicable law (section III).

I. Jurisdiction

47. The Tribunal should first determine whether it has jurisdiction to give the advisory opinion requested by the SRFC. Based on the *Kompetenz-Kompetenz* principle recognized in article 288, paragraph 4, of the Convention, it is for the Tribunal alone to decide the question of its jurisdiction.

48. In contrast to the Sea-Bed Disputes Chamber, the jurisdiction of the Tribunal to give advisory opinions is not explicitly addressed in Annex VI of the Convention ("Statute of the International Tribunal for the Law of the Sea"), except that article 21 of the Statute states that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.*"[46] (Emphasis added). The CRFM notes the generic reference to "jurisdiction" in article 21, which can be said to include both contentious and advisory jurisdiction. Moreover, article 20 of the Statute, which has to be read with article 21,[47] confirms that

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45 The Sea-Bed Disputes Chamber of the Tribunal issued an advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area* (Case No. 17) on 1 February 2011 based on article 191 of the Convention. *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 (hereinafter "the Deep Seabed Mining Advisory Opinion").

46 All references to the Convention are taken from the United Nations, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference, U.N. Pub. Sales No. E.83.V.5 (1983). See also the Virginia Commentary.

47 See Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 15; Statement by Rüdiger Wolfrum, 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, 24 October 2005, p. 10. Texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

"[t]he Tribunal shall be open to entities other than States Parties … in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

49. The jurisdiction of the Tribunal to give advisory opinions is mentioned in the Rules of the Tribunal, the legal foundation for which is set forth in article 16 of the Statute of the Tribunal.[48] Article 138, paragraph 1, placed in Section H ("Advisory proceedings") of the Rules, reads: "The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." The latter words are clearly linked to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" in article 21 of the Statute.[49] Article 138 of the Rules of the Tribunal clearly frames "rules for carrying out its functions," namely, the Tribunal's advisory function. Paragraph 2 of article 138 stipulates that "[a] request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal." Finally, paragraph 3 provides that the Tribunal "shall apply *mutatis mutandis* articles 130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber.

50. The ITLOS Web site confirms the advisory function and jurisdiction of the Tribunal, where it is stated under the tab "The Tribunal:"

> The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21). The Tribunal is open to States Parties to the Convention (i.e. States and international organisations which are parties to the Convention). It is also open to entities other than States Parties, i.e., States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement

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48 Article 16 of the Statute reads: "The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."

49 See also Speech by Judge Hugo Caminos, Representative of the International Tribunal for the Law of the Sea, at the First Meeting of International and Regional Courts of the World on the One-Hundredth Anniversary of the Central American Court of Justice, Managua, Nicaragua, 4-5 October 2007, p. 6 ("On the basis of that provision [i.e., article 21 of the Statute], article 138 of the Tribunal's Rules authorizes it to give an advisory opinion concerning the purposes of the Convention, if that is stipulated in an international agreement."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=1%20AND%201%3D1-->, accessed 7 November 2013.

> conferring jurisdiction on the Tribunal which is accepted by all the parties to that case" (Statute, article 20).
>
> (...)
>
> The Seabed Disputes Chamber is competent to give advisory opinions on legal questions arising within the scope of the activities of the International Seabed Authority. The Tribunal may also give advisory opinions in certain cases under international agreements related to the purposes of the Convention.

51. The above statement confirms that intergovernmental organizations which are not parties to the Convention may have access to the Tribunal pursuant to article 20, paragraph 2, of the Statute.

52. Under the tab "Jurisdiction" on the ITLOS Web site, the following is stated under the heading "Advisory jurisdiction:" "The Tribunal may also give an advisory opinion on a legal question if this is provided for by 'an international agreement related to the purposes of the Convention' (Rules of the Tribunal, article 138)." This language is in line with the words "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" employed in article 21 of the Statute.

53. It has been pointed out in the literature that:

> The jurisdiction of ITLOS to issue advisory opinions has been raised on several occasions at meetings of LOSC States Parties and during debates in the UN General Assembly. However, no strong objection appears to have been raised, and a number of States have expressed support for Rule 138. Authoritative commentators, including several judges on the Tribunal, have also affirmed the existence of a sound legal basis for Rule 138 in the LOSC.[50]

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[50] Michael B. Gerrard and Gregory E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013), pp. 524-525 (footnotes within cite deliberately omitted). See also Michael A. Becker, "Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion," *American Society of International Law Insights*, Vol. 17, Issue 19 (23 August 2013); P. Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), pp. 393-394.

54. Indeed, consecutive Presidents of the Tribunal have confirmed the full Tribunal's advisory jurisdiction through a series of official statements.[51]

55. In sum, in the view of the CRFM there can be no doubt that the Tribunal is vested with advisory jurisdiction on the basis of its constituent instruments, in addition to contentious jurisdiction. Such a jurisdiction also accords with the judicial function entrusted to the Tribunal as an independent judicial body under the Convention.[52] In order to exercise its judicial functions properly in accordance with the Convention and implementing instruments, including the Rules of the Tribunal, the Tribunal must be vested with advisory jurisdiction. These instruments must be interpreted to ensure the effectiveness of their terms. To conclude otherwise would contravene the rule of *effet utile*. As the ICJ has stated, "[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot

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51 See, e.g., Statement by Rüdiger Wolfrum, 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, 24 October 2005, p. 11; Statement of Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, on the occasion of the ceremony to commemorate the Tenth Anniversary of the Tribunal, 29 September 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, 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, 23 October 2006, p. 7; Statement by H.E. Rüdiger Wolfrum, 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, 29 October 2007, p. 9; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, pp. 18-19 (describing the Tribunal's advisory function as "a significant innovation in the international judicial system"); Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, pp. 4, 6-10 (pointing out that the full Tribunal's advisory jurisdiction is "based on a procedure which has no parallel in previous adjudication practice" and represents a "procedural novelty"); Statement by Judge S. Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 76(a) "Oceans and the Law of the Sea", at the Sixty-sixth Session of the United Nations General Assembly, 6 December 2011, p. 4, para. 9; Statement by Shunji Yanai, President of ITLOS, given at the International Conference at Yeosu, Republic of Korea, 12 August 2012, p. 7; and Statement made by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 75(a) "Oceans and the Law of the Sea", at the Plenary of the Sixty-seventh Session of the United Nations General Assembly, 11 December 2012, p.3, para. 7 (all texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=49&L=1%2527%2560%2528>, accessed 7 November 2013).

52 See, e.g., Tafsir Malick Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea," 9(3) *Chinese Journal of International Law* 565-587 (2010); Doo-young Kim, "Advisory Proceedings before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea," *Issues in Legal Scholarship 2010*; Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited," 39 *Ocean Dev. & Int'l L.* 360 (2008).

justify [an interpretation of a treaty] contrary to [its] letter and spirit."[53] Thus, the CRFM invites the Tribunal to conclude that it has advisory jurisdiction.

56. The CRFM will briefly consider four issues arising from article 138 of the Rules of the Tribunal and the SRFC's request, namely:

(a) Whether there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion;

(b) Whether there was a valid request of the requesting organization;

(c) Whether the questions asked are "legal questions;" and

(d) Whether the request was transmitted to the Tribunal by a body "authorized by or in accordance with the agreement to make the request to the Tribunal."

57. In the view of the CRFM, these are the only conditions to be met for the Tribunal to have jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

58. As regards the first issue, the conditions to be met under article 138 of the Rules are: (a) that there is an international agreement; (b) that the agreement is related to the purposes of the Convention; and (c) that it provides specifically for the submission of a request for an advisory opinion to the ITLOS. Under article 33 ("Submissions of matters to the International Tribunal for the Law of the Sea for Advisory Opinion") of the MCA Convention, "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion." In other words, the MCA Convention provides specifically for the submission to the Tribunal of a request for advisory opinion and confers on the Conference of Ministers, acting through the Permanent Secretary, the power to make such requests. The MCA Convention, a multilateral treaty which regulates the determination of the minimal conditions for access and exploitation of marine resources within the maritime areas under jurisdiction of the Member States of the SRFC, is evidently an international agreement related to the

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53 *Interpretation of Peace Treaties (second phase), Advisory Opinion, I.C.J. Reports 1950*, p. 229; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91. See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), p. 428; R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 1280 ("The parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless … . [A]n interpretation is not admissible which would make a provision meaningless, or ineffective") (referring to international decisions and literature in footnote 26); Deep Seabed Mining Advisory Opinion, para. 57.

purposes of the Convention, which also addresses the conservation and management of living resources within the EEZ and on the high seas.[54] The MCA Convention deals with IUU fishing in Part IV. It is submitted therefore that the Tribunal should conclude that there is in this case an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion.

59. As to the second issue, the information provided by the requesting organization shows that the decision of the competent body of that organization—namely, the Conference of Ministers comprising representatives of each of the Member States of the SRFC[55]—was taken unanimously and is otherwise in accordance with the constituent instrument and internal rules of procedure of the organization. Article 8 of the SRFC Agreement provides that "[d]ecisions taken at the Conference of Ministers shall be unanimously agreed upon by representatives of Member Countries which shall undertake to ensure their application;" this is therefore the key stipulation applicable to the validity of decisions made by the Conference of Ministers. The "Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory Opinion," adopted on 28 March 2013 during the Fourteenth Extraordinary Session of the Conference of Ministers of the SRFC held in Dakar from 25 to 29 March, received a unanimous vote and appears otherwise to have been validly adopted on the basis of article 8 of the constituent instrument of the SRFC and article 33 of the MCA Convention. It is submitted therefore that the Tribunal should conclude that there is in this case a valid request by the requesting organization.

60. With respect to the third issue, the Tribunal must satisfy itself that the advisory opinion requested by the SRFC concerns "legal questions" within the meaning of article 138 of the Rules of the Tribunal. According to article 131, paragraph 1, of the Rules, which applies *mutatis mutandis* to advisory opinions under article 138 by operation of article 138, paragraph 3, of the Rules, "[a] request for an advisory opinion on a legal question … shall contain a precise statement of the question." In examining this requirement, the CRFM invites the Tribunal to observe that the four questions put to the Tribunal

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54 The MCA Convention is a "treaty" as defined in article 2, paragraph 1(a), of the 1969 Vienna Convention on the Law of Treaties ("'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.").

55 Article 4 of the Convention of 29 March 1985 on the establishment of a Sub Regional Fisheries Commission as amended in 1993 (hereinafter "the SRFC Agreement"), lists "the Conference of Ministers" as one of three organs of the SRFC. Article 5 further describes the Conference of Ministers as "the supreme organ of the Commission" with a mandate "to decide on any matter relating to the preservation, conservation and management of fishery resources in the sub-region."

relate, *inter alia*, to "the obligations" of the flag State; the extent to which the flag State shall "be held liable;" and "the rights and obligations of the coastal State." The questions put to the Tribunal in this case concern the interpretation of provisions of the Convention and raise issues of general international law. As the ICJ has stated, "questions 'framed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law'(*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, para. 15)."[56] It is submitted therefore that the Tribunal should conclude that the questions raised by the SRFC are of a legal nature.

61. Finally, as regards the fourth issue, Judge José Luis Jesus, speaking in his capacity as President of the Tribunal, has stated that "any organ, entity, institution, organization or State that is indicated in … an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a body within the meaning of article 138, paragraph 2, of the Rules."[57] Pursuant to the aforementioned Resolution of the Conference of Ministers of the SRFC, the Permanent Secretary of the SRFC, who heads the Permanent Secretariat of the SRFC and is charged with "implementing decisions of the Conference of Ministers,"[58] transmitted the request for an advisory opinion by letter dated 27 March 2013 addressed to the President of the Tribunal, and received by the Registry on 28 March 2013.[59] According to the text of that Resolution, the Conference of the Ministers "**[d]ecides**, in accordance with Article 33 of the CMAC, to authorize the Permanent Secretary of the Sub-Regional Fisheries Commission to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion" on the four questions submitted to the Tribunal (emphasis in original).[60] The resolution was signed by the representatives of all seven Member States of the SRFC. The Nineteenth Session of the Conference of Ministers of the SRFC had instructed the Permanent Secretary of the

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56 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, 415, para. 25 (22 July 2010). See also Deep Seabed Mining Advisory Opinion, para. 39.

57 Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, pp. 9-10, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

58 SRFC Agreement, article 12.

59 See ITLOS Order 2013/2 of 24 May 2013, p. 2.

60 Id.

SRFC to refer the four questions to the Tribunal for an advisory opinion. It is submitted therefore that the Tribunal should answer the fourth issue in the affirmative.

62. For the aforementioned reasons, the CRFM invites the Tribunal to find that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the SRFC.

II. Admissibility

63. In the view of the CRFM, there are no grounds on which the Tribunal should decline to provide the advisory opinion requested by the SRFC. Being an independent and impartial judicial body, the Tribunal's answers to the questions submitted to it by the SRFC will assist all subjects of international law to which the Convention is addressed in the performance of their rights and obligations under the Convention as well as general international law.

64. The Tribunal has a high responsibility to ensure that the provisions of the Convention are interpreted and implemented properly and the regime for fisheries in the EEZ and on the high seas is properly interpreted and applied.[62] Through its authoritative statements in reply to the SRFC's questions, the Tribunal will contribute to the implementation of the Convention's pertinent provisions and, indeed, sound governance of the seas and oceans and the Rule of Law in general.[63] By answering the questions submitted by the SRFC the Tribunal will assist the SRFC, as well as all similarly placed entities, in the performance of their activities. The SRFC and its Member States as well as States Parties to the Convention may take guidance from the interpretation in the Tribunal's advisory opinion of the pertinent rules on the obligations and liability of States in the Convention and under general international

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62 In resolution 56/12 of 28 November 2001, the UN General Assembly underlined what it referred to as the Tribunal's "important role and authority concerning the interpretation or application of the Convention." UN Doc. A/RES/56/12. As a former President of the Tribunal has stated, "interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention." Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, The Gilberto Amado Memorial Lecture, held during the 61st Session of the International Law Commission, Geneva, 15 July 2009, p. 9, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013. See also Statement by H.E. Rüdiger Wolfrum, 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, 29 October 2007, pp. 9-10 ("Advisory proceedings could also be advantageous for those seeking an indication as to how a specific sea-related matter could be interpreted under the Convention or which would be the applicable law when there is no specific provision governing the matter."); Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 19, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

63 See March 2013 Technical Note of the SRFC, p. 6, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=252&L=0>, accessed 7 November 2013.

law.[64] Accordingly, the CRFM invites the Tribunal to conclude that it is appropriate to render the advisory opinion requested by the SRFC and to proceed accordingly.

III. Applicable Law

65. The Tribunal should also indicate the applicable law. Article 23 of the Statute of the Tribunal reads: "The Tribunal shall decide all disputes and applications in accordance with article 293." In the view of the CRFM, there is no reason not to apply article 23 of the Statute to matters specifically provided for in any agreement which confers jurisdiction on the Tribunal.

66. Article 293, paragraph 1, of the Convention, reads: "A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention." In the view of the CRFM, "other rules of international law" must be interpreted to refer to the sources of international law listed in article 38 of the Statute of the International Court of Justice.[65] Article 38, paragraph 1, reads:

> The Court, …. , shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
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> (c) the general principles of law recognized by civilized nations;

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64 See also Statement by H.E. Rüdiger Wolfrum, 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, 23 October 2006, pp. 7-8 ("Through an advisory opinion, the requesting body may obtain legal guidance from the Tribunal on a specific question … ."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013.

65 The preamble to the Charter of the United Nations refers to the need to respect "the obligations arising from treaties and other sources of international law." As a former President of the Tribunal has stated, the "reference [in article 293] to 'other rules of international law' should be understood to include rules of customary international law, general principles that are common to the major legal systems of the world transposed into the international legal system, and rules of a conventional nature." 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, pp. 7-8, text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

67. As Judge Rüdiger Wolfrum has repeatedly stated in his capacity as President of the Tribunal:

> I should underline that the law of the sea should not be seen as an autonomous regime but as part of general international law. In effect, numerous provisions in the Convention are today considered part of general international law, and the obligations of States Parties under the Convention entail international legal obligations.[66]

68. The "other rules of international law" referred to in article 293, paragraph 1, of the Convention also include those concerning the interpretation of treaties contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[67] Articles 31 and 32 reflect customary international law[68] and should be applied by the Tribunal in its interpretation of the relevant provisions of the Convention and other conventional law sources.[69]

69. The procedural rules applicable during advisory proceedings before the Tribunal are set out in section H ("Advisory proceedings") of the Rules of the Tribunal, article 138, paragraph 3 of which provides that the Tribunal "shall apply *mutatis mutandis* articles

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66 Statement by H.E. Rüdiger Wolfrum, 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, 29 October 2007, p. 7; Statement by Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, given at the Asia-Pacific Ambassadors' Luncheon, Berlin, 17 January 2008, p. 18 (texts available from the ITLOS Web site, <http://www.itlos.org/index.php?id=68&L=0>, accessed 7 November 2013). See also 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. 7 ("By applying the Convention in a specific case, the Tribunal applies not only the new treaty provisions that it contains, but also the general international law that it codifies."), text available from the ITLOS Web site, <http://www.itlos.org/index.php?id=179&L=0>, accessed 7 November 2013.

67 155 UNTS 331.

68 See *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), I.C.J. Reports 2007*, p. 60, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. U.S.A.), I.C.J. Reports 2004*, p. 48, para. 43; *Japan – Taxes on Alcoholic Beverage*, Report of the Appellate Body, WT/DS8/AB/R, 1996, p. 10.

69 The CRFM invites the Tribunal to apply the approach to treaty interpretation laid out in paragraphs 57-63 of the Deep Seabed Mining Advisory Opinion.

130 to 137" pertaining to advisory proceedings before the Sea-Bed Disputes Chamber. Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

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.

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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 form, any activity described in paragraphs (i) to (iii), including transhipment; 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

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[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.

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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

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[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 operators … .[78] (Emphasis added)

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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

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[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]

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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

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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

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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

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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.

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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

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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

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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]

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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

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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

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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" obligation[124] 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

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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.

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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 approach[131] by setting limit reference points for maximum sustainable yield.

131. The collection and exchange of data[132] 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

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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:

Article 6	As alluded to above, this is a general approach underpinning the agreement that States shall apply the *precautionary approach* 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.
Article 7(1)(b)	The *duty to cooperate* 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 *within* and beyond *the areas under national jurisdiction.*
Article 14	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.
Article 17(2)	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.
Article 17(4)	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.
Article 18	This article lists *"Duties of the flag State"* and article18(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.
Article 19	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.
Article 20	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. 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.
Article 20(6)	"Where there are reasonable grounds for believing that a *vessel* on the high seas has been *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* 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)

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:

Article III(1)(a)	"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."
Article IV	Obligation to maintain a record of fishing vessels.
Article V	Duty to cooperate.
Article VI	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'

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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;

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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 them[142] and the agreement also requires that the Competent

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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

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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

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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 Development[156] 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 resources[158] "can only be protected through close and continuous cooperation

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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 engagement[163] 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]

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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 prerequisitie 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 acquifers, 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

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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 UNCLOS[172] and the Fish Stocks Agreement[173] 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,

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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 law ... ."[176] (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 1995[177] 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]

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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>, 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. he 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]

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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]

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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.

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

I. The scope of the second question

174. This question concerns the liability of the flag State in respect of "IUU fishing activities conducted by vessels sailing under its flag" and the extent of such liability. In other words, Question 2 concerns the liability of a State arising from a vessel's illegal conduct (breach), and not the State's conduct as a legal entity. The main issue raised by Question 2 is the liability of the flag State for private actors within their jurisdiction or control committing violations when the private acts cannot be directly attributed to the State. As the response to Question 1 showed, flag States can be liable for violations of their "due diligence" obligations as well as for violations of direct obligations, including the obligation to apply a precautionary approach and the obligation to protect and preserve the marine environment, including the living resources of the water column.

175. The answer to the second question requires the identification and, as necessary, interpretation of international law rules on the liability of a flag State for IUU fishing activities conducted by vessels flying its flag. These rules are not only found in the responsibility and liability provisions set out in articles 232, 235, paragraph 1, and 304 of the Convention,[192] including any relevant instruments that have been adopted in accordance with the Convention, but also in other sources and rules of international law to the extent that they are not incompatible with the Convention and related instruments.

176. In Question 2, the term "liable" refers to the consequences of a breach of the flag State's obligations.[193] Unlike Question 1, which concerns the flag State's obligations in the EEZ, the territorial scope of Question 2 is not limited to the EEZ of other States. Thus, in reply to Question 2, the Tribunal is called upon to identify and, as necessary, interpret the flag State's obligations on the high seas before answering the question of the liability of the flag State for IUU fishing activities conducted by vessels flying its flag under international law. As an international tribunal, the ITLOS can only opine on questions of *international* law in the exercise of its advisory function. In other words,

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192 At para. 168 of the Deep Seabed Mining Advisory Opinion, the Chamber took into account articles 235 and 304 as well as other relevant provisions of the Convention applicable to activities in the Area.

193 At para. 66 of the Deep Seabed Mining Advisory Opinion, the Chamber pointed out that "the term 'liability' refers to the secondary obligation, namely, the consequences of a breach of the primary obligation."

questions of liability under domestic law, including the law of coastal States, are outside of its jurisdiction.

177. The CRFM notes that the Convention does not address expressly whether the responsibility of the flag State is engaged, or whether the flag State may incur liability, if private vessels flying its flag do not comply with the laws and regulations of coastal States and engage in IUU fishing activities within the EEZ of other States or on the high seas. The Convention does, however, contain certain provisions which are of relevance in addressing this question, and general international law is of relevance as well in this context.

178. The CRFM's observations on Question 2 begin by setting out the primary obligations of flag States, particularly in relation to IUU fishing activities conducted on the high seas given that there is no territorial limitation within the question, before considering State liability/responsibility for IUU fishing activities conducted by flag State vessels.

II. Flag State obligations regarding IUU fishing within the EEZ

179. The obligations of flag States in cases where IUU fishing activities are conducted by their nationals and vessels flying their flag within the EEZ of another State are set out in the CRFM's response to Question 1.

III. Flag State obligations regarding IUU fishing on the high seas

A. Flag State obligations under conventional law

180. In addition to obligations within the EEZ of another State, Question 2 raises the question of the obligations of flag States in respect of IUU fishing activities conducted by vessels flying their flag on the high seas.

181. The CRFM refers to the articles comprising Part VII of the UNCLOS, which set forth rules concerning the high seas. While the Convention does not define the term "high seas" itself, article 86 provides that the provisions governing the high seas "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[194]

182. It has been pointed out that "[t]he legal regime of the high seas has traditionally been characterised by the dominance of the principles of free use and the exclusivity of flag

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194 UNCLOS, article 86.

state jurisdiction."[195] In principle a flag State enjoys exclusive jurisdiction over vessels flying its flag on the high seas, as no State may purport to subject the high seas to its own sovereignty.[196] With exclusive jurisdiction over its vessels on the high seas comes a "general requirement for a flag state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[197] Question 2, as it pertains to the high seas, therefore relates to identifying and, as necessary, interpreting the obligations of a flag State in relation to vessels conducting IUU fishing activities and which do not fall under the jurisdiction of any State other than the flag State.

183. While the high seas are not within the sovereign territory of any State, this zone is nevertheless subject to the law of nations.[198] Legal order on the high seas is created "through the cooperation of the law of nations and the municipal laws of such states as possess a maritime flag."[199] With regard to IUU fishing in the EEZ, the flag State carries obligations *vis-à-vis* the coastal State, which bears the primary responsibility for the conservation and management of living resources within the EEZ. On the high seas, RFMOs increasingly play that role.[200]

184. The CRFM suggests that the obligations of flag States regarding IUU fishing activities on the high seas can be grouped primarily into three different categories:[201]

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195 R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP 1999), p. 203. See also Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., 2010), p. 665 ("The key to regulating activities within the high seas is the concept of flag state jurisdiction").

196 Id. See also *The Flag State's Obligations for Merchant Vessels,* Bernaerts' Guide To The 1982 United Nations Convention On The Law Of The Sea ("As there is no sovereign authority of a state or other agency to maintain law and order on the high seas, there must be some tie to the jurisdiction of a state. According to common international law, which is confirmed by the Convention, the flag state in general exercises exclusive jurisdiction over a vessel on the high seas.")

197 *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas, supra* note 12, p. 5 ("Boats on the high seas are thus best regarded as mobile pockets of sovereignty, governed by the rules and regulations of the state whose flag they fly.")

198 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 727.

199 Id.

200 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

201 See also the conventional and soft law instruments discussed elsewhere in this written statement.

(a) Flag States owe certain obligations to coastal States with regard to activities not occurring within the EEZ but occurring in areas beyond or adjacent to the EEZ.

(b) The UNCLOS imposes upon all States, including flag States, an obligation to protect and preserve the marine environment. Within the high seas specifically, States are bound by a general duty to take all measures necessary for the conservation of the living resources of the high seas and to cooperate in the conservation and management of high seas living resources.[202]

(c) The UN Fish Stocks agreement, together with other agreements following a similar model, recognizes specific obligations of flag States to regulate vessels and provides a mechanism for improved compliance with and enforcement of conservation measures on the high seas within a framework which delegates management of the relevant stocks to regional fisheries organizations or bilateral agreements. Within this framework, numerous bilateral and regional instruments bind flag States to uphold certain obligations to monitor and investigate vessels flying their flag.

1. The UNCLOS

185. Part VII of the UNCLOS sets out the legal regime applying to the high seas. Articles 88 to 115 of the Convention deal with rights and duties of States in relation to the high seas.

186. Article 89 of the Convention preserves the general principle that States may not purport to subject any part of the high seas to their own sovereignty. Moreover, every State, whether coastal or land-locked, has the right to have ships flying its flag sail on the high seas based on article 90 of the Convention.

187. The freedom of navigation is one of several non-exhaustive freedoms listed in the 1958 Convention on the High Seas, which claimed to be declaratory of established principles of international law.[203] The freedom to fish on the high seas is another such freedom. States exercise the freedoms of the high seas primarily through vessels flying their flags.[204]

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202 See David Freestone "Fisheries, High Seas," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012) p. 66, para. 7.

203 Both the 1958 High Seas Convention and the UNCLOS proclaim the high seas to be free and open to vessels of all States and indicate that any list of freedoms in the high seas is non-exhaustive. See Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., 2010), p. 665.

204 See the President's 2007 Presentation (Annex 6), p. 2.

188. Article 87 of the UNCLOS sets out the principal freedoms which all States enjoy on the high seas. Paragraph 2 of article 87 provides that in the exercise of the freedoms of the high seas, all States must have "due regard for the interests of other states."

189. The UNCLOS preserves the right of all States for their nationals to engage in fishing on the high seas.[205] However, this freedom of fishing is not absolute;[206] rather, article 116 of the UNCLOS identifies three limitations on States' freedoms to fish on the high seas:

(a) Restrictions grounded in treaty obligations;

(b) Rights, duties and interests of coastal States provided for, *inter alia*, in article 63, paragraphs 1 and 2 (for stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it) and articles 64 to 67 (highly migratory species, marine mammals, anadromous stocks, catadromous species); and

(c) The provisions of Section 2 of Part VII of the Convention, regarding the conservation and management of the living resources of the high seas (articles 117-120).[207]

190. Neither article 87 nor articles 116-120 of the Convention specifically references flag States. However, as noted above, the activities of fishing vessels on the high seas are subject to the jurisdiction and control of their flag State.[208] Any limitation on the freedom to fish within the high seas arising out of the UNCLOS can be construed as imposing a corresponding obligation on the flag State, namely, to exercise effective jurisdiction over vessels flying its flag and conducting IUU fishing activities on the high seas.

191. Fishing restrictions grounded in treaty obligations include those grounded in the Convention itself, as well as any restriction to fishing on the high seas grounded in a regional or bilateral treaty to which the States parties have consented to be bound. As discussed further below, following the Convention's entry into force, States have concluded a number of legal instruments obligating flag States to exercise effective control over their vessels as a condition of participation in a RFMO.

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205 UNCLOS, articles 86, 116.

206 See the President's 2007 Presentation (Annex 6), p. 5.

207 Id.

208 See also Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., OUP 2010), p. 680.

192. With regard to restrictions grounded in the rights, duties and interests of coastal States, articles 63 and 64 of the Convention regulate the fishing of shared stocks and stocks of common interest within the EEZ, as well as in the area beyond and adjacent to the EEZ. Articles 63 and 64 provide that the coastal State and the State whose nationals fish in the region (i.e., the flag State) shall cooperate directly or through appropriate international, regional, or sub-regional organizations to ensure the conservation of the living resources.

193. Section 2 of Part VII of the Convention ("Conservation and Management of the Living Resources of the High Seas") includes relevant obligations set forth in articles 117-119. Pursuant to article 117 of the Convention, all States have the obligation "to take, or to co-operate 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."

194. The duty of the flag State in particular is engaged by article 118 of the Convention, which addresses "States whose nationals exploit identical living resources, or different living resources in the same area." In that situation, article 118 prescribes that those States "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned" and that they "shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."[209]

195. Article 119 of the Convention indicates that the principle upon which conservation and management measures should be based is that of the best scientific evidence available. The measures should be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.

196. While article 116 of the Convention references articles 63 and 64-67, Part VII of the Convention does not otherwise refer to certain fisheries stocks in describing the States Parties' obligations toward the conservation and management of the living resources of the high seas. Some commentators have critiqued the UNCLOS provisions with regard to fishing on the high seas as "rather vague."[210] For example, while Part V of the Convention describes specific measures to be taken by the coastal State with regard to the conservation of living resources in the EEZ, Part VII of the Convention prescribes only the duty to "take such measures … as may be necessary." Some commentators have speculated that the high seas fisheries regime was "neglected" during the drafting

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209 See David Freestone, "Fisheries, High Seas," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012) p. 66, para. 7 ("This recognizes that states fishing on the high seas must do this within the framework of existing relevant regional or species-related fisheries management organizations.").

210 Id., para. 8.

of the UNCLOS.[211] However, since the Convention's entry into force, several additional instruments have been developed that elaborate on the obligations of States, including flag States, with regard to conserving the living resources of shared stocks and highly migratory stocks.

197. As described above, with regard to obligations of flag States in the EEZ, articles 91 and 94 of the Convention contain specific provisions governing the obligations of flag States. Pursuant to article 94, "every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Yet the enumerated duties of flag States do not expressly address conservation of the marine living resources.

198. While Part VII of the Convention does not explicitly describe the duties of a flag State on the high seas,[212] all obligations with regard to exercising the freedom to fish on the high seas necessarily attach to the flag State, as a result of the exclusivity of the flag State's jurisdiction.[213] Article 92 of the Convention provides that ships shall sail under the flag of one State only, and shall be subject to its exclusive jurisdiction.

199. In addition to the provisions of Part VII ("Conservation and Management of the Living Resources of the High Seas"), article 192 of the Convention provides that all States have the general obligation to protect and preserve the marine environment. Article 194 further requires States to "take all measures necessary to ensure that activities under their jurisdiction and control do not cause damage to other States and their marine environment." Finally, as noted in response to Question 1, article 217, paragraph 1, of the Convention requires flag States to "ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference."

200. A summary of the relevant articles in the Convention is provided in Annex 13.

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211 Kaare Bangert, "Fish Stocks," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 29, para. 11.

212 See *High Seas Task Force (2006), Closing the net: Stopping illegal fishing on the high seas, supra* note 12 ("The extent to which the Law of the Sea itself elaborates the responsibilities of flag states is limited, and largely general in nature.").

213 See Jörn-Ahrend Witt, *Obligations and Control of Flag States, Developments and Perspectives in International Law and EU Law*, (LIT, 2007), p. 4 (in accordance with the established international law rule of "exclusive flag state jurisdiction," the flag State is responsible for the implementation of conventions and their enforcement vis-à-vis the ships which have their nationality.)

2. The Fish Stocks Agreement

201. The high seas conservation regime set forth in the UNCLOS was further developed in the UN Fish Stocks Agreement, which entered into force in 2001.[215] The Fish Stocks Agreement sets out principles for the conservation and management of certain fish stocks, as noted above. The Agreement sets out the legal regime for the conservation and management of straddling and highly migratory fish stocks with a view to ensuring their long-term conservation and sustainable use.

202. The Fish Stocks Agreement provides a framework for cooperation on conservation and management. Under the Agreement, RFMOs are the primary vehicle for cooperation between coastal States and high seas fishing States in the conservation and management of straddling fish stocks and highly migratory fish stocks. A number of States have incorporated the Agreement's provisions into their fisheries laws and regulations.[216]

203. Article 8 of the Fish Stocks Agreement encourages States to cooperate through establishing regional and sub-regional fisheries regimes including only States with a "real interest" in the stocks.[217] Management of the relevant stocks is delegated to these RFMOs. This framework provides that only flag States willing to cooperate in the conservation regime can participate in fishing the stock.

204. Unlike the UNCLOS, the Fish Stocks Agreement provides a list of flag State obligations.[218] Pursuant to article 18 of the Fish Stocks Agreement, the flag State must ensure that vessels flying its flag do not undermine the effectiveness of conservation and management measures on the high seas. Moreover, the flag State shall authorize fishing on the high seas only when it can exercise its responsibilities effectively. The Fish Stocks Agreement provides a further list of flag State obligations in relation to record-keeping, investigation, ensuring compliance, and enforcement measures against vessels engaged in illegal fishing.

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215 Kaare Bangert, "Fish Stocks," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 29, para. 12.

216 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

217 Id.

218 See also the President's 2007 Presentation (Annex 6), pp. 5-6 (pointing out that "[t]he listing of the duties of the flag State does not mean that the Fish Stocks Agreement does not conform to or goes beyond the Convention. On the contrary, it confirms and strengthens the well-established law on nationality of ships and the principle of exclusive flag-State jurisdiction on the high seas as set forth in article 91 of the Convention and elaborated in article 94.").

205. The Fish Stocks Agreement establishes in article 6 that conservation and management must be based on the precautionary approach, discussed above in connection with the response to Question 1, and on the best available scientific information.[219]

206. The general principles of the Fish Stocks Agreement are also key principles in the 2008 FAO International Guidelines for the management of deep-sea fisheries in the high seas and the protection of vulnerable marine ecosystems.[220]

3. The FAO Compliance Agreement

207. As a former President of the Tribunal has stated:

> [The FAO Compliance Agreement] is the first global instrument that details the duties of the flag State with respect to vessels fishing on the high seas in the context of conservation and management of fisheries. These duties concern not only ship registration and fishing licenses but now also include the obligation to exchange and provide information.
>
> (...)
>
> Article III of the Compliance Agreement sets out the responsibilities of the flag State concerning conservation and management measures in areas of the high seas. Each party is obliged to take the necessary steps to ensure that fishing vessels flying its flag do not engage in activities that undermine the effectiveness of international conservation and management measures. In particular, no party should allow any fishing vessel entitled to fly its flag to fish in the seas or to be used for fishing on the high seas without the authorization of that party (Compliance Agreement, article III, paragraph 2. When granting authorization to carry out fishing, the party must be satisfied that it is able to exercise effectively its responsibilities over the vessel pursuant to the Compliance Agreement (article III, paragraph 3). Parties also have a duty not to authorize fishing vessels previously registered in another territory that undermined international conservation and management measures to be

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219 See also UNCLOS, article 119.

220 See "The 1995 United Nations Fish Stocks Agreement: Background Paper," text available at <http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>, accessed 7 November 2013.

used for fishing on the high seas unless certain conditions are met (Compliance Agreement, article III, paragraph 5).[221]

208. The FAO Compliance Agreement also requires flag States to take enforcement measures where appropriate. Paragraph 8 of article III stipulates that such measures could include making the contravention of the provisions of the Agreement an offense under national legislation. The Agreement also requires that sanctions "be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement."

209. The CRFM notes that the FAO Compliance Agreement was designed in part to close a loophole in fisheries management: that of the circumvention of fisheries regulations by re-flagging vessels under the flags of States that are unable or unwilling to enforce conservation measures. In order to combat the contravention of fisheries regulations through reflagging, States are obligated to refuse their flags to vessels known to have violated the Agreement.[222]

4. Regional Treaty Practice

210. Where flag States have willingly joined regional and sub-regional fisheries management organizations, the States typically enter into binding agreements within the framework of the RFMO by which they acknowledge and undertake certain obligations with regard to vessels sailing under their flag that engage in fishing on the high seas. As noted above, the Draft CCCFP Agreement reflects the CRFM Member States' current and intended practice in relation to responsible fishing within the territory and beyond of the CRFM members. The Draft CCCFP Agreement is typical of the practice of regional fisheries management organizations in that it is intended to 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

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221 President's 2007 Presentation (Annex 6), p. 8.

222 See also International Commission for the Conservation of Atlantic Tunas (ICCAT), *Compendium Management Recommendations and Resolutions Adopted by ICCAT for the Conservation of Atlantic Tunas and Tune-like Species* (2013), p. 140, "Resolution by ICCAT concerning the Change in the Registry and Flagging of Vessels" (Transmitted to Contracting Parties: December 14, 2005) ("Prior to the registry of any vessel, the CPC should investigate the history of compliance of the subject vessel in ICCAT and other regional management organizations, in order to determine if such vessel is on the negative lists and/or is currently registered in the sanctioned CPCs or non-Contracting Parties."). ICCAT maintains an "IUU Vessel List" on its Web site, <http://www.iccat.int/en/IUU.asp>, accessed 7 November 2013.

fishing takes place in the waters of a Third State, to nationals of Participating Parties."[223]

211. Other examples of regional treaties referenced above reflect a growing pattern of States consenting to be bound by regional fisheries treaties for the conservation of shared resources, where flag States willingly incur obligations that restrict the otherwise freedom of fishing on the high seas in order to cooperate in the management of shared resources.

212. The CRFM notes that some States have expressed concern that when a State refuses to join an RFMO, international law does not purport to bind the flag State to any affirmative obligations with regard to the high seas. Some have referred to this concern as the "free rider" problem.[224] The concern is that, where conservation measures for a particular stock on the high seas have been agreed by a community of States, often through a regional organization, vessels from States not parties to the agreement could fish for the stock at issue, undermining the conservation efforts. The possibility of reflagging a fishing vessel is one potential way to avoid compliance with international fisheries conservation. A growing body of soft law instruments, referenced above, aim to strengthen the fisheries conservation regime with regard to the high seas by encouraging States to voluntarily agree to adopt a code of conduct governing flag State behaviour.

213. Some treaties establishing flag State obligations themselves seek to apply the obligations set forth therein to non-parties. For example, articles 192 and 235 of the UNCLOS refer to "States," as opposed to "States Parties," and article 17, paragraph 1, of the Fish Stocks Agreement provides that all measures established by the RMFO be enforced against all States. With regard to non-parties, "multilateral treaty practice is moving beyond merely encouraging states to participate in such regimes and is increasingly requiring them to do so in order to have access to them."[225] The fisheries agreements incorporate a series of incentives to discourage the "free rider" problem. According to article 33, paragraph 1, of the Fish Stocks Agreement, States parties shall, on the one hand, encourage non-parties to become parties to that agreement, which could be achieved by diplomatic efforts or through economic incentives. On the other hand, paragraph 2 of article 33 of the Fish Stocks Agreement provides that States

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223 Draft CCCFP Agreement, article 6.2.

224 R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP, 1999), p. 301.

225 Malcolm Evans, "The Law of the Sea," in M. Evans (ed.), *International Law* (3rd ed., OUP 2010), p. 680.

parties shall take measures to deter the activities of non-party vessels which undermine the effectiveness of international conservation and management measures.

B. Flag State obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to this aspect of Question 2

214. The CRFM submits that the duties to act in good faith, to cooperate, and to apply the precautionary principle as discussed in relation to the obligations of flag States regarding IUU fishing activities within the EEZ of other States in connection with the response to Question 1 above are equally applicable to IUU fishing activities on the high seas. Similarly, the references to the various subsidiary sources previously noted are repeated.

215. The CRFM notes that the provision set forth in article 192 of the Convention has been described as "explicitly proclaiming in positive terms, as a general principle of law, that all States have the obligation to protect and preserve the marine environment, and implicitly (in negative terms) the obligation not to degrade it deliberately (or perhaps even carelessly)."[226]

IV. Responsibility and Liability

A. Applicable UNCLOS provisions on liability

216. With regard to activities in the EEZ or on the high seas, article 235 of the Convention states in general terms the responsibility and liability of States in the matter of the protection and preservation of the marine environment, which all States have the "duty to protect and preserve" pursuant to article 193 of the Convention. Paragraph 1 of article 235 ("*Responsibility and liability*")[227] reads:

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226 Virginia Commentary, Part XII, pp. 39-40, para. 192.8.

227 Whereas the title of article 235, in the English authentic text, uses the words "responsibility and liability," in the other authentic texts a single word, generally translated as "responsibility," covers both aspects. According to the Virginia Commentary, "'[r]esponsibility' relates to the discharge of the obligations imposed by customary or conventional international law; 'liability' relates to the reparation or other compensation due for damage that might result from failure to observe the applicable international laws and regulations, or from violations of those laws and regulations." Virginia Commentary, Part XII, p. 412, para. 235.10(a). See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 77, para. (1) ("The term 'international responsibility' covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State.").

> 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.[228]

217. Unlike paragraph 2 of article 235, the above statement in paragraph 1 states in general terms the responsibility and liability of States and is not limited to pollution of the marine environment. In other words, it is reasonable to assume that other harmful effects on the marine environment, such as "harmful changes to the marine environment"[229] or "irreversible disturbance of the ecological balance,"[230] including through the accidental or intentional introduction of non-indigenous species to the wild or overfishing/stock depletion, are covered by the general statement of liability in article 235 of the Convention.

218. Similar to the duty to protect and preserve the marine environment, including its living resources, which article 192 imposes on all States, article 235 imposes direct obligations on States. These are obligations of result. It has been explained that:

> [T]hese provisions of Article 235 seem also to assume that even in so far as this part of the Convention may create general obligations, this can only be obligations for states, and not for individuals.[231]

219. With regard to enforcement measures taken pursuant to section 6 ("Enforcement") of Part XII ("Protection and Preservation of the Marine Environment") of the Convention, article 232 provides as follows:

> States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of the available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.

220. Article 232 concerns the liability of flag States, coastal States and port States alike, whose enforcement rights and obligations are addressed in Section 6 of Part XII of the

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228 It has been pointed out that "[t]he phrase 'in accordance with international law' leaves open, for the purposes of article 235, the question of liability without fault, whether of a State or of an international organization, as part of general international law." Virginia Commentary, Part XII, p. 412, para. 235.10(c).

229 UNCLOS, article 206.

230 UNCLOS, article 234.

231 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 825.

Convention. The conditions for the liability of the flag State to arise under article 232 are: (a) failure to carry out its responsibilities in accordance with the Convention; and (b) occurrence of damage.[232] In connection with article 232, the existence of a causal link between the flag State's failure and the damage is required and cannot be presumed.

221. A reference to the international law rules on liability is contained in article 304 ("*Responsibility and liability for damage*")[233] in Part XVI ("General Provisions") of the Convention. Article 304 reads:

> The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

222. These rules supplement the rules concerning the liability of States set out in the Convention. Since article 304 of the Convention refers to "the application of existing rules and the development of further rules regarding responsibility and liability under international law," the Tribunal will have to take such rules under customary law into account, especially in light of the ILC Articles on State Responsibility.[234] As the Chamber observed in *Case No. 17*:

> Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked by the Tribunal (*The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at paragraph 160).[235]

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232 According to the Virginia Commentary, "[t]erms such as 'liable,' 'damage or loss,' and 'attributable' are to be understood in light of the general international law governing State responsibility." Virginia Commentary, Part XII, p. 380, para. 232.6(a).

233 It has been pointed out that "[a]lthough the English text [of the Convention] uses the words 'responsibility and liability,' reflecting common law usages, the other languages employ a single term." Virginia Commentary, Part XVI, p. 163, para. 304.2. According to the same source, "[n]o interpretative material appears on the record" for this provision. Id., para. 304.1.

234 Deep Seabed Mining Advisory Opinion, para. 169. According to the Chamber, at para. 211, "[t]he regime of international law on responsibility and liability is not considered to be static."

235 Id.

223. The failure of a flag State to carry out its responsibilities and obligations under international law may consist in an act or omission that is contrary to that State's responsibilities under international law.[237] Whether a flag State has carried out its obligations depends primarily on the requirements of the obligations which the flag State is said to have breached, which were described in connection with Question 1 above. As stated above, flag States have both direct obligations of their own and obligations in relation to the activities carried out by entities under their jurisdiction or control, including vessels flying their flag.

224. As mentioned above, article 232 of the Convention makes clear that the failure of a State to carry out its responsibilities addressed by that provision entails liability only if there is damage or loss. This provision covers neither the situation in which the flag State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the flag State has met its obligation. As the Chamber observed in the Deep Seabed Mining Advisory Opinion:

> This constitutes an exception to the customary international law rule on liability since, as stated in the *Rainbow Warrior Arbitration* (*Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX*, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.[238]

225. As one of the States participating in *Case No. 17* explained in its written statement:

> There is an internationally wrongful act of a State when conduct is attributable to that State and such conduct constitutes a breach of an international obligation of that State (Art. 2 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83, Annex). Such internationally wrongful act involves legal consequences

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237 See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 82, para. (4).

238 Deep Seabed Mining Advisory Opinion, para. 178. See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 203, para. (7). (pointing out that "there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation.").

> even in the absence of damage (Part Two Articles on Responsibility of States for Internationally Wrongful Acts). In the event of damage, the responsible State is required to compensate for the damage caused by the internationally wrongful act, insofar such damage has not been made good by restitution (Art. 36 Articles on Responsibility of States for Internationally Wrongful Acts). However, a responsible State is only required to compensate if there is a causal connection between the internationally wrongful act of that State and the damage (Art. 31.2 Articles on Responsibility of States for Internationally Wrongful Acts).[239]

226. The failure by a flag State "to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States."[240] It has been pointed out that:

> [w]hether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[241]

227. The Convention does not specify what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage resulting from IUU fishing activities would include damage to the marine environment, including in the form of pollution, harmful changes to the marine environment and/or irreversible disturbance of the ecological balance, including through overfishing or stock depletion. Subjects entitled to claim compensation may include other users of the sea and coastal States.[242] As the Chamber stated in the Deep Seabed Mining Advisory Opinion, "[e]ach State Party [to the Convention] may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas … ."[243] The CRFM invites the Tribunal to clarify the Chamber's statement in the instant case concerning IUU fishing activities.

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239 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 8, para. 3.9.

240 Deep Seabed Mining Advisory Opinion, para. 210.

241 James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 84, para. (9).

242 Deep Seabed Mining Advisory Opinion, para. 179.

243 Id., para. 180 (referring in support to article 48 of the ILC Articles on State Responsibility).

228. From the wording of the responsibility and liability provisions of the Convention and related instruments, it is evident that liability arises from the failure of the flag State to carry out its own responsibilities.[244] Thus, the flag State is in principle not responsible or liable from the failure of vessels flying its flag to meet their obligations. The rules on the liability of States set out in the Convention are in line with the rules of customary international law. As the Chamber stated in *Case No. 17*:

> Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[245]

229. As one of the States participating in *Case No. 17* observed in its written statement:

> Under the general rules of international law related to responsibility of States for internationally wrongful acts, conduct is only attributable to a State under specific circumstances. In principle, conduct of natural or juridical persons under the jurisdiction of a State is as such not attributable to that State (See commentary of the International Law Commission on Chapter 11 of the Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, vol. II, Part Two, at 38 (para. 3)); This also applies to conduct of state enterprises unless they are exercising elements of governmental authority (*ibid.*, at 48 (para. 6)).[246]

230. The CRFM notes that the liability regime established in the Convention does not provide for the attribution of activities of registered vessels to flag States.

231. While "private conduct cannot be attributed to a State, the Commentary to Chapter II of the [ILC] Articles on State Responsibility clarifies that in some cases this is nevertheless possible:"[247]

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244 See also James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 80, para. (6) (pointing out that "the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.").

245 Deep Seabed Mining Advisory Opinion, para. 180.

246 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 10, para. 3.14.

247 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 238.

> But the different rules of attribution stated in chapter II have a cumulative effect, such that a *State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects*. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[248]

232. In respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction, article 235, paragraph 2, of the Convention imposes on States Parties to the Convention the obligation to "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief."[249] Paragraph 3 of article 235 imposes on States a duty to cooperate in the context of paragraph 2.[250] The absence of effective remedies or actual, good-faith cooperation would engage the flag State's international responsibility.

233. In the event that no causal link pertaining to the failure of the flag State to carry out its responsibilities and any damage caused thereby can be established, the question arises whether it may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with below.

B. Extent of liability under the Convention

234. As stated above in the reply to Question 1, flag States have both direct obligations of their own and obligations in relation to the activities carried out by entities under their jurisdiction or control, including vessels flying their flag. The nature of these obligations also determines the scope, or extent, of liability.

235. As the Tribunal stated in *Case No. 2*:

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248 Commentary to the ILC Articles on State Responsibility, p. 81 (emphasis added).

249 A similar provision is found in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena de Indias on 24 March 1983, article 14 of which reads: "The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area."). See text in Annex 10 to this written statement.

250 It has been pointed out that "Paragraphs 2 and 3 of Article 235 are drafted in ecumenical terms, and make the link between international obligations and municipal law 'recourse' thereby ensuring 'prompt and adequate compensation' for all damage, 'caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.'" R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., Longman, 1996), p. 824.

> 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).[251]

236. With regard to reparation, the Tribunal has noted:

> Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.[253]

237. As far as the form of the reparation is concerned, article 34 of the ILC Articles on State Responsibility reads:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.[254]

238. As regards the amount and form of compensation, the Chamber stated as follows in the Deep Seabed Mining Advisory Opinion:

> The obligation for a State to provide for a full compensation or *restitutio in integrum* is currently part of customary international law. This

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251 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 170.

253 Id., para. 171.

254 Deep Seabed Mining Advisory Opinion, para. 196.

> conclusion was first reached by the Permanent Court of International Justice in the *Factory of Chorzów* case (*P.C.I.J. Series A, No. 17*, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[255]

239. According to the Chamber, "the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*."[256]

240. In situations where the existence of a causal link between the flag State's breach and the damage is required, as in article 232 of the Convention, "it is only '[i]njury ... caused by the internationally wrongful act of a State' for which full reparation must be made."[257]

241. In *Case No. 17*, the Chamber was faced with key provisions concerning the obligations of States Parties sponsoring entities that are allowed to carry out activities in the Area, namely, article 139, paragraph 1, article 153, paragraph 4, and Annex II, article 4, paragraph 4, of the Convention. There are no corresponding provisions concerning the obligations of flag States in cases of illegal conduct by vessels flying their flag within the EEZ of other States or on the high seas.

242. The Convention and related instruments contain specific provisions absolving States sponsoring activities in the Area that have taken certain measures from liability for damage. No such provisions are included with respect to maritime zones other than the Area. As a consequence, any exonerations from liability or responsibility arising from activities in maritime zones other than the Area are derived from, and are governed by, general international law.[260]

C. General rules of international law related to liability of States

243. As stated above, the liability of the flag State is without prejudice to the rules of international law. The relevant rules of international law are those related to the

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255 Id., para. 194.

256 Id., para. 197.

257 James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 203, para. (9).

260 See ILC Articles on State Responsibility, Chapter V ("Circumstances Precluding Wrongfulness").

responsibility of States for internationally wrongful acts and the liability of States for acts not prohibited by international law. Since the adoption of the Convention, international law regarding responsibility and liability has been codified and further developed. Article 304 of the Convention anticipates the application of contemporary rules regarding responsibility and liability as they emerge. Thus, the purpose of the "without prejudice" provision in article 304 does not include a potential reduction of responsibilities and liabilities under the Convention itself. It has been pointed out that there is a "growing scholarly consensus that responsibility in the context of transboundary harm is well handled by the customary rules of State responsibility and that therefore no special general rules of State liability exist … ."[261]

244. Accordingly, under general international law, a flag State in principle cannot be held responsible for the conduct of a private vessel flying its flag. However, it has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to (the marine environment of) other States or areas beyond the limits of national jurisdiction.[262] This obligation is a due diligence obligation and its breach engages the State's international responsibility.[263]

245. It was pointed out above that a State is under an obligation "to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control"[264] and that the ICJ has established that this general obligation of States "is now part of the corpus of international law relating to the environment."[265] The "environment" also consists of the marine environment, including the living and non-living resources of the marine environment. It has been explained in the literature that "although the no harm principle does not state so explicitly, a State can only breach the principle if it fails to act with due diligence" and that "a consensus is building that breach by a State of its due diligence obligations, and the consequent significant damage caused to the environment of other States or of areas beyond national

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261 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 238.

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

263 See James Crawford, *The International Law Commission's Articles on State Responsibility—Introduction, Text and Commentaries* (Cambridge University Press 2002), p. 125, para. (1).

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

265 Id.

jurisdiction, engages the origin State's legal responsibility."[266] As mentioned above in response to Question 1, 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,"[267] suggesting that this obligation rests either on the fact that "international law, based as it is upon the sovereign equality of States and mutual respect, requires States to make every effort to ensure that no activities are carried out under their jurisdiction that might undermine activities which are performed by others covered by their jurisdiction and which are in conformity with international law" or "as far as the protection of the marine environment is concerned" on the argument that "there is a mutual obligation to reinforce each other's efforts to manage and conserve the marine environment."[268]

246. In *Case No. 17*, the requesting organization asked what the necessary and appropriate measures are that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement relating to the Implementation of Part XI of the Convention. The answer to that question envisaged the identification of the necessary measures that a sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement. This is tantamount to identifying the standard of due diligence that a State must observe with respect to activities in the Area sponsored by it. By contrast, the SRFC has not asked a similar question in the instant case relating to the EEZ and the high seas. Nonetheless, in the view of the CRFM it would be helpful, in the light of the liability question raised by Question 2, if the Tribunal were to clarify the standard of due diligence that a flag State must observe with respect to IUU fishing activities conducted by vessels sailing under its flag within the EEZ of other States or areas beyond national jurisdiction.

247. The CRFM submits that compliance with a "due diligence" obligation requires the adoption, implementation, supervision and enforcement of measures by the State on which the due diligence obligation rests. It has been explained in the literature that a "breach of [obligations that require States to exercise due diligence] consists not of failing to achieve the desired result but failing to take the necessary, diligent steps

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266 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 239.

267 President's 2007 Presentation (Annex 6), p. 4.

268 Id., pp. 4-5.

towards that end."[269] As one of the States participating in *Case No. 17* observed in its written statement:

> A due diligence obligation requires States to adopt, implement, supervise and enforce measures of a legislative, administrative, or juridical nature to prevent legally protected interests from being harmed by the acts of state and non-state actors. In order to establish a breach of a due diligence obligation, it is necessary to determine the degree of diligence which must be observed by States. The case concerning British Claims in the Spanish Zone of Morocco provides some general guidance in this respect: States should act with *diligentia quam in suis*, i.e. the degree of diligence with which national interests are protected, and the degree actually exercised may not be significantly less than the degree other States may reasonably expect to be exercised (*United Nations Reports of International Arbitral Awards*, vol. II, 615 at 644).[270]

248. However, "[d]ue diligence does not require similar measures from all States, as lack of economic and technological capacity may mitigate the attendant obligations for developing countries" subject to any international agreements in force for those countries.[271] It may be said that it "seems established that due diligence obligations are at their strictest when an activity is within a State's area of territorial sovereignty or sovereign rights, and particularly when it is within a State's actual physical control."[272] As to a State's due diligence obligations with regard to vessels flying its flag, it must be kept in mind that "a State cannot fully exercise due diligence in supervising such vessels when they are sailing outside its territorial waters."[273]

249. Where a State is under an obligation to cooperate in cases of transboundary harm situations, failure to comply with that obligation "may result in that State being deemed not to have acted diligently."[274] It has been explained in the literature that the "Alabama" arbitration of 1872 made clear that "a government could not justify its

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269 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236.

270 Written statement of the Kingdom of The Netherlands dated 11 August 2010, p. 8, para. 3.7.

271 Timo Koivurova, "Due Diligence," in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 236, 240.

272 Id.

273 Id.

274 Id.

failure to exercise due diligence by pleading insufficiency of the legal means of action which it possessed."[275] In addition, where a State's due diligence obligation is enshrined in a treaty instrument to which it has consented to be bound, the law of treaties prevents that State from invoking its domestic law to exempt it from its international obligations.[276]

250. In the context of IUU fishing activities, articles 62, 91, 94, 192 and 217 of the Convention, when read together and in conjunction with the flag State's "due diligence" and cooperation obligations described above, may be said to impose on a flag State wishing to grant or allow the use of its flag to a certain vessel through registration (including periodic renewal thereof) an obligation to deny this right to any vessels that are known or suspected IUU fishing vessels, a duty to conduct close monitoring of such vessels,[277] and perhaps a duty to evoke a violating vessel's registration while informing all other States and competent organizations of the reason for its decision,[278] the non-compliance with which will engage the flag State's responsibility.[279] It has been pointed out that "[t]he High Seas Convention preparatory works the International Law Commission developed suggests that mere administrative formality, i.e., registry only or grant of a certificate of registry without submitting to registry state control, does not satisfy that Convention's 'genuine link' requirement."[280]

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275 Id., p. 243.

276 See ILC Articles on State Responsibility, article 32 ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."). See also Vienna Convention on the Law of Treaties, article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."), article 46, paragraph 1 ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."). See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhof Publishers, 2009), pp. 369-375, 583-594.

277 See Virginia Commentary, Part VII, p. 294, para. 117.9(a).

278 See Anastasia Telesetsky, "Law of the Sea Symposium: State Responsibility and Flag State Duties," Opinio Juris Blog, 30 May 2013, text available at <http://opiniojuris.org/2013/05/30/law-of-the-sea-symposium-state-responsibility-and-flag-state-duties/>, accessed 7 November 2013.

279 See also footnote 222 above and accompanying text.

280 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, 198-199. According to the same author, "what seems the weight of recent decisional and commentator authority, it would appear that a 'genuine link' requires more than nominal registry." Id., p. 200.

Moreover, "[w]hat is appropriate exercise and control is a matter of national laws, but in any case it must be effective exercise and control."[281] Pursuant to article 217 of the Convention, flag States are "under the obligation to provide for the *effective enforcement* of the applicable international rules and standards."[282]

251. As mentioned above, Judge Rüdiger Wolfrum, speaking in his capacity as President of the Tribunal, has pointed out 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"[283] and that "flag States have an obligation to adopt conservation measures," the adoption of which "requires not only that they be implemented and appropriate legislation be adopted but also that the necessary control and monitoring measures be taken."[284]

252. Finally, the pro-active nature of the general obligation in article 192 of the Convention has been described as follows:

> The thrust of article 192 is not limited to the prevention of prospective damage to the marine environment but extends to the 'preservation of the marine environment.' Preservation would seem to *require active measures* to maintain, or improve, the present condition of the marine environment … .[285] (Emphasis added).

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281 Id., p. 201.

282 Virginia Commentary, Part XII, p. 242, para. 217.1 (emphasis added). Article 217 and related provisions of the Convention "imply that legislation exists or *will be enacted to give effect to* article 217." Id., p. 256, para. 217.8(g) (emphasis added).

283 President's 2007 Presentation (Annex 6), p. 4.

284 Id., p. 13.

285 Virginia Commentary, Part XII, p. 40, para. 192.9.

QUESTION III: *UNE ORGANISATION INTERNATIONALE DÉTENTRICE DE LICENCES DE PÊCHE PEUT-ELLE ÊTRE TENUE POUR RESPONSABLE DES VIOLATIONS DE LA LÉGISLATION EN MATIÈRE DE PÊCHE DE L'ETAT CÔTIER PAR LES BATEAUX DE PÊCHE BÉNÉFICIANT DESDITES LICENCES?*

I. The scope of the third question

253. The CRFM first observes that the third question as it appears in the English version of the Tribunal's Order 2013/2 is not the question that was posed by the SRFC; the French version of that Order contains the correct question. The genesis of this error appears to be as follows:

(a) The draft version of the question that was considered by the SRFC's Conference of Ministers was framed in the following terms:

Lorsqu'une licence de pêche est accordée à un navire dans le cadre d'un accord international avec l'Etat du pavillon ou avec une structure internationale, cet Etat ou cette organisation peut-il être tenu pour responsable des violations de la législation en matière de pêche de l'Etat côtier par ce navire[289]

(b) Following discussion at the Conference, this language was amended. This is evident from the French version of the resolution adopted by the SRFC's Conference of Ministers, which is appended to the Permanent Secretary's letter dated 27 March 2013 to the Tribunal requesting the advisory opinion. Importantly, it is this version of the question that is contained within the text of the SRFC's letter to the Tribunal. In French, the final formulation of the question that was adopted by the SRFC's Conference of Ministers and communicated to the Tribunal in the cover letter from the SRFC's Permanent Secretary is as follows:

Une Organisation Internationale détentrice de licences de pêche peut-elle être tenue pour responsable des violations de la législation en matière de pêche de l'Etat côtier par les bateaux de pêche bénéficiant desdites licences?[290]

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289 Available at <http://www.spcsrp.org/medias/csrp/comm/25cc/CSRP_web_art_25e_sess_ext_cte_coord_justif_ex-ecr.pdf>, accessed 7 November 2013.

290 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_fr_01.pdf>, accessed 7 November 2013.

(c) However, the English version of the resolution adopted by the SRFC's Conference of Ministers, which appears to have also been appended to the French-language letter from the SRFC's Permanent Secretary to the Tribunal, was presumably based mistakenly on the original *draft* question and not the *final* question.[291] The English version, which is fundamentally different to the French, reads as follows:

"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?"

(d) When the Registry prepared the English translation[292] of the French letter from the SRFC's Permanent Secretary to the Tribunal, rather than providing a translation of the actual questions contained in the letter, it appears to have copied the questions from the English version of the SRFC resolution attached to that letter.

(e) As a result of the errors in the English version of the SRFC resolution submitted under cover of the letter from the SRFC's Permanent Secretary and the Registry's translation of the SRFC's letter, the Tribunal adopted the correct French version of the third question in the French-language version of its Order of 24 May 2013, but adopted an erroneous and overly broad formulation of that question in the English-language version.

254. Although both language versions of the Tribunal's Order of 24 May 2013 are expressed in that Order to be "equally authoritative" / "*également foi*", the CRFM's position is that the narrower, French-language version of the third question is evidently the correct formulation. This is confirmed by the drafting history, as noted above. Moreover, it would appear that the SRFC's Permanent Secretariat is primarily (if not exclusively) French-speaking.[293] Accordingly, the CRFM submits that the Tribunal's jurisdiction regarding the third question is limited to the terms of that question as framed in French.

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291 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf>, accessed 7 November 2013.

292 Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf>, accessed 7 November 2013.

293 The SRFC's Web site (<http://www.spcsrp.org >) is available only in French, and it is headquartered in a French-speaking country (Senegal).

II. The CRFM's preliminary response to the third question

255. This question, as properly formulated, concerns licensing and the responsibility of an international organization in respect of "violations of the fisheries legislation of the coastal State" by vessels to which a license has been issued by that organization. Similar to Question 2, Question 3 addresses the responsibility of international organizations for the conduct (breach) of private entities, and not for acts done by those organizations themselves. Unlike Question 2, however, the question is not expressly framed in the context of IUU fishing or of international law.

256. The CRFM notes that the language used in Question 3, even in its French original version, is ambiguous and for this reason reserves the right to make statements with respect to Question 3 in a subsequent phase of the proceedings in the instant case after reviewing the part of the written statements of the requesting organization and any other participants dealing with Question 3.

257. By its terms, Question 3 at first blush does not appear to raise any question of international law. International law is not concerned with the question of liability on the part of an international organization arising from the breach by a private actor of a State's legislation – it only concerns the international responsibility of States and intergovernmental organizations arising from their own failure to comply with their responsibilities under international law. The Convention makes clear that the question of liability to which it refers must be addressed "in accordance with international law."[294] The question of liability on the part of whatever entity, domestic or foreign, arising from a private actor's violation of the fisheries legislation of a coastal State is primarily, and quintessentially, a question of domestic law and is ultimately one to be decided by domestic courts having competent jurisdiction. The answer to this question will depend upon the evidence presented to the competent court and its appreciation thereof, as well as upon the relevant legal factors. In this context, much depends on whether the fisheries or other legislation of the coastal State whose legislation was violated imposes direct obligations on the international organization concerned.

258. To the extent that an international agreement forming the basis for the issuance of fishing licenses by the international organization referred to in Question 3 addresses the question of whether the responsibility or liability of that organization is engaged, that agreement will be the primary instrument governing the question of responsibility or liability of such organization. Outside the conventional context, the CRFM notes that

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294 UNCLOS, article 235, paragraph 1. This provision addresses only the responsibility and liability of "States." While article 263 of the Convention refers to "competent international organizations" and includes a cross-reference to article 235, that provision is limited to marine scientific research.

the International Law Commission's Draft Articles on the Responsibility of International Organizations, adopted in 2011, may provide a useful starting-point for analyzing any questions of international responsibility of international organizations, just as the International Law Commission's Articles on State Responsibility provide useful guidance in determining the responsibility of States, but only to the extent that the Tribunal deems such texts to reflect a codification of existing law, or *lex lata*.[295] The CRFM also notes that nothing in the Convention or related instruments indicates whether or not the competent international organization and the flag and coastal States shall bear joint and several liability. Finally, any primary or secondary obligations on the part of intergovernmental organizations are without prejudice to the privileges and immunities which such organizations may claim under conventional law and the rules of international law.

259. At this point, the CRFM simply notes that, in light of the fact that it is not charged with issuing fishing licenses to any vessels or entities, it is not an "international organization" within the meaning of Question 3.

260. For the aforementioned reasons, the CRFM submits that Question 3 calls for a cautious approach by the Tribunal, an international judicial body charged with applying and interpreting international law, and not domestic law (including the consequences arising from the violation of domestic legislation).

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295 It has been pointed out that "[t]he phrase 'in accordance with international law' leaves open, for the purposes of article 235, the question of liability without fault, whether of a State or of an international organization, as part of general international law." Virginia Commentary, Part XII, p. 412, para. 235.10(c).

QUESTION IV: WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE COASTAL STATE IN ENSURING THE SUSTAINABLE MANAGEMENT OF SHARED STOCKS AND STOCKS OF COMMON INTEREST, ESPECIALLY THE SMALL PELAGIC SPECIES AND TUNA?

I. The scope of the fourth question

261. The CRFM's observations in respect of the fourth question begin with coastal States' conventional rights and obligations to ensure the sustainable management of "shared stocks" and "stocks of common interest" in relation to the maritime zones beyond their territorial waters (i.e., the EEZ and the high seas). Thereafter, this written statement will focus specifically on coastal States' rights to prevent IUU activities before identifying the CRFM Member States' relevant agreements. Chapter 1 noted the concept of sustainable development under international law by reference to the work of various committees of the International Law Association.

262. In this context, there are four preliminary matters that must be addressed:

(a) First, the CRFM's response to Question 4 is limited to coastal State rights and obligations as coastal States alone; although IUU activities can be committed by vessels that sail under a coastal State's flag, the relevant obligations of the coastal State as the flag State are set out in relation to the first question.

(b) Second, as noted above, the CRFM's response is limited to a coastal State's rights and obligations in connection with the maritime zones beyond their territorial waters.

(c) Third, the CRFM regards the two types of fish stock referred to in Question 4, namely, shared stocks and stocks of common interest, as falling within the notion of being a shared resource;[296] in particular, these concepts must include *straddling fish stocks* (UNCLOS, article 63) and *highly migratory fish stocks* (UNCLOS, article 64).

(d) Finally, the ICJ's view that shared resources "can only be protected through close and continuous cooperation between the [sharing] States" is noted once

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296 As set out in note 35 above, 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, *supra* note 24, which provides that species may constitute shared resources "by virtue of their migratory character" or "because they inhabit shared habitats." Accordingly, this term can be said to cover shared fish stocks and fish stocks of common interest, particularly straddling fish stocks and highly migratory fish stocks.

again.[297] The CRFM repeats its position that cooperation between States engaged in, or 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 in this regard. This duty requires actual engagement and colors the interpretation of all other obligations and rights with respect to the utilization of shared natural resources.

II. Coastal States' rights and obligations under conventional law to ensure the sustainable management of fish stocks

263. Pursuant to article 192 of the UNCLOS, coastal States are under an overarching obligation to "protect and preserve the marine environment" while exercising their sovereign rights to exploit their natural resources. Since the Tribunal has held that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment,"[298] this obligation requires that coastal States ensure the sustainable management of shared stocks and stocks of common interest. This duty has a general influence on the scope of coastal States' rights and has been expanded with greater specificity in relation to living resources in the EEZ and on the high seas.

A. The Exclusive Economic Zone

264. A leading international law treatise describes Part V of the Convention, which addresses the EEZ, as a "scheme … in which the coastal state has sovereign rights, a predominant interest, and certain crucial determinations it must make and administer."[299] Under article 56 of the Convention, coastal States enjoy sovereign rights for the purpose of exploiting fish stocks in the EEZ and have jurisdiction as regards the protection and preservation of the marine environment. Articles 61 and 62 of the Convention set out the rules for the conservation and the use of the EEZ's living resources. According to *Oppenheim's International Law*:

> Article 61 provides for conservation through proper management by the coastal state in the light of the best available scientific evidence, cooperation with appropriate international organisations, exchange of scientific information, catch and fishing effort statistics and other data

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

298 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 70.

299 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 801.

> between the coastal state, international organisations and other states whose nationals are allowed to fish in the zone. The measures are aimed not merely for conservation but are to be designed 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield'. The maximum sustainable yield is, however, a somewhat flexible concept, because it is qualified by a number of considerations [set out in article 61, paragraph 3, of the Convention].[300]

265. The requirement under article 61 that coastal States determine the allowable catch of the living resources in their EEZ[301] is crucial to the global compliance with these stock management obligations. *Oppenheim's International Law* includes the following observation with respect to this requirement:

> This determination is to be made not only with a view to conservation of the resources but also with a view to their efficient exploitation; for Article 62, which deals with the "utilization of the living resources", requires the coastal state to "promote the objective of optimum utilization" of those resources,[303] though without prejudice to their conservation and proper management. So, having determined the allowable catch, the coastal state is then to determine its own capacity to harvest it, and where it does not have the capacity to harvest the entire allowable catch, it "shall", through agreements or other arrangements, and subject to laws, regulations, terms and conditions stated in the Article, "give other States access to the surplus of the allowable catch", having in mind, however, the particular needs of land-locked states, "geographically disadvantaged States", and developing states.[304]

266. Thus, by granting coastal States the right to determine the allowable catch and to determine their own capacity to harvest from that catch, while only granting other States' nationals the right to fish from the surplus within the allowable catch, the

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300 Id., p. 796. See also Virginia Commentary, Part V, p. 610, paras. 61.12(g)-(h).

301 See Virginia Commentary, Part V, p. 636, para. 62.16(d) ("State practice indicates that the duty to determine the allowable catch can be met by reference to particular species or stocks of fish, or to a particular management unit as a species group or stock.").

303 On the importance of "promote" and "optimum" in respect of article 62, see Virginia Commentary, Part V, p. 635, para. 62.16(b).

304 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 797.

Convention grants coastal States extensive control over the management and exploitation of fish stocks within their EEZ.

267. Since fish do not observe such man-made boundaries, articles 63 and 64 of the Convention further regulate the fishing of shared stocks and stocks of common interest. Article 63 provides that where fish stocks occur within the EEZs of two or more States, or partly in the EEZ and partly in the seas beyond and adjacent to an EEZ, (i.e., straddling stocks) there shall be cooperation and coordination between the EEZ States, or between the EEZ State(s) and those whose nationals fish from the same stock in the sea beyond the EEZ. Of equal importance is article 64, which provides that coastal and other States whose nationals fish for highly migratory species of fish in the same region shall cooperate directly through appropriate international organizations with a view to conservation and optimum utilization both within and beyond the EEZ.[305] This duty extends to cooperating to establish international organizations for such purposes where no appropriate international organization exists. The rights and obligations under articles 63 and 64 of the Convention are supported and supplemented by the 1995 UN Fish Stocks Agreement, which requires that States cooperate to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks while promoting their optimum utilization. The Fish Stocks Agreement requires that coastal States apply the precautionary approach in accordance with article 6.[306]

268. Since many States have declared 200-nautical-mile exclusive fishing zones rather than full EEZs,[307] it is necessary to consider the implications of this practice on coastal States' rights and obligations. The CRFM's position is that such declarations must be understood as being sufficient to engage the conventional duties set out above: coastal States that wish to benefit from exclusive fishing rights in the 200-mile zone are under an obligation to ensure the sustainable management of the living resources in that zone,

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305 See also Virginia Commentary, Part V, p. 657, para. 64.9(a) ("To the maximum extent practical, any management measures taken should be applied throughout the migratory range of the species in question.").

306 See Meinhard Schröder, "Precautionary Approach/Principle," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012) p. 400. See also Principle 15 of the Rio Declaration on Environment and Development, 31 ILM 874 (1992): "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." On articles 63 and 64 of the UNCLOS generally, see also Dolliver Nelson, "Exclusive Economic Zone," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume III, OUP 2012), p. 1035, 1044-1046, paras. 54-61.

307 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 804.

particularly in respect of shared resources, including straddling fish stocks and highly migratory fish stocks.

B. The high seas

269. Although article 116 of the Convention grants the nationals of all States the right to fish on the high seas, this is subject to various rules: first, the requirements of articles 117 to 120 of the Convention, which are discussed in greater detail below; second, the requirements of articles 63 to 67 of the UNCLOS, which were discussed in greater detail above; and third, the State's obligations under other treaties.

270. Article 118 of the Convention obliges all States to "cooperate with each other in the conservation and management of living resources in the areas of the high seas." In particular, where appropriate this includes an obligation to enter into negotiations to establish regional or sub-regional fisheries organizations with a view to the conservation of the living resources where the nationals of multiple States fish in the same area of the high seas or fish identical stocks. Additionally, article 117 of the Convention requires States to take such measures with respect to their nationals "as may be necessary for the conservation of the living resources of the high seas." The same provision calls on States to cooperate in this endeavour. Article 119 of the Convention sets out further detailed provisions for determining the allowable catches while conserving the high seas' living resources and requires the exchange of "scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks" to facilitate compliance with this duty.

C. Coastal States' rights to prevent IUU fishing activities

271. International law grants coastal States various rights (including enforcement rights[308]) to enable them to comply with their obligations to ensure the sustainable management of shared resources, including straddling fish stocks and highly migratory fish stocks. These rights are set out over the following paragraphs, organized based on the differing

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308 See *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013,* available at <http://www.itlos.org/index.php?id=264&L=0>, accessed 25 November 2013. In paragraph 23 of his Dissenting Opinion, Judge Golitsyn stated: "Laws and regulations enacted by the coastal State in furtherance of its exclusive jurisdiction under article 60, paragraph 2, of the Convention would be *meaningless* if the coastal State did not have the authority to ensure their enforcement. Consequently, it follows from article 60, paragraph 2, of the Convention that the coastal State has the right to enforce such laws and regulations, including by detaining and arresting persons violating laws and regulations governing activities on artificial islands, installations and structures" (emphasis added). Further, in paragraph 12 of their Joint Separate Opinion, Judge Wolfrum and Judge Kelly stated: "As far as enforcement actions in the exclusive zone in general are concerned the enforcement jurisdiction of the coastal State is limited if it is not legitimized by [*inter alia* articles 73, 110, 111, 220, 221 and 226]."

rights that can be exercised by coastal States depending on where the IUU activities took place and where the coastal State is to act.

272. In addition to those rights set out below, coastal States that are parties to the 1993 FAO Compliance Agreement are obliged by articles 5, paragraph 1, and 6, paragraph 8(b), to inform flag States of any activities that undermine the effectiveness of international conservation and management measures which they reasonably suspect have been undertaken by vessels of the flag State.

1. Rights arising when the IUU fishing activities took place on the high seas

273. When IUU fishing activities take place on the high seas, the scope of permissible actions that can be taken by coastal States depends heavily on where such actions are to be carried out.

(a) *On the high seas and in the coastal State's EEZ*

274. Coastal States cannot exercise jurisdiction over foreign vessels on the high seas in respect of IUU fishing activities that have taken place on the high seas. In *The Case of the S.S. "Lotus,"* it was held that "vessels *on the high seas* are subject to no authority except that of the State whose flag they fly" (emphasis added).[309] An exception to this rule must be that States whose nationals are on board the offending vessel may exercise their authority over such nationals (just not the vessel itself, with the exception of the flag State).[310]

275. If a vessel exercises rights of navigation in a coastal State's EEZ having engaged in IUU fishing activities on the high seas and does not commit such activities in the EEZ itself, the principle underlying *The Case of the S.S. "Lotus"* is applicable. While Part V of the Convention grants coastal States sovereign rights over fishing in the EEZ, the EEZ can effectively be classified as the high seas for the purposes of mere navigation.[311]

276. However, coastal States may enter into regional or bilateral agreements with flag States to permit the exercise of rights of visit, search and arrest on the high seas or within the EEZ over vessels flagged to the latter State to enable the proper control over fishing.[312]

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309 *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, [1927] PCIJ Series A, No. 10, 25.

310 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), pp. 734-735.

311 See UNCLOS, article 58.

312 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 737.

(b) *In the coastal State's territorial sea*

277. With respect to coastal States' rights in relation to vessels that are engaged in IUU fishing activities while on the high seas but which are in their territorial sea at the time of the proposed action, the major limitation is the vessel's right of innocent passage. Article 17 of the UNCLOS grants all vessels the right of innocent passage through the territorial sea. Article 24, paragraph 1, of the Convention obliges coastal States not to hamper this right except as permitted by the Convention. *Passage* is defined in article 17, and *innocence* is defined in article 18. In particular, article 18, paragraph 2 sub (i), of the Convention deems passage to be non-innocent if the vessel engages in "any fishing activities" *in the territorial sea*. The CRFM regards this term as sufficiently wide in scope to cover many IUU fishing-related activities.

278. For example, at-sea transhipment of fish hauls derived from IUU fishing activities (which is a major method for evading anti-IUU measures[313]) must fall within this term. As such, if a foreign vessel engages in at-sea transhipment of such fish hauls in a coastal State's territorial sea, that State may take "necessary steps" to prevent this non-innocent use of the territorial sea irrespective of where the fish was caught.[314] One option open to the coastal State in such circumstances would be to exercise criminal jurisdiction over the vessel. Since article 27, paragraph 1(a), of the Convention requires that the consequences of the criminal act must extend to the coastal State, any such criminal jurisdiction would certainly extend to transhipment of IUU fish hauls taken from shared resources (particularly, straddling fish stocks and highly migratory fish stocks).[315]

279. Similarly, the CRFM regards the mere transport through the territorial sea of fish hauls derived from IUU fishing activities (especially when taken from shared resource

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313 —, "Belize announces moratorium on transshipments at sea" (*Undercurrent News*, 26 June 2013), available at <http://www.undercurrentnews.com/2013/06/26/belize-announces-moratorium-on-transshipments-at-sea/>, accessed 7 November 2013. See also the Environmental Justice Foundation's Press Release in response to this news: A Sedgwick, "Environmental Justice Foundation Supports Ban Against 'Pirate' Transshipping at Sea" (*Amandala*, 28 June 2013), available at <http://amandala.com.bz/news/environmental-justice-foundation-supports-ban-pirate-transshipping-sea/>, accessed 7 November 2013.

314 UNCLOS, article 25, paragraph 1.

315 See also article 220, paragraph 2 of the UNCLOS which, subject to the Convention's articles on innocent passage, permits action by coastal States in circumstances where there are "clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention." Again, the CRFM observes that the proper interpretation of this article is to grant a general right in addition to a specific, pollution-centric right.

stocks) as falling with the notion of "any fishing activity." As such, coastal States may take "necessary steps" to prevent this non-innocent use of the territorial sea. The comments regarding criminal jurisdiction in the preceding paragraph are repeated.

280. The mere passage through the territorial sea of an empty fishing vessel, albeit one that is known to engage in IUU fishing activities within and without the high seas, is not sufficient to deprive the passage of its innocence.[316] However, article 21, paragraph 1 sub (d) and (e), of the Convention permits coastal States to adopt laws relating to innocent passage through the territorial sea in respect of both "the conservation of the living resources of the sea" and "the prevention of infringement of the fisheries laws and regulations of the coastal State." Such laws may not discriminate against vessels "carrying cargoes to, from or on behalf of any State," nor may they "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage."[317] So long as these prohibitions are not breached, the coastal State may legislate, and may take measures, to ensure that IUU fishing activities are not carried out by the foreign vessel during its passage through the coastal State's territorial sea, and the vessel is obliged to comply with such domestic legislation.

(c) *In ports*

281. Judge Wolfrum, speaking in his capacity as President of the Tribunal, has stated that:

> 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. In particular as far as IUU fishing is concerned, port States play an increasing role in the implementation of the rules governing the elimination of IUU fishing as their purpose is to prohibit the landing of fish whose origin is clearly documented and show that it was harvested legally.[318]

282. In ports (and internal waters more generally), there is a balance between the exercise of port State jurisdiction and flag State jurisdiction. It is said that it is *usually* more

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316 It has been argued that "the reference to *activities* [in article 19, paragraph 2, of the UNCLOS] suggests that the mere presence or passage of a ship could not, under the Convention, be characterised as prejudicial to the coastal State, unless it were to engage in some activity" and therefore requires that something must have actively been done in the territorial sea to deprive the vessel's passage through the territorial sea of its innocence. See R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, OUP 1999), p. 72.

317 UNCLOS, article 24, paragraph 1.

318 President's 2007 Presentation (Annex 6), p. 11.

appropriate to resolve this balance in favor of flag States.[319] However, flag States may have failed to exercise jurisdiction over IUU fishing matters, as may particularly occur when the vessel is registered under an open registry arrangement and "may never have occasion to visit their home port of registration"[320] thereby avoiding the exercise of flag State jurisdiction. In such circumstances, it is both appropriate and legitimate to resolve the aforementioned balance in favor of port State jurisdiction so as to allow port States to exercise sovereign authority over the vessels in their internal waters. While the decision in *The Case of the S.S. "Lotus"* was that "vessels *on the high seas* are subject to no authority except that of the State whose flag they fly" (emphasis added), the PCIJ expressly accepted that this would not prevent the exercise of jurisdiction by non-flag States over the vessel when it is within their territorial jurisdiction.[321] Accordingly, coastal States are entitled to criminalize, *inter alia,* IUU fishing activities on the high seas that affect them[322] and enforce such legislation when the offending vessel enters their internal waters. Further, it is notable that article 23, paragraph 1, of the Fish Stocks Agreement expressly provides that port States have the right "and the duty" to take measures with regard to fishing vessels that are voluntarily in its ports if the vessel has acted against rules of international law for the conservation and management of fish stocks.[323]

283. The CRFM also refers to the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing.[324] While it is not yet in force, that agreement's objective to "prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and

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319 It has been noted that there is an increasing trend to encourage the exercise of port State jurisdiction over vessels acting in breach of international standards: see Erik J. Molenaar, "Port State Jurisdiction: Towards Mandatory and Comprehensive Use," in D. Freestone, R. Barnes and D. Ong (eds), *The Law of the Sea: Progress and Prospects* (OUP 2006).

320 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 732.

321 *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, [1927] PCIJ Series A, No. 10, 25.

322 I.e. IUU fishing of shared resources, including straddling fish stocks and highly migratory fish stocks.

323 See Erik J. Molenaar, "Port State Jurisdiction" and R Lagoni, "Ports," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume VIII, OUP 2012), p, 355. See also article 220, paragraph 1, of the Convention which, subject to the safeguards set out in Section 7 of Part XII, permits port States to "institute proceedings in respect of any violation of [their] laws and regulations adopted in accordance with this Convention;" again, the CRFM observes that the proper interpretation of this article is to grant a general right in addition to a specific, pollution-centric right. See further, article 5, paragraph 2, of the 1993 FAO Compliance Agreement.

324 For the text of this Agreement, see <http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf>, accessed 7 November 2013.

sustainable use of living marine resources and marine ecosystems" is noted.[325] The CRFM considers that port States are able to effect this objective through the means discussed above.

2. Rights arising when the IUU fishing activities took place in the coastal State's EEZ

284. The coastal State's jurisdiction under article 73 of the Convention to legislate[326] and enforce laws and regulations in the EEZ is a logical and perfect corollary to its exclusive sovereign rights to explore, exploit, manage and conserve living resources in the EEZ, which were discussed above. Both flag States and "[n]ationals of other States fishing in the exclusive economic zone," under articles 58, paragraph 3, and 62, paragraph 4, of the Convention respectively, must comply with the terms of such legislation.[328] Actions to enforce such legislation can be carried out in the coastal State's EEZ, territorial sea,[329] or internal waters. As regards enforcement in internal waters, the CRFM's position is that principles underlying the position set out in section C(b)-(c) above are applicable also to the exercise of port State jurisdiction over IUU fishing activities that took place within the coastal State's EEZ.

285. Where a coastal State's authorities commenced pursuit of a vessel which committed IUU fishing activities within its EEZ (or territorial sea and internal waters), the pursuing vessels are entitled to continue the pursuit after the vessel has left the EEZ and territorial waters of the State.[330] This entitlement is under the doctrine of hot pursuit, which has been described as being "essentially a temporary extension onto the high seas of the coastal state's jurisdiction."[331]

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325 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, article 2.

326 See UNCLOS, article 62, paragraph 5 ("Coastal States shall give due notice of conservation and management laws and regulations."). See also Virginia Commentary, Part V, p. 638, para. 62.16(k).

328 See also the CRFM's response to the first question in Chapter 3, section I above.

329 The corollary of article 27, paragraph 5, of the Convention is that coastal States may take any steps on board a foreign vessel passing innocently through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the vessel entered the territorial sea so long as that offence was created under and in accordance with Part V of the UNCLOS, which was discussed above.

330 UNCLOS, article 111. See also R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), pp. 739-741; Hugo Caminos, "Hot Pursuit," in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Volume IV, OUP 2012), p. 1000.

331 R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman, 1992), p. 739.

D. Regional and bilateral treaties

286. The CRFM requests the Tribunal to take notice of the following agreements as examples of regional practice and which are of relevance to Question 4:

(a) Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena 1983. The Convention is contained in Annex 10. The following instrument, which is contained in Annex 11, has been adopted pursuant to this Convention: 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).

(b) The Draft Agreement establishing the Caribbean Community Common Fisheries Policy. This instrument is contained in Annex 5.

287. The CRFM further requests the Tribunal to take notice of the following bilateral agreements as examples of regional practice and which are of relevance to Question 4:

(a) Maritime delimitation treaty between Jamaica and the Republic of Colombia (1993), particularly articles 3(2), 3(4) and 3(6). This treaty is contained in Annex 8.

(b) Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados (2003), particularly articles 4, 5 and 8. This treaty is contained in Annex 9.

III. Coastal States' rights and obligations under customary international law and as derived from general principles of law; and the subsidiary sources relevant to Question 4

288. The duties to act in good faith, to cooperate and to apply the precautionary principle and the law of neighbourliness as discussed in relation to the obligations of flag States regarding IUU fishing activities conducted within the EEZ of third States (see the response to Question 1 above) are equally applicable to the rights and obligations of coastal States. Similarly, the references to the various subsidiary sources previously noted are repeated.

CHAPTER 4

CONCLUSIONS

289. On 24 May 2013, the Tribunal adopted an Order on the conduct of the proceedings in Case No. 21. According to the Order, certain intergovernmental organizations listed in the Annex to the Order were invited to participate in the advisory proceedings concerning the questions submitted to the Tribunal in Case No. 21. The Caribbean Regional Fisheries Mechanism (CRFM) was identified in that Annex as such an organization and through the Order was invited to "present written statements" on the questions submitted to the Tribunal for an advisory opinion by 29 November 2013.

290. The CRFM welcomes the opportunity it has had to provide the Tribunal with its views in Case No. 21, in its capacity as an intergovernmental organization for regional fisheries cooperation, with a membership of 17 Caribbean States, which are Small Island Developing States.

291. The CRFM's views expressed in this written statement stem from its overarching mission to promote sustainable use of the living marine and other aquatic resources in the Caribbean by the development, efficient management and conservation of such resources.

292. It is in the spirit of this mission that the Tribunal is urged in this written statement to adopt a comprehensive view to defining the obligations and liability of flag States and coastal States in respect of vessels and nationals engaged in IUU fishing activities within the EEZ of third States and on the high seas. The Tribunal should note that the problems of ocean space, including IUU fishing activities, are closely interrelated and need to be considered in a holistic manner through an integrated, interdisciplinary and intersectoral approach and addressed in the context of sustainable development. In this respect, the CRFM strongly endorses the shared or related "ecosystem" approach. The living resources provisions of the UNCLOS and other relevant instruments recognize international interdependence on these resources and provide a framework for their cooperative and sustainable management, conservation and exploitation.

293. As a matter of general principle, it is the CRFM's view that there should be no lacunae in the obligations and liability of States for IUU fishing activities conducted by entities within their jurisdiction or control.

294. In the view of the CRFM the answer to the *first* question should be as follows:

Flag States have two kinds of obligations under the Convention and related instruments as well as under general international law:

A. The obligation to ensure compliance by vessels flying their flag with the obligations set out in the Convention and related instruments and imposed by general international law.

This is an obligation of "due diligence." The flag State is bound to make best possible efforts to ensure compliance by vessels flying their flag with relevant international rules and standards and domestic laws and regulations, especially those concerning the protection and preservation of the marine environment, wherever such vessels may be.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved, including their location. Because of their nature and effects, IUU fishing activities may impose a higher standard, especially when such activities or entities engaging in them are within a State's area of territorial sovereignty or sovereign rights.

This "due diligence" obligation requires the flag State to take preventive and precautionary measures within its legal system based on its genuine link with vessels entitled to fly its flag. These measures, which may consist of laws, regulations and administrative measures, must be necessary for the implementation of international rules and standards and domestic laws and regulations for the prevention, reduction and control of pollution of, or significant and harmful changes to, the marine environment, including through irreversible disturbance of the ecological balance. What measures are "necessary" measures for the implementation of such rules, standards, laws and regulations will depend on all the circumstances, including the particular characteristics of the legal system of the State in question and the legal framework set by competent regional fisheries management organizations.

B. Direct obligations with which flag States must comply independently of their obligation to ensure a certain conduct on the part of vessels flying their flag.

Compliance with these obligations may also be seen as a relevant factor in meeting the "due diligence" obligation of the flag State.

The most important direct obligations of the flag State are:

(a) the obligation to protect and preserve the marine environment, including by promptly investigating and where appropriate instituting proceedings whenever there is a reasonable suspicion of engagement in IUU fishing activities by vessels flying its flag, wherever such vessels may be. As regards the protection of the marine environment, the laws, regulations and administrative measures of

the flag State cannot be less effective than international rules, regulations and procedures.

(b) the duty to cooperate in good faith with other States and competent international organizations in respect of fisheries conservation and management, including in preventing, deterring and eliminating IUU fishing and by notifying interested States and competent organizations whenever there is a reasonable suspicion of engagement in IUU fishing activities by vessels flying its flag, wherever such vessels may be; where there is a duty to cooperate, the duty requires actual, good-faith cooperation with other States and with relevant regional fisheries organizations; mere membership of such organizations in itself is not sufficient.

(c) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in treaty and other instruments; this obligation is also to be considered an integral part of the "due diligence" obligation of the flag State and applicable beyond the scope of treaties binding on it and includes the duty to monitor and investigate vessels flying its flag whenever there is a reasonable suspicion of such vessels' engagement in IUU fishing activities.

295. In the view of the CRFM the answer to the *second* question should be as follows:

The liability of flag States Parties to the Convention arises from their failure to fulfill their obligations under the Convention and related instruments. Such liability may arise from either direct obligations or "due diligence" obligations. Failure of the vessel flying the flag of a certain State to comply with its obligations does not in itself give rise to liability on the part of the flag State.

The conditions for the liability of the flag State to arise are found in the relevant provisions of the Convention and related instruments in respect of their States Parties, and in the rules of international law in situations where the Convention is not applicable.

Whether a flag State has carried out its obligations depends on the requirements of the obligation which the flag State is alleged to have breached.

The nature of the obligation breached determines the extent of liability.

The liability of the flag State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and any damage. The existence of a causal link between the flag State's failure and the damage is required and cannot be presumed.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the flag State has met its obligations,

damage caused by vessels flying its flag does not give rise to the flag State's liability. If the flag State has failed to fulfil its obligations and damage has occurred, the flag State shall be liable for the actual amount of the damage. If the flag State has failed to fulfil its obligations but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

A State is exonerated from liability under the Convention and related instruments if it fulfils the conditions for exoneration imposed by relevant provisions of the Convention and related instrument or, as applicable, general international law. In situations where the Convention is not applicable, the rules of international law govern the exoneration of States from liability under applicable laws.

296. In the view of the CRFM the answer to the *third* question (as formulated in the French-language version of the Tribunal's Order 2013/2) should be as follows:

International law in principle is not concerned with the question of responsibility or liability on the part of an international organization arising from the breach of a State's fisheries legislation by private actors – it only concerns the international responsibility of States and intergovernmental organizations arising from their own failure to comply with their responsibilities under international law.

The question of liability on the part of whatever entity, domestic or foreign, arising from the violation of a coastal State's fisheries legislation is primarily a question of domestic law and is ultimately one to be decided by domestic courts having competent jurisdiction.

To the extent that an international agreement forming the basis for the issuance of fishing licenses by an international organization addresses the question of whether the responsibility or liability of that organization is engaged, that agreement will be the primary instrument governing the question of responsibility or liability of such organization. Any primary or secondary obligations on the part of intergovernmental organizations are without prejudice to the privileges and immunities which such organizations may claim under conventional law and the rules of international law.

297. In the view of the CRFM the answer to the *fourth* question should be as follows:

Coastal States' direct obligations under the Convention and other rules of international law:

The most important direct obligations of the coastal State are:

(a) the obligation to protect and preserve the marine environment, including by promptly investigating and where appropriate instituting proceedings whenever

there is a reasonable suspicion of vessels engaging in IUU fishing activities within the coastal State's area of territorial sovereignty or sovereign rights.

(b) the duty to manage fishing in its EEZ so as to ensure the sustainable development of the living resources in the EEZ while enabling the maximum sustainable utilization of those resources.

(c) the duty to manage the fishing in its EEZ of shared stocks (those that straddle EEZs or the EEZ and the high seas, and stocks of highly migratory fish species), which requires cooperation between the States whose nationals fish from such stocks within and without the EEZ.

(d) the duty to cooperate with other States whose nationals or vessels fish from the same stocks as its own nationals on the high seas so as to properly manage the living resources available; where there is a duty to cooperate, the duty requires actual, good-faith cooperation within relevant regional fisheries organizations; mere membership of such organizations in itself is not sufficient.

(e) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in treaty and other instruments; this obligation is also to be considered an integral part of the "due diligence" obligation of the coastal State and applicable beyond the scope of treaties binding on it.

Coastal States' rights under the Convention and other rules of international law:

The most important rights of the coastal State relate to the right to prevent IUU fishing of its resources. This array of rights is extensive and exists concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. The most important rights, which are to be exercised in accordance with the Convention and related instruments (where applicable) and the rules of international law, are:

(a) the right to legislate and enforce such laws as required to ensure the sustainable development and management of fish stocks within the coastal State's area of territorial sovereignty or sovereign rights.

(b) the right to take all necessary steps to prevent, deter and eliminate (including by punishing) IUU fishing activities conducted within the coastal State's area of territorial sovereignty or sovereign rights.

(c) the right to exercise port State jurisdiction over vessels voluntarily within their ports which have engaged in IUU activities affecting them.

(d) the right to enter into regional and bilateral agreements with flag States to permit the exercise of coastal State jurisdiction on the high seas in respect of vessels flying the flags of other States.

298. The Tribunal's Order of 24 May 2013 indicates that "oral proceedings shall be held" in the instant case. It is the intention of the CRFM to have legal counsel involved in the preparation of this written statement present oral argument in the matter and legal counsel with Steptoe & Johnson LLP will therefore appear for the CRFM.

27 November 2013

Milton Haughton

Executive Director, Representative of
the Caribbean Regional Fisheries Mechanism

Annexes to the written statement of the Caribbean Regional Fisheries Mechanism

INDEX

Annex 1: Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia, on 28 July 2010

Annex 2: Agreement Establishing the Caribbean Regional Fisheries Mechanism

Annex 3: Ministry of Agriculture and Fisheries of Jamaica, "IUU Fishing and Border Security Issues in Jamaican Waters," Discussion Paper submitted at the Fourth Meeting of the Ministerial Council of the CRFM, 20 May 2011, St. John's, Antigua

Annex 4: CFRM Ministerial Council, Resolution of the Seventh Meeting held on 31 May 2013

Annex 5: Draft Agreement establishing the Caribbean Community Common Fisheries Policy (adopted in 2011)

Annex 6:"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

Annex 7: Extract from *The Flag State's Obligations for Merchant Vessels*, Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea

Annex 8: Maritime delimitation treaty between Jamaica and the Republic of Colombia (1993)

Annex 9: Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados (2003)

Annex 10: Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagefia de Indias, 1983)

Annex 11: 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)

Annex 12: Table summarizing key provisions of the UNCLOS in relation to the first question

Annex 13: Table summarizing key provisions of the UNCLOS in relation to the second question

Annex 1

CASTRIES (ST. LUCIA) DECLARATION ON ILLEGAL, UNREPORTED AND UNREGULATED FISHING, ADOPTED BY THE 2ND SPECIAL MEETING OF THE CRFM MINISTERIAL COUNCIL HELD IN CASTRIES, ST. LUCIA, ON 28 JULY 2010

CASTRIES (ST. LUCIA) DECLARATION ON ILLEGAL, UNREPORTED AND UNREGULATED FISHING

We the Member States of the Caribbean Regional Fisheries Mechanism,

ACCEPTING that illegal, unreported and unregulated (IUU) fishing is any fishing which undermines or disregards national, regional or international fisheries conservation and management arrangements and measures;

RECOGNISING the important role of fisheries in the CARICOM region and its significant contribution to food and nutrition security, employment, economic and the social well-being of our people;

CONSCIOUS of the potential for increased benefits from sustainable fisheries and aquaculture development;

NOTING that high demand for fish, the economic benefits derived from IUU fishing and the inadequate monitoring, control and surveillance (MCS) systems in the region have made Caribbean States particularly vulnerable to IUU fishing;

COGNISANT that the contribution of fisheries to our social and economic development and food security is being threatened by IUU fishing occurring nationally, regionally and globally;

AWARE that IUU fishing is practised by both local and foreign vessels;

RECONISING that national, regional and global cooperation is necessary to effectively prevent, deter and eliminate IUU fishing;

MINDFUL of the principles and rules of international law as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1982 UN Convention); the United Nations Agreement for the Implementation of the Provisions of the UN 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 (UN Fish Stocks Agreement); and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993 (FAO Compliance Agreement);

RECALLING relevant United Nations General Assembly Resolutions on Sustainable Fisheries, including resolution A/Res/64/72 of 4 December 2009;

REAFFIRMING our commitment to the principles and standards contained in the FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct);

RECALLING ALSO the endorsement by the 120th Session of the FAO Council on 2 June 2001 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU);

ACKNOWLEDGING the objectives of the Revised Treaty of Chaguaramas and more specifically Articles 58 and 60 which enjoin Member States to co-operate in all areas necessary to foster regional development and integration regarding Natural Resource Management and Fisheries Management and Development respectively;

MINDFUL ALSO of the establishment of the Caribbean Regional Fisheries Mechanism (CRFM) with its main objectives of promoting efficient management and sustainable development of marine and other aquatic resources and promoting and establishing cooperative management arrangements of shared and highly migratory resources in conformity with the economic objectives of the Member States;

CONCERNED by the depletion of fisheries resources, the degradation of aquatic habitats and the threats to sustainable fisheries and aquaculture development worldwide;

GRAVELY CONCERNED by the prevalence of IUU fishing and its harmful consequences on the sustainability of both large-scale and small-scale artisanal fisheries, on the conservation of marine living resources and marine diversity as a whole and on the economies of Member States and on efforts to use and manage fisheries and associated ecosystems in a sustainable manner;

NOTING 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;

AWARE that effective fisheries MCS is essential to combat IUU fishing and that integrated MCS, including vessel monitoring systems (VMS), as well as a regional register of fishing vessels authorised to operate within the CARICOM Region, are key tools in this endeavour;

RECOGNISING the need to mobilise resources and seek international cooperation for the development of harmonized VMS so as to implement the relevant provisions of the Code of Conduct for Responsible Fisheries and the International Plan of Action to Prevent, Deter and Eliminate IUU fishing and protect the livelihood of fishermen and fishing communities in the Caribbean;

RECOGNISING ALSO the unique transboundary character of living marine resources and ecosystems and, therefore, the need to co-operate in the management of shared resources and in promoting harmonized approaches to prevent, deter and eliminate IUU fishing in the Region;

COMMITTED to capacity building at national and regional levels for sustainable fisheries development;

DESIROUS of achieving more effective implementation of various international instruments for sustainable fisheries development adopted or enacted in the past decades;

DESIROUS ALSO of strengthening collaboration in the fight to prevent, deter and eliminate IUU fishing, to safeguard the benefits from the optimum utilization of fisheries resources for both present and future generations;

HEREBY DECLARE THAT:

1. We are determined to work together and with other stakeholders, including regional and multilateral partners to identify, prevent, deter and eliminate IUU fishing within the Caribbean and globally;

2. We are committed to concentrating and intensifying our efforts to effectively implement relevant international instruments for the sustainable use, conservation and management of marine living resources; and

3. We reaffirm the need to implement the principles and rules of international law herein mentioned to protect, conserve, manage and use the fisheries and other living marine resources and their ecosystems in a sustainable manner.

4. WE RESOLVE AND RENEW OUR EFFORTS TO:

   (i) establish a comprehensive and integrated approach to prevent, deter and eliminate IUU fishing by emphasising the primary responsibility of the flag state in accordance with international law, and including port State, coastal State, and market related measures, as well as measures to ensure that nationals do not support or engage in IUU fishing, all of which shall address the economic, social and environmental impacts of IUU fishing;

   (ii) encourage the phased implementation of measures to prevent, deter and eliminate IUU fishing through the development of national and regional plans of actions in accordance with the IPOA-IUU;

   (iii) adopt conservation measures consistent with the long-term sustainable use of fish stocks and the protection of the environment in accordance with the 1982 UN Convention and other relevant regional and international agreements and documents;

   (iv) adopt, review and revise as appropriate, relevant legislation and regulations regarding compliance with fisheries management measures and to provide sanctions of sufficient gravity, so as to deprive offenders of the benefits accruing from their illegal activities and to deter further IUU fishing;

   (v) identify, reduce and ultimately eliminate the economic incentives derived from IUU fishing at the national, regional and global levels;

   (vi) implement MCS schemes with a view to increasing the cost effectiveness of surveillance activities, such as encouraging the fishers and other stakeholders to report any suspected IUU fishing activities they observe;

(vii) adopt internationally agreed market-related measures in accordance with international law including principles, rights and obligations established in WTO agreements, as called for in the IPOA-IUU;

(viii) develop a comprehensive database of fishing vessels in good standing and vessels involved in IUU related activities, subject to confidentiality requirements in accordance with national laws and in conformity with Article VI.1 of the FAO Compliance Agreement;

(ix) seek technical assistance and training to promote the development of fisheries management regimes at the local, national and regional levels, to prevent, deter and eliminate IUU fishing;

(x) ensure the participation and coordination of all its Member States, including stakeholders such as industry, fishing communities and non-governmental organizations, either directly or indirectly through the CRFM and other appropriate organisations, in combating IUU fishing; and

(xi) ensure that plans of action are implemented in a transparent manner in accordance with Article 6.13 of the FAO Code of Conduct.

5. WE CALL UPON:

(i) Member States to cooperate in the implementation of harmonized minimum terms and conditions of access to monitor, control and conduct surveillance of fisheries resources;

(ii) Member States to maintain records of fishing vessels entitled to fly their flag and authorized to be used for fishing in waters under their jurisdiction and on the high seas.

(iii) The international community to cooperate with the Member States and provide financial and technical support where required to transfer technology and build capacity, as well as, facilitate the development and implementation of policies and measures to prevent, deter and eliminate IUU fishing within the Region.

6. WE AGREE ON THE NEED:

(i) For a holistic and integrated approach to dealing with IUU fishing;

(ii) For flag, port, and coastal states and where appropriate, the CRFM , to effectively monitor and regulate transhipment of fish and fish products in order to combat IUU fishing activities and to prevent laundering of illegal catches;

(iii) For Member States in collaboration with the CRFM Secretariat, as well as NGOs and members of the fishing industry, to exchange information on suspected IUU fishing, if possible on a real time basis, and by actively participating in the International MCS network;

(iv) To strengthen coastal and port state measures for fishing vessels consistent with international law in order to prevent, deter and eliminate IUU fishing in the Region and on the high seas;

(v) For further international action to eliminate IUU fishing by vessels operating in open registries, flying "flags of convenience", as well as to require that a "genuine link" be established between states and fishing vessels flying their flags in the Region and on the high seas;

(vi) To strengthen the CRFM as a regional fisheries body in order to more effectively coordinate the actions of its Member States and disseminate information on preventing, deterring and eliminating IUU fishing;

(vii) To implement vessel marking requirements in accordance with the FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels and any applicable CRFM requirements;

(viii) To establish a Working Group to be convened through the CRFM to regularly consult on methodologies and approaches that will harmonise and enhance the reliability of data collection in relation to IUU fishing; and

(ix) For Member States, to the extent permitted by their national laws and regulations, to exchange among themselves and provide the CRFM Secretariat with relevant information including but not limited to IUU fishing activities.

7. WE URGE ALL MEMBER STATES:

(i) To implement relevant provisions of the FAO Code of Conduct on Responsible Fishing, and the Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation) as it relates to achieving sustainable fisheries;

(ii) To supply information on fishing vessels flying their flag to the CRFM Secretariat as agreed by the Ministerial Council;

(iii) That have not yet done so to become parties to the 1982 UN Convention, the FAO Compliance Agreement, the UN Fish Stocks Agreement, and other relevant international agreements that will provide support in the fight against IUU fishing;

(iv) That are parties to the FAO Compliance Agreement to fulfil their obligations to submit to FAO, for inclusion in the High Seas Vessel Authorization Record, data on vessels entitled to fly their flags that are authorized to be used for fishing on high seas, and those that are not yet parties to the FAO Compliance Agreement to submit data on a voluntary basis; and

(v) To ensure that they exercise full control over fishing vessels flying their flag, in accordance with international law, in order to combat IUU fishing.

2nd Special Meeting
CRFM Ministerial Council
Castries, St. Lucia
28 July 2010

Annex 2

AGREEMENT ESTABLISHING THE CARIBBEAN REGIONAL FISHERIES MECHANISM

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THE STATES PARTIES,

Convinced *of the need to promote sustainable use of the living marine and other aquatic resources by the development, efficient management and conservation of such resources;*

Convinced further *of the intrinsic and non-extractive value and interdependence of the living marine and other aquatic resources;*

Acknowledging *that under international law, coastal States have sovereign rights for the purpose of exploring, exploiting, conserving and managing the living and non-living resources of their exclusive economic zones and their fisheries zones;*

Conscious *that certain of the living marine resources which are of interest to the peoples of the Caribbean Region are highly migratory, straddle national boundaries and are harvested by third States;*

Recognising *that the unsustainable exploitation of the living marine and other aquatic resources can lead to irreparable damage to those resources;*

Noting *that there are international institutions, bodies and competent organisations, the policies and programmes of which may be relevant to the living marine and other aquatic resources of interest to Member States;*

Recognising further *the need for co-operation and consultation among all the States Parties to this Agreement, third States, interested international institutions and bodies involved in fisheries in the Caribbean Region;*

Recognising also *the need of the States Parties for specific assistance including financial, scientific and technological assistance in the area of fisheries management, development, conservation and sustainable use;*

Aware *of the relevant provisions of the Third United Nations Convention on the Law of the Sea (1982); the FAO Code of Conduct for Responsible Fisheries (1995); the Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993); the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (1995); Sustainable Development of the Programme of Action for Small*

Island Developing States (1994), and the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean (1990);

Noting further *Resolution 54/225 of the United Nations General Assembly, dated 15 February 2000 on Promoting an Integrated Management Approach to the Caribbean Sea area in the context of sustainable development;*

Convinced *that this Agreement will serve to enhance co-operation in the area of fisheries among States Parties and interested third parties, thereby contributing to the general well-being of the peoples of the Caribbean Region;*

Bearing in mind *the Revised Treaty of Chaguaramas (2001) Establishing the Caribbean Community including the CARICOM Single Market and Economy,*

Have agreed *as follows:*

Article 1
Use of Terms

In this Agreement, unless the context otherwise requires:

"the Caribbean Community" *(hereinafter referred to as "CARICOM") means the organisation established by the Treaty of Chaguaramas and the Protocols thereto:*

"the Caribbean Fisheries Forum" *means the organ established by Article 6(b) of this Agreement;*

"competent organisations" *means any group or body formed by two or more States in a co-operative arrangement for the sustainable use of shared, straddling or highly migratory stocks or of a particular specie of marine or other aquatic resources and recognised as such by other States, fishers of the same stock or specie;*

"the Ministerial Council" *means the organ established by Article 6(a) of this Agreement;*

"the Mechanism" *means the Caribbean Regional Fisheries Mechanism established by Article 2 of this Agreement;*

"the Secretary-General" *means the Secretary-General of CARICOM;*

"the Caribbean Technical Fisheries Unit" *(hereinafter referred to as "**the Technical Unit**") means the organ established by Article 6(c) of this Agreement.*

Article 2
Establishment

1. *There is hereby established the Caribbean Regional Fisheries Mechanism (hereinafter referred to as "the Mechanism").*

2. *The Headquarters of the Mechanism shall be located in Belize.*

3. *The Mechanism shall establish elsewhere within the CARICOM Region such other offices as may be considered necessary for the performance of its functions.*

4. *The Mechanism shall conclude a Headquarters Agreement with the Government of Belize setting out the privileges and immunities to be recognised and granted by the Government of Belize.*

Article 3
Membership

1. *Membership of the Mechanism shall be open to Member States and Associate Members of CARICOM.*

2. *The Ministerial Council may admit as an Associate Member of the Mechanism any State or Territory of the Caribbean Region which in its opinion is able and willing to discharge its obligations under this Agreement.*

3. *States mentioned in paragraph 1 of this Article which have signed this Agreement in accordance with Article 35 or acceded to it in accordance with Article 38 shall become Members of the Mechanism.*

4. *States or Territories mentioned in paragraph 2 of this Article which have concluded an association agreement with the Mechanism shall become Associate Members of the Mechanism.*

Article 4
Objectives of the Mechanism

The Mechanism shall have as its objectives;

(a) *the efficient management and sustainable development of marine and other aquatic resources within the jurisdictions of Member States;*

(b) *the promotion and establishment of co-operative arrangements among interested States for the efficient management of shared, straddling or highly migratory marine and other aquatic resources;*

(c) *the provision of technical advisory and consultative services to fisheries divisions of Member States in the development, management and conservation of their marine and other aquatic resources.*

Article 5
General Principles

In pursuance of its objectives, the Mechanism shall be guided by the following principles:

(a) *maintaining bio-diversity in the marine environment using the best available scientific approaches to management;*

(b) *managing fishing capacity and fishing methods so as to facilitate resource sustainability;*

(c) *encouraging the use of precautionary approaches to sustainable use and management of fisheries resources;*

(d) *promoting awareness of responsible fisheries exploitation through education and training;*

(e) *according due recognition to the contribution of small scale and industrial fisheries to employment, income and food security, nationally and regionally, and*

(f) *promoting aquaculture as a means of enhancing employment opportunities and food security, nationally and regionally.*

Article 6
Organs of the Mechanism

The Mechanism shall be composed of:

(a) *the Ministerial Council;*

(b) *the Caribbean Fisheries Forum (hereinafter called "the Forum");*

(c) *the Technical Unit.*

Article 7
The Ministerial Council

1. *Each Member of the Mechanism shall nominate a Minister of Fisheries to represent it on the Ministerial Council and such representative shall have one vote.*

2. *The Ministerial Council shall meet in regular session once a year and in such special sessions as may be necessary to perform its functions.*

3. *The Ministerial Council shall determine the policy of the Mechanism. In particular, the Ministerial Council shall:*

   (a) *promote the efficient management, conservation and development of shared, straddling and highly migratory marine and other aquatic resources of the*

Caribbean Region through attainment of competence over the resources and through co-operation with competent organisations as the case may be;

(b) develop and maintain relations with national, sub-regional and regional institutions and bodies and international institutions and organisations the work of which have an impact on the fisheries within the Region;

(c) promote and facilitate human resource training and development in the fisheries sub-sector at the professional, technical and vocational levels in Member States;

(d) promote and support programmes designed to establish, facilitate and strengthen fisheries research, including the acquisition and sharing of relevant data in Member States;

(e) promote and encourage technical co-operation in the fisheries sub-sector, including technology transfer, information exchange and networking among States of the Caribbean Region and beyond;

(f) encourage co-operation among the Member States in order to avoid disputes or to resolve them in a peaceful manner;

(g) support efforts aimed at ensuring safe, healthy and fair working and living conditions for fishers and fish workers;

(h) consider the annual reports and make decisions in response to recommendations and requests from the Forum;

(i) approve the Budget, Annual Audited Accounts and Procurement Procedures of the Mechanism and Strategic Plan and Work Programme of the Technical Unit;

(j) appoint the Director and Deputy Director of the Technical Unit;

(k) receive and consider policy proposals from the Forum;

(l) approve co-operative arrangements proposed by the Forum;

(m) approve recommendations for States or Territories to be admitted as Associate Members;

(n) approve recommendations for groups, institutions and bodies whose work contribute to the work of the Mechanism to be admitted to the Forum, as Observers;

(o) review the work of the Technical Unit;

(p) submit annual reports to the Council for Trade and Economic Development (COTED) and the Council for Foreign and Community Relations (COFCOR).

4. Subject to the provisions of this Article and Article 18, the Ministerial Council shall determine its own rules of procedure.

Article 8

<u>Composition of the Forum</u>

1. The Forum shall comprise:

(a) one representative of each Member of the Mechanism;

(b) one representative of each Associate Member of the Mechanism;

(c) representatives of the following groups, institutions and bodies, approved by the Ministerial Council as Observers:

(d) Fisher Folk Organisations and Private Fishing Companies within the Caribbean Region;

(e) Regional bodies and institutions and regional organisations whose work in the area of fisheries contribute to the work of the Mechanism;

(f) Non-Governmental Organisations whose work in the area of fisheries contribute to the work of the Mechanism.

2. *The Forum shall elect a chairman from among the Members of the Mechanism and, subject to this Agreement, shall establish its own rules of procedure.*

Article 9

Functions of the Forum

1. *Subject to paragraph 3 of Article 7, the Forum shall determine the technical and scientific work of the Mechanism and, in particular, the Forum shall:*

   (a) *promote the protection and rehabilitation of fisheries habitats and the environment generally;*

   (b) *encourage the use of post-harvest practices in the fisheries sub-sector that maintain the nutritional value and quality of products;*

   (c) *encourage the establishment of effective mechanisms for monitoring, control and surveillance of fisheries exploitation;*

   (d) *recommend for approval by the Ministerial Council, arrangements for sustainable fisheries management and development in Member States based upon the best available technical or scientific data and information;*

   (e) *recommend for approval by the Ministerial Council, co-operative and other arrangements relating to fisheries;*

   (f) *review the arrangements recommended by the Technical Unit for sustainable fisheries management and development in Member States;*

   (g) *examine and consider action taken by Member States and third States which may prejudice arrangements for sustainable fisheries management and development;*

   (h) *receive reports on new arrangements made between Member States and third States with respect to the conservation and management of fisheries;*

(i) *receive reports on such activities as may from time to time be entrusted to sub-committees or interest groups of the Forum;*

(j) *receive and examine the draft Work Plan and Budget of the Mechanism and submit recommendations thereon to the Ministerial Council;*

(k) *determine from time to time the priorities for the Work Programme of the Mechanism;*

(l) *approve the staff regulations recommended by the Technical Unit;*

(m) *undertake such other functions as from time to time may be entrusted to it by the Ministerial Council.*

2. *The Forum shall convene in regular sessions once a year and in such special sessions as it considers necessary to perform its functions.*

Article 10

<u>The Executive Committee</u>

1. *There shall be established at the first regular session of the Forum an Executive Committee of the Forum which shall comprise [seven] Members, of whom [five] shall be Members of the Mechanism and two (2) Associate Members.*

2. *The Director of the Technical Unit shall be an ex-officio Member of the Executive Committee.*

3. *The members of the Executive Committee shall be elected annually. The Chairman of the Executive Committee shall be elected from among the Members of the Mechanism.*

4. *Decisions of the Executive Committee shall be reached by a majority of the Members present and voting. In the event of a tie, the Chairman shall exercise a casting vote.*

5. *The Executive Committee shall function as necessary between meetings of the Forum using, as appropriate, modern communication facilities, and shall keep the Forum*

informed of its activities.

Article 11

Sub-Committees of the Forum

1. *The Forum may establish such Sub-Committees as may be considered necessary for the fulfillment of its functions.*

2. *Such Sub-Committees may comprise representatives of Member States, Associate Members and interest groups whose activities within the Caribbean Region are of interest to the Mechanism.*

3. *Sub-Committees so formed shall determine their own method of work and shall keep the Forum informed of their activities.*

Article 12

Composition of the Technical Unit

1. *The Technical Unit shall be the permanent Secretariat of the Mechanism and shall be adequately provided with the managerial, technical, scientific and support staff to enable it to discharge the mandate of the Mechanism.*

2. *The Technical Unit shall comprise a Director, a Deputy Director and such other technical and administrative staff as may be necessary for the fulfillment of the functions of the Mechanism.*

3. *The Director shall be the Chief Executive Officer of the Mechanism and shall exercise full responsibility for all aspects of the work of the Mechanism.*

4. *The Director shall be appointed by the Ministerial Council on the recommendation of the Forum and shall serve for a period of three years and be eligible for reappointment.*

5. *The Director shall report annually to the Ministerial Council on the work of the Mechanism.*

6. *The Director shall be assisted by a Deputy Director who shall also be appointed by the Ministerial Council on the recommendation of the Forum.*

7. *The other staff of the Technical Unit shall be appointed by the Director.*

8. *In the appointment of the staff of the Technical Unit, due consideration shall be given to the principle of equitable geographical representation.*

9. *The officials of the Technical Unit shall enjoy the status of international public servants whose loyalty shall be to the Mechanism. Members and Associate Members of the Mechanism undertake to respect the status of the officials of the Technical Unit.*

Article 13

Functions of the Technical Unit

In the discharge of its functions, the Technical Unit shall:

(a) *provide technical, consultative and advisory services to Member States in the development, assessment, management and conservation of marine and other aquatic resources and, on request, in the discharge of any obligations arising from bilateral and other international instruments;*

(b) *support and enhance the institutional capacity of Member States in fisheries' areas such as:*

- (i) *policy formulation;*
- (ii) *economics and planning;*
- (iii) *registration and licensing systems;*
- (iv) *information management;*
- (v) *resource monitoring, assessment and management;*
- (vi) *education and awareness building;*
- (vii) *harvest and post-harvest technologies;*

(c) *encourage, support and, as appropriate, provide effective regional representation at relevant international fora;*

(d) collect and provide relevant data on fisheries resources, including sharing, pooling and information exchange;

(e) promote the conduct of trade in fish and fish products according to applicable agreements;

(f) act as the central co-ordinating body for the Mechanism;

(g) serve as the Secretariat to the Ministerial Council and the Forum;

(h) collaborate with national fisheries authorities;

(i) formulate the Work Programme, prepare and submit the Budget of the Mechanism to the Forum;

(j) implement the Work Programme recommended by the Forum and approved by the Ministerial Council, including the preparation of such technical and scientific papers as may be required;

(k) provide management and development advice and assistance, particularly in the areas of co-ordination, communication and technical scientific operations;

(l) establish, in consultation with the Member States, and where appropriate and approved by the Ministerial Council, a network of relationships comprising non-CARICOM States as well as CARICOM and non-CARICOM organisations, bodies and institutions whose work and interest coincide with that of the Mechanism;

(m) develop projects for execution both in the Member States and regionally;

(n) seek and mobilise financial and other resources in support of the functions of the Mechanism;

(o) represent the Mechanism or, at the request of any Member State or group of Member States, represent them at meetings of international bodies and organisations which are concerned with fisheries in the Caribbean and whose objectives and activities coincide with those of the Mechanism;

(p) *receive applications for Associate Membership or Observer Status and make recommendations in respect of such applications to the Forum;*

(q) *address urgent or ad hoc requests outside of the regular Work Programme presented by Member States;*

(r) *collaborate with the Executive Committee between meetings of the Forum in the execution of its functions;*

(s) *recommend to the Forum the staff regulations of the Mechanism.*

Article 14
Decision-Making

1. *Every Member of the Mechanism shall have one vote in its deliberative organs. Every Associate Member shall have one vote in respect of matters for which it is eligible to vote.*

2. *Unless otherwise provided, decisions of the deliberative organs of the Mechanism shall be reached by consensus. In the absence of consensus decisions shall be deemed adopted, if supported by a qualified majority of three-quarters (¾) of the Member States comprising the Mechanism.*

3. *The quorum of the Ministerial Council shall be formed by two-thirds (•) of its Members. The quorum of the Forum shall be formed by two-thirds (•) of its Members and must include at least two-thirds (•) of the Member States of the Mechanism. The quorum of the Executive Committee shall be formed by at least three (3) / five (5) of the Member States of the Mechanism.*

4. *The Member States may vote in any organ or sub-committee of the Mechanism. Associate Members may participate in discussions in the Forum and its Sub-Committees but are eligible to vote only where decisions are being taken on management regimes to which they are parties or concerning fisheries which they share with other Member States.*

5. *Observers shall not have the right to vote at meetings of any of the organs comprising the Mechanism.*

6. *A Member State or Associate Member which is absent from a meeting of any organ or body of the Mechanism and is prejudiced by a decision taken at that meeting shall have the right to request a review of the decision, and the organ or body which took that decision shall review it.*

Article 15
Financing of the Mechanism

1. *Member States and Associate Members shall pay such annual contributions as are agreed by the Ministerial Council.*

2. *Observers shall pay such subscriptions as are levied from time to time for attendance at particular meetings of an organ of the Mechanism or at meetings of a Sub-Committee of the Mechanism.*

3. *Where a Member State is in arrears with its contribution and as a consequence thereof the Mechanism obtains overdraft facilities, the Member State in arrears shall bear the cost of the provision of such facilities.*

4. *The Technical Unit shall prepare annual accounts which shall be audited by the Auditors appointed by the Director of the Unit.*

5. *The Report of the Auditors shall be submitted to the Ministerial Council (MC) for consideration and approval.*

Article 15(bis)
The Reserve Fund

1. *The Mechanism shall establish a Reserve Fund along the lines set out in this Article.*

2. *The resources of the Reserve Fund shall consist of the following:*

   (a) grants from international donors and sponsors of the Mechanism;

   (b) grants from Member States and Associate Members;

   (c) grants from entities, public and private, which are not sponsors of the Mechanism;

   (d) unspent balances from the regular budgets of the Mechanism;

   (e) revenues derived from the operations of the Mechanism;

   (f) income from investments of the Mechanism.

3. *The resources of the Reserve Fund shall be used to finance as required the regular and capital budgets of the Mechanism.*

4. *Withdrawal of resources from the Reserve Fund shall require the prior authorisation of the Ministerial Council.*

5. *The resources of the Reserve Fund shall be held in such liquid form as the Ministerial Council may determine, provided that whenever it is in the interest of the Mechanism, the resources of the Reserve Fund may be invested in the securities of the Region.*

6. *Investments mentioned in paragraph 5 shall be made by the Director of the Unit with the approval of the Ministerial Council.*

7. *The finances of the Reserve Fund shall be audited annually by the auditors appointed by the Director of the Technical Unit (TU) to audit its accounts. The Report of the Auditors shall be submitted to the Ministerial Council for consideration and approval.*

Article 16
The Budget

1. *The Budget of the Mechanism shall be prepared by the Technical Unit and presented to the Ministerial Council for approval after examination and recommendation by the Forum.*

2. *The Budget shall be so prepared as to ensure financing of the Work Programme of the Technical Unit.*

3. *The Budget shall be approved by consensus, failing which it shall be approved by a qualified majority of three-quarters (¾) of the Members of the Mechanism.*

4. *The regular Budget shall comprise:*

   (a) annual contributions from Member States and Associate Members;

   (b) contributions from co-operating partners or other contributors;

   (c) grant funds received from regional and international donor agencies;

   (d) funds paid by donor agencies to the Mechanism for project execution services provided by the Mechanism with respect to projects financed by the donor agencies;

   (e) earnings above cost for special services provided by the Mechanism to commercial operators in the fishing industry and to other bodies;

   (f) income derived from the sale or the licensing of intellectual property created and owned by the Mechanism;

   (g) any other source of funding.

Article 17

Provisional Budgetary Measures

1. *The Mechanism is authorised to commit provisionally and pending approval of the Budget, expenditure not exceeding one-fifth (1/5) of the regular Budget for the previous year.*

2. *The Mechanism is also authorised to obtain overdraft facilities to this end.*

Article 18

Sanctions for Non-Payment of Contributions

1. *Subject to paragraph 2, a Member State whose contributions to the regular Budget of the Mechanism is in arrears for more than two years, shall not have the right to vote.*

2. *In exceptional circumstances to be determined by the Ministerial Council, a defaulting Member State may be permitted to vote pending the payment of its arrears of contributions.*

Article 19

Status, Privileges and Immunities

Member States shall accord to the Mechanism within their jurisdictions, the status, immunities, exemptions and privileges set out in Articles 20 to 27 in order to enable it to effectively fulfill its objectives and carry out the functions entrusted to it.

Article 20

Legal Status of the Mechanism

1. *The Mechanism shall possess full juridical personality and, in particular, full capacity to:*

   (a) contract;
   (b) acquire and dispose of moveable and immoveable property;

(c) institute legal proceedings.

2. *The Mechanism may enter into agreements with Member States, third States and other international organisations for the achievement of its objectives.*

3. *In any legal proceedings, the Mechanism shall be represented by the Director.*

Article 21
Legal Process

1. *The Mechanism shall be immune from every form of legal process, except in cases arising out of or in connection with the purchase of land, securities or merchantable commodities, in which cases actions may be brought against the Mechanism in a court of competent jurisdiction in the Territory of a Member State in which the Mechanism has an office or in a third State where the Mechanism has appointed an agent for the purpose of accepting service or notice of process.*

2. *Notwithstanding the provisions of paragraph 1, no action shall be brought against the Mechanism by a Member State or any agency thereof, or by any entity or person directly or indirectly acting for or deriving claims from a Member State. Member States shall have recourse to such special procedures for the settlement of disputes between the Mechanism and its Member States as may be provided for in this Agreement.*

3. *The Mechanism, its property and assets wheresoever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before delivery of final judgment against the Mechanism.*

4. *Nothing in this Agreement shall be construed as disentitling a person aggrieved by a motor vehicle accident from instituting legal proceedings against the Mechanism, its officials, representatives or experts.*

Article 22

Immunity of Assets and Archives

1. *Property and assets of the Mechanism, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.*

2. *The archives of the Mechanism and, in general, all documents belonging to or held by the Mechanism, shall be inviolable, wherever located.*

Article 23

Freedom of Assets from Restrictions

To the extent necessary to achieve the objectives and perform the functions of the Mechanism effectively, and subject to the provisions of the Agreement, the Mechanism:

(a) may hold assets of any kind and operate accounts in any currency;

(b) shall be free to transfer its assets from one country to another or within any country, and to convert any currency held by it into any other currency, without being restricted by financial controls, regulations or moratoria of any kind.

Article 24

Privilege for Communications

Official communications of the Mechanism shall be accorded by each Member State, treatment not less favourable than it accords to the official communications of any similar inter-governmental organisation.

Article 25
Privileges and Immunities of Mechanism Personnel

1. *Members and Advisers of the Ministerial Council and the Forum, Officials of the Mechanism and Experts performing missions for the Mechanism:*

   (a) *shall be immune from legal process in respect of acts performed by them in their official capacity;*

   (b) *shall, unless they are nationals, be accorded such immunities from immigration restrictions, alien registration requirements and national service obligations, and such facilities as regards exchange regulations as are not less favourable than those accorded by Member States concerned to the representatives, officials and experts of comparable rank of any other Member State;*

   (c) *shall be granted such repatriation facilities in time of international crisis as are not less favourable than those accorded by the Member States concerned to the representatives, officials and experts of comparable rank of any other Member State.*

2. *The Director shall notify Member States of the Officials and Experts to be accorded the immunities in paragraph 1.*

Article 26
Exemption from Taxation

1. *The Mechanism, its assets, property, income, operations and transactions shall be exempt from all direct taxation and from all customs duties on goods imported for its official use.*

2. *Notwithstanding the provisions of paragraph 1 of this Article, the Mechanism shall not claim exemption from taxes which are no more than charges for public utility services.*

3. *The Mechanism will not normally claim exemption from excise duties and from taxes on the sale of moveable and immoveable property which form part of the price to be paid.*

Nevertheless, where the Mechanism is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Member States shall, whenever possible, make appropriate administrative arrangements for the remission or the return of the amount of duty or tax.

4. *Articles imported under an exemption from customs duties as provided by paragraph 1 of this Article, or in respect of which a remission or return of duty or tax has been made under paragraph 3, shall not be sold in the territory of the Member State granting the exemption, remission or retrieve except under conditions agreed with the Member State.*

5. *No tax shall be levied on or in respect of salaries and emoluments paid by the Mechanism to the Directors, officials or experts performing missions for the Mechanism. However, Member States reserve the right to tax their own citizens, nationals or persons permanently resident in the territories of such Member States.*

Article 27
Waiver of Immunities, Exemptions and Privileges

1. *The exemptions, immunities and privileges provided in Articles 21-27 are granted in the interest of the Mechanism. The Council may waive to such extent and upon such conditions as it may determine, the immunities, exemptions and privileges provided in the said Articles in cases where such action would, in its opinion, be appropriate in the best interest of the Mechanism.*

2. *The Director shall have the right and duty to waive any immunity, exemption or privilege in respect of any official or expert performing a mission for the Mechanism where, in his opinion, the immunity, exemption or privilege would impede the course of justice and could be waived without prejudice to the interests of the Mechanism.*

3. *In similar circumstances and under the same conditions, the Ministerial Council shall have the right and duty to waive any immunity, exemption or privilege in respect of the Director.*

Article 28

Implementation

Every Member State shall take appropriate steps to make the provisions of Articles 21 - 27 effective within its jurisdiction and shall inform the Mechanism promptly.

Article 29

Questions of Interpretations and Application

1. *Any question of interpretation or application of the provisions of this Agreement not otherwise expressly provided for shall be submitted to the Ministerial Council for decision.*

2. *In any case where the Ministerial Council has given a decision under paragraph 1 of this Article, any Member State may require that the question be referred to an arbitral tribunal whose decision shall be final. Pending the decision of the arbitral tribunal, the Mechanism, as it considers necessary, may act on the basis of the decision of the Ministerial Council.*

Article 30

Constitution of Arbitral Tribunal

1. *Each Party to a dispute shall be entitled to appoint one arbitrator. The two arbitrators chosen by the parties shall be appointed within fifteen days following the decision to refer the matter to arbitration. The two arbitrators shall, within fifteen days following the date of their appointments, appoint a third arbitrator who shall be the Chairman. As far as practicable, the arbitrators shall not be nationals of any of the parties to the dispute.*

2. *Where either party to the dispute fails to appoint its arbitrator under paragraph 1, the Secretary-General shall appoint the arbitrator within ten days. Where the arbitrators fail to appoint a Chairman within the time prescribed, the Secretary-General shall appoint a Chairman within ten days.*

3. *Where more than two Member States are parties to a dispute, the parties concerned shall agree among themselves on the two arbitrators to be appointed within fifteen days following the decision to refer the matter to arbitration and the two arbitrators shall within fifteen days of their appointment appoint a third arbitrator who shall be the Chairman.*

4. *Where no agreement is reached under paragraph 3, the Secretary-General shall make the appointment within ten days and where the arbitrators fail to appoint a Chairman within the time prescribed the Secretary-General shall make the appointment within ten days.*

5. *Notwithstanding paragraphs 1, 2, 3 and 4, Parties to a dispute may refer the matter to arbitration and consent to the Secretary-General appointing a sole arbitrator who shall not be a national of a party to the dispute.*

Article 31

Rules of Procedure of Arbitral Tribunal

1. *Subject to the relevant provisions of this Agreement, the Arbitral Tribunal shall establish its own rules of procedure.*

2. *The procedures shall assure a right to at least one hearing before the Arbitral Tribunal as well as the opportunity to provide initial and rebuttal written submissions.*

3. *The Arbitral Tribunal's hearings, deliberations and initial report, and all written submissions to and communications with the Arbitral Tribunal, shall be confidential.*

4. *The Arbitral Tribunal may invite any Member State to submit views orally or in writing.*

5. *The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based.*

6. *Where the parties cannot agree on the interpretation or implementation of the award, either party may apply to the Arbitral Tribunal for a ruling within thirty days of the award. The term of the Arbitral Tribunal shall come to an end unless an application for a ruling has been received, in which case it shall continue for such reasonable time, not*

exceeding thirty days, as may be required to make the ruling.

7. *Decisions of the Arbitral Tribunal shall be taken by a majority vote of its members and shall be final and binding on the Parties to the dispute.*

Article 32

Third Party Intervention

A Member State which is not a party to a dispute, on delivery of a notification to the parties to a dispute and to the Secretary-General, shall be entitled to attend all hearings and to receive written submissions of the parties to a dispute and may be permitted to make oral or written submissions to the Arbitral Tribunal.

Article 33

Additional Information from Experts

Where proceedings have commenced, the Arbitral Tribunal may, on its own initiative or on the request of a party to the dispute, seek information and technical advice from any expert or body that it considers appropriate, provided that the parties to the dispute so agree and subject to such terms and conditions as the parties may agree.

Article 34

Expenses of Arbitral Tribunal

1. *The expenses of the Arbitral Tribunal, including the fees and subsistence allowances of arbitrators and experts engaged for the purposes of a dispute, shall be borne equally by the Member States Parties to the dispute unless the Arbitral Tribunal, taking into account the circumstances of the case, otherwise determines.*

2. *Where a third party intervenes in the proceedings, the party shall bear the costs associated with the intervention.*

Article 35

Entry Into Force

This Agreement shall enter into force upon the signature by any [7] of the States mentioned in paragraph 1 of Article 3.

Article 36

Accession

1. *Any country to which paragraph 1 of Article 3 applies may accede to this Agreement.*

2. *Instruments of Accession shall be deposited with the Secretary-General.*

Article 37

Associate Membership

1. *Any State or Territory mentioned in paragraph 2 of Article 3 may, upon application to the Forum for associate membership, be admitted as an Associate Member of the Mechanism in accordance with paragraph 2 of this Article.*

2. *Upon an application made pursuant to paragraph 1 of this Article, the Ministerial Council shall make a determination on the application. When the determination is in the affirmative, the Ministerial Council shall determine the conditions of associate membership.*

Article 38

Registration

This Agreement and any amendments thereto shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter.

Article 39

Withdrawal

1. *A Contracting Party may withdraw from this Agreement by giving one year's notice in writing to the Depositary who shall promptly notify the other Contracting Parties accordingly and the withdrawal shall take effect one year after the date on which the notice has been received by the Depositary, unless the Contracting Party before the withdrawal becomes effective notifies the Depositary in writing of the cancellation of its notice of withdrawal.*

2. *A Contracting Party that withdraws from this Agreement undertakes to honour any financial or other obligations duly assumed as a Contracting Party; this includes any matter relating to an appeal filed before withdrawal becomes effective.*

Article 40

Implementation

The Contracting Parties shall take all necessary action, whether of a legislative, executive or administrative nature, for the purpose of giving effect to this Agreement. Such action shall be taken as expeditiously as possible, and the Director shall be informed accordingly.

IN WITNESS WHEREOF *the undersigned duly authorised in that behalf by their respective Governments have executed this Agreement.*

DONE *at* _____ *on the* _____ *day of* _____ *2002.*

Signed by

for the Government of Antigua and Barbuda on the day of 2002 at

Signed by

for the Government of The Bahamas on the day of 2002 at

Signed by

for the Government of Barbados on the day of 2002 at

Signed by

for the Government of Belize on the day of 2002 at

Signed by

for the Government of the Commonwealth of Dominica on the day of 2002 at

Signed by

for the Government of Grenada on the day of 2002 at

Signed by

for the Government of the Co-operative Republic of Guyana on the day of 2002 at

Signed by

for the Government of Jamaica on the day of 2002 at

Signed by

for the Government of Montserrat on the day of 2002 at

Signed by

for the

Government of St. Kitts and Nevis on the day of 2002 at

Signed by

for the Government of Saint Lucia on the day of 2002 at

Signed by

for the Government of St. Vincent and the Grenadines on the day of 2002 at

Signed by

for the Government of The Republic of Suriname on the *day of*

2002 at

Signed by

for the Government of The Republic of Trinidad and Tobago on the *day of*

2002 at

Signed by

for the Government of Anguilla on the day of

2003 at

Signed by

for the Government of British Virgin Islands on the day of

2003 at

Signed by

for the Government of Haiti on the day of

2003 at

Signed by

for the Government of Turks and Caicos Islands on the day of

2003 at

Participating Member States of the Caribbean Regional Fisheries Mechanism as at February 2002 are:

Anguilla
Antigua and Barbuda
The Bahamas
Barbados
Belize
Dominica
Grenada
Guyana
Haiti
Jamaica
Montserrat
St. Kitts and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad and Tobago
British Virgin Islands
Turks and Caicos Island

Annex 3

MINISTRY OF AGRICULTURE AND FISHERIES OF JAMAICA, "IUU FISHING AND BORDER SECURITY ISSUES IN JAMAICAN WATERS," DISCUSSION PAPER SUBMITTED AT THE FOURTH MEETING OF THE MINISTERIAL COUNCIL OF THE CRFM, 20 MAY 2011, ST. JOHN'S, ANTIGUA

MINISTRY OF AGRICULTURE AND FISHERIES

JAMAICA

FOURTH MEETING OF THE MINISTERIAL COUNCIL OF THE CRFM SECRETARIAT

MAY 20, 2011

ST. JOHN'S, ANTIGUA

DISCUSSION PAPER

IUU FISHING AND BORDER SECURITY ISSUES IN JAMAICAN WATERS

IUU Fishing and Border Security Issues in Jamaican Waters

Discussion Paper

1.0 INTRODUCTION

It is widely recognized within the international fisheries management arena that illegal, unreported and unregulated (IUU) fishing depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal communities, particularly in developing countries. Estimates of the total size of IUU catch and its impact on the environment vary widely but the United Nations Food and Agriculture Organization (FAO) reported that for some important fishing areas, IUU fishing accounts for up to 30% of total catches and that for some species, IUU catches could be up to three times the permitted amount.

It is noteworthy that the fisheries sector represents a key renewable natural resource and provides a source of livelihood for thousands of Jamaicans as well as a source of export earnings. As such, the development and effective management of the country's fisheries can play an important role in Jamaica's sustainable growth and development.

2.0 BACKGROUND

Illegal harvesting of finfish and shellfish has been occurring in Jamaican waters over many decades resulting in a depletion of the country's fishery resources. This activity is carried out mainly by illegal poachers from Central America. As an example of the impact of poaching, it is noted that Jamaica produces approximately 400 Metric Tons (MT) of lobsters per year. Approximately one third of the country's production is exported and the local lobster industry makes about US$8M per year. A conservative estimate is that poachers take at least twice as much lobster as the country does, and at an average price of US$15 per pound; Jamaica has lost approximately US$132.3M over the past five years.

The Jamaican queen conch fishery faced a similar situation where losses due to poaching were at one time estimated as being over 400 MT. Since 2009 however, due to the intervention of the CITES, poaching for conch has reduced significantly albeit it still remains an issue.

Over the past year the Jamaica Defence Force (JDF) Coast Guard reported 42 sightings of multiple vessels poaching on the Pedro Bank, but was only able to apprehend three boats. Unfortunately, when these poachers are caught by the Coast Guard and are brought before the courts, the sanctions brought against them are very minor and do not act as a deterrent unless the vessel is forfeited by the courts.

3.0 JAMAICA'S BORDER SECURITY ISSUES

Two vessels were seized by the JDF Coast Guard towards the end of last year. These vessels contained lobster tails and meat totaling approximately 6,680 lbs. of lobster meat and 4,740 lbs. of lobster head meat. The crews of these vessels were taken before a special sitting of the Court on January 4, 2011 where one crew pleaded guilty and the other not guilty to the charges. The guilty plea was accepted and the vessel and catch ordered forfeited to the Crown and the crew ordered deported. The owner has since filed an appeal in the Supreme Court in respect of the forfeiture of the vessel. The crew of the other vessel has had several court appearances where they were eventually found guilty, fined and ordered deported. A forfeiture hearing is still pending in the court.

On Friday, January 7, 2011, the JDF Coast Guard intercepted a Honduran vessel that was found fishing illegally in Jamaican waters. Arising from this incident, it was reported that two Honduran fishermen were injured from an encounter with the Coast Guard. They were hospitalized in Jamaica, treated and repatriated as soon as they were able to safely travel. Their three (3) colleagues who accompanied them to Jamaica were

taken before the courts, found guilty of the charges and ordered deported after their fines were paid.

On May 8, 2011, the JDF Coast Guard intercepted a vessel of Nicaraguan registration fishing illegally on the North West Ridge of the Pedro Banks, well within Jamaica's archipelagic boundaries. This in and of itself is disturbing however, what is of greater concern to Jamaica is the fact that this vessel was fishing for sharks. Jamaica has videographic and photographic evidence of this activity. Eighty-six (86) sharks weighing approximately 2,000 pounds were seized.

These activities reflect the grave concern which Jamaica has for IUU fishing. In addition, it also brings into focus other trans-national issues as it relates to criminal activities and border security matters. Our intelligence reflects that there is a thriving business in the guns for drugs trade by virtue of using the fishing industry as a guise to carry on these illegal activities.

4.0 ADDRESSING IUU FISHING

There is a wide array of approaches which may be considered "best practice" when it comes to tackling IUU fishing; however it is prudent that these all start with developing and implementing sound governance and fisheries management practices inclusive of appropriate Monitoring, Control and Surveillance (MCS) arrangements.

Domestic Enforcement

The policy of the Government of Jamaica (GOJ) is to make sure that its laws, rules and regulations applicable to fisheries are adhered to, and to do this at a level of costs that is commensurate with its income from established revenue sources. To implement this policy, the GOJ plans to fully enforce the Fisheries Act and Regulations and other applicable instruments of law through actions of MCS affected by its different agencies

including the Coast Guard, Marine Police, the Fisheries Division, game and park wardens and through direct involvement of fishermen and fish farmers in co-management.

Sub-Regional Enforcement

(a) One of the major objectives of this policy is the ***control of access to the 200 nautical miles EEZ of Jamaica.*** The GOJ will carry out regular controls from the air and by sea to check on any violations by foreign craft. Jamaican vessels operating offshore will be encouraged, in their own interest, to report such violations. As a member of or participant in sub-regional or regional fisheries management organizations or arrangements, the GOJ will implement agreed measures adopted in the framework of such organizations or arrangements and consistent with international law to deter the activities of vessels flying the flag of non-members or non-participant countries where such vessels engage in activities that undermine the effectiveness of conservation and management measures established by the abovementioned organizations and arrangements.

(b) Vessel Monitoring System – The GOJ is committed to exploring and utilizing the most cost effective vessel monitoring systems as an efficient means of aiding MCS. However information and data sharing with regional neighbours is essential for an effective VMS programme – this is inclusive of shared fleets, satellite monitoring and shared access to databases.

Legislation Rationalization

(a) When possible, relevant legislations such as the Aquaculture, Inland and Marine Product and By-Product Act and the Fishing Industry Act will continue to be used to apply sanctions to poachers. However, the fines under these laws are very low. Examples of these fines are Eleven Dollars and Sixty Cents (USD$11.60) for

fishing without a license and Two Dollars and Thirty Three Cents (USD$2.33) for operating an unregistered vessel.

(b) Harmonization of relevant legislation among member states or across the region. Particularly for transboundary and/or highly migratory species such as lobsters and large pelagics, effective enforcement requires harmonization of certain legislative measures such as for example the synchronization of closed seasons for lobsters and conch.

Delimitation

Currently there are delimitation matters which are being resolved through negotiation between Jamaica, the countries named above and the Cayman Islands through the United Kingdom. On completion of these negotiations we expect that sovereign territories will be more clearly identified leading to fewer encumbrances in the monitoring, surveillance and enforcement of Jamaican waters. However, these negotiations have been taking place for over a decade whilst the illegal activities still persist.

5.0 PROPOSED ITEMS FOR DISCUSSIONS

While there may have been attempts to address some IUU fishing problems in the region, there is no indication that IUU fishing across the region as a whole is declining. Instead, there is reason to believe that the problem is likely to increase in the absence of significant intervention.

Recalling the current efforts by Council through the Castries (St. Lucia) Declaration on IUU, Jamaica requests that the Council note the concerns aforementioned and advances discussions on:

- **Proposals for immediate actions that may be taken to begin reducing the scourge of**

IUU fishing

- **Common regional IUU and enforcement issues**
- **Multilateral approaches to the inclusion of CARICOM neighbouring and extra-regional states in addressing trans-boundary IUU fishing and enforcement.**

6.0 CONCLUSION

There is no simple, single or short-term solution to IUU fishing as it is not just an issue for the fisheries sector. Successful responses will require holistic and integrated policies linked to the drivers for IUU fishing. Success will require independent action by States, bilateral action particularly by adjacent States, and multilateral action. It will involve greater commitment to and implementation of internationally recognized benchmarks for fisheries management and MCS.

Jamaica encourages the Honorable Ministers responsible for Fisheries to note these concerns and to discuss with their fellow Ministers responsible for National Security, Labour and Social Security in your respective States in respect of these very critical issues, so that we can find a regional solution in solving these problems which threaten all CARICOM States. If commitments endorsed by Ministers are implemented, this is an indication that states can be well placed to address and reduce the impact of IUU fishing.

Annex 4

CRFM MINISTERIAL COUNCIL, RESOLUTION OF THE SEVENTH MEETING HELD ON 31 MAY 2013

ISSN: 1995-4808

CRFM Management Report – PY 2013 / 14

VOLUME 2

REPORT AND PROCEEDINGS OF THE SEVENTH MEETING OF THE MINISTERIAL COUNCIL OF THE CARIBBEAN REGIONAL FISHERIES MECHANISM
31 MAY 2013

CHAIRPERSONS:

The Hon. Dr. David C. Estwick, M.P.
Minister of Agriculture, Food, Fisheries and Water Resource Management
BARBADOS

&

The Hon. Dr. Kenneth Darroux, M.P.
Minister of the Environment, Natural Resources, Physical Planning and Fisheries
DOMINICA

DATE AND VENUE:

Accra Beach Hotel and Spa
Rockley
Christ Church
BARBADOS

31 MAY 2013

CRFM Secretariat, Barbados
2013

CRFM Management Report – PY 2013 / 14. Volume 2. Report and Proceedings of the Seventh Meeting of the Ministerial Council of the Caribbean Regional Fisheries Mechanism, Accra Beach Hotel and Spa, Christ Church, Barbados, 31 May 2013

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ISSN # 1995-4808

Published by the Caribbean Regional Fisheries Mechanism Secretariat
Belize and St. Vincent and the Grenadines

Policy Statement on use of Ecosystem Approach to Fisheries

98. The **Executive Director** reported that the Ecosystem Approach to fisheries is promoted primarily by the FAO and referred to in various international fisheries instruments. He said that the Ecosystem Approach was viewed as a central pillar to achieving sustainable fisheries globally and within the wider Caribbean region.

99. The **Executive Director** indicated that the Ecosystem Approach was defined in the CFP and that the Council was being asked to formally adopt the use of this approach as a measure for the achievement of sustainable fisheries within the region.

100. The **Barbados Representative** suggested that additional training in the use of the Ecosystem Approach was required and cost effective strategies be identified for implementing the approach throughout the region.

The Ministerial Council:

Noted the discussions by the Forum on the Ecosystem Approach to Fisheries;

Acknowledged the need for further action at the regional, national and local levels to ensure long-term sustainable use and management of aquaculture and fisheries resources and marine biodiversity through the wide application of the ecosystem approach to fisheries and aquaculture;

Noted the provisions in the Draft Agreement Establishing the Caribbean Community Common Fisheries Policy for the application of the ecosystem approach to fisheries and aquaculture;

Called Upon all CRFM Member States and partner organisations to strengthen their commitment to and implementation of the ecosystem approach to fisheries and aquaculture through fisheries legislation, policies, plans and management arrangements at regional, national and local levels;

Reaffirmed and declared the ecosystem approach to fisheries and aquaculture as a key guiding principle for the CRFM, including network partner organisations such as CNFO and UWI, to ensure the long-term conservation and sustainable use of aquaculture and marine living resources;

Emphasized the need for further training in relation to the ecosystem approach to fisheries; and

Called upon the CRFM Secretariat to identify opportunities for additional training in respect to the ecosystem approach and to ensure that the strategies proposed for the implementation of this approach both at the regional and national levels are cost effective.

CLME Strategic Action Programme (SAP)

101. The **Project Coordinator** for the Caribbean Large Marine Ecosystem Project, Mr. Patrick Debels, reported on this item. He revealed that the project was co-funded by the GEF and implemented under the United Nations Development Programme in partnership with several other United Nations agencies and key regional stakeholders, of which, the CRFM is associated.

102. He said that the objective of the project was to promote the use of the Ecosystems Approach in respect to the sustainable management of the shared living marine resources within the Caribbean and North Brazil Shelf Large Marine

Annex 5

DRAFT AGREEMENT ESTABLISHING THE CARIBBEAN COMMUNITY COMMON FISHERIES POLICY (ADOPTED IN 2011)

Agreement establishing the Caribbean Community Common Fisheries Policy

The Participating Parties:

Being guided by the Principles and Rights enunciated in the Revised Treaty of Chaguaramas, which was signed by Heads of Government in Nassau, Bahamas on 5 July 2001, and by the Principles expressed in the Agreement establishing the Caribbean Regional Fisheries Mechanism, which was signed in Belize City, Belize on 4 February 2002;

Conscious of the decision of the Conference of Heads of Government of the Caribbean Community at the Fourteenth Inter-Sessional Meeting held in Trinidad and Tobago, 14 to 15 February 2003, to elaborate a Common Fisheries Regime;

Conscious also of the directive of the Ministers responsible for fisheries at the First Meeting of the Ministerial Council of the Caribbean Regional Fisheries Mechanism, held in Saint Vincent and the Grenadines on 16 January 2009, to elaborate the Common Fisheries Policy and defer consideration of matters relating to the Common Fisheries Regime;

Committed to fostering cooperation and collaboration among Participating Parties in the conservation, management and sustainable utilisation of fisheries resources and related ecosystems for the welfare and well-being of the peoples of the Caribbean;

Mindful of the relevant provisions of the 1982 United Nations Convention on the Law of the Sea; the 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region; the 1990 Protocol concerning Specially Protected Areas and Wildlife in the Wider Caribbean; the 1992 United Nations Convention on Biological Diversity; the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas; the 1994 Barbados Programme of Action for the Sustainable Development of Small Island Developing States; the 1995 FAO Code of Conduct for Responsible Fisheries; the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; the 2002 Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development; the 2005 Mauritius Strategy for the Implementation of the Barbados Programme of Action; and the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;

Recognising the Caribbean Sea as a large marine ecosystem that is shared by Members of the Caribbean Community and non- Member States and Territories;

Recognising also the importance of fisheries to social and economic development, food and nutrition security and the welfare of the peoples of the Caribbean;

Conscious that there exists within the jurisdiction of Participating Parties underexploited or unexploited fisheries resources of great value which represent a safeguard for the future development of fisheries and, when used sustainably, present

an opportunity to increase the contribution of fisheries to the social and economic development of the Caribbean Community;

Aware that many commercial species are fully or overexploited and are in need of management, conservation and rehabilitation;

Aware also that certain living marine resources, which are of interest to the peoples of the Caribbean, are shared, straddling or highly migratory and in some cases are harvested by Third States;

Conscious of the need to promote the sustainable utilisation of fisheries resources and the need to protect associated ecosystems through the efficient development, management and conservation of such resources;

Noting that Article 60 of the Revised Treaty provides that the Caribbean Community, in collaboration with competent national, regional and international agencies and organisations, shall promote the development, management and conservation of the fisheries resources in and among the Members of the Caribbean Community on a sustainable basis;

Noting also that Article 4(a) of the Agreement establishing the Caribbean Regional Fisheries Mechanism has among its objectives the efficient management and sustainable development of marine and other aquatic resources within the jurisdictions of the Members of CRFM;

Determined to ensure the long-term sustainable utilisation and conservation of the living aquatic resources within the jurisdictions of Participating Parties;

Recalling the United Nations General Assembly Resolutions supporting sustainable ocean management in the Caribbean;

Convinced that the implementation of the Caribbean Community Common Fisheries Policy will contribute to the enhanced treatment of the Caribbean Sea as a special area in the context of sustainable development;

Recognising the need to develop the Caribbean Community Common Fisheries Policy in consultation with all relevant parties, including representatives of fisherfolk organisations;

Have agreed as follows:

Article 1 Definitions

For the purpose of this Agreement, the following definitions shall apply:

(a) "access agreement" means an agreement concluded between or among Participating Parties or between or among one or more Participating Parties and one or more Third States, for the purpose of exploiting the fisheries resources of a State or group of States;

(b) "aquaculture" means all activities in fresh, brackish or salt waters aimed at the husbandry or culturing of fish or aquatic flora and includes ranching and hatchery-reared re-stocking practices;

(c) "aquatic flora" means any aquatic plant, including parts or derivatives;

(d) "Competent Agency" means an organisation designated by Participating Parties to support them in achieving the objectives of this Agreement;

(e) "conservation" means the maintenance, improvement and use of natural resources according to principles that will assure both the sustainability of those resources and economic and social benefits for present and future generations;

(f) "ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit;

(g) "ecosystem approach to fisheries management" means the balancing of diverse societal objectives, by taking account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries;

(h) "fish" means any aquatic animal, including parts and derivatives;

(i) "fisheries management and development plan" means a specific plan, policy or strategy for the management and development of single-species or multi-species fisheries in a sustainable manner;

(j) "fisheries resources" means any harvestable fish or aquatic flora, natural or cultured;

(k) "fishing" means:

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

ii) engaging in any activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fisheries resources, for any purpose;

iii) placing, searching for or recovering fish aggregating devices or associated electronic equipment, such as radio beacons;

iv) 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 transhipment; and

v) use of any other vessel, vehicle, aircraft or hovercraft, for any activity described in paragraphs (i) to (iv),

but does not include any operation related to emergencies involving the health or safety of crew members or the safety of a vessel;

(l) "fishing effort" means the level of fishing, as may be defined, *inter alia*, by the number of fishing vessels, the number of fishers, the amount of fishing gear and technology that may enhance catchability and the time spent on fishing or searching for fish;

(m) "fishing vessel" means any vessel, boat, ship or other craft, including associated equipment, which is used for or is intended to be used for fishing;

(n) "Participating Party" means any State or Territory that has signed or acceded to this Agreement;

(o) "precautionary approach to fisheries management" means an approach to management according to which:

i) Participating Parties shall be more cautious when information is uncertain, unreliable or inadequate; and

ii) the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures;

(p) "Revised Treaty" means the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, signed by Heads of Government in Nassau, Bahamas on 5 July 2001;

(q) "Secretary-General" means the Secretary-General of the Caribbean Community;

(r) "SPS" means sanitary and phytosanitary standards;

(s) "stock" means fisheries resources in a given management area; and

(t) 'Third State" means a State or Territory that is not a party to this Agreement.

Article 2 Establishment of the Caribbean Community Common Fisheries Policy

This Agreement establishes the Caribbean Community Common Fisheries Policy.

Article 3 Participation

Participation in this Agreement is open to:

(a) Members of the Caribbean Community, in accordance with Article 25 or Article 26; and

(b) any other Caribbean State or Territory that is, in the opinion of the Participating Parties, able and willing to exercise the rights and assume the obligations under this Agreement, in accordance with Article 26.

Article 4 Vision, Goal and Objectives

4.1 Vision

The vision of the Caribbean Community Common Fisheries Policy is effective cooperation and collaboration among Participating Parties in the conservation, management and sustainable utilisation of the fisheries resources and related ecosystems in the Caribbean region in order to secure the maximum benefits from those resources for the Caribbean peoples and for the Caribbean region as a whole.

4.2 Goal

The goal of the Caribbean Community Common Fisheries Policy is to establish, within the context of the Revised Treaty, appropriate measures for: the conservation, management, sustainable utilisation and development of fisheries resources and related ecosystems; the building of capacity amongst fishers and the optimisation of the social and economic returns from their fisheries; and the promotion of competitive trade and stable market conditions, so as to realise the vision expressed in Article 4.1.

4.3 Objectives

The objectives of the Caribbean Community Common Fisheries Policy are to:

(a) promote the sustainable development of fishing and aquaculture industries in the Caribbean region as a means of, *inter alia*, increasing trade and export earnings, protecting food and nutrition security, assuring supply to Caribbean markets and improving income and employment opportunities;

(b) develop harmonised measures and operating procedures for sustainable fisheries management, post-harvest practices, fisheries research and fisheries trade and the administration of the fishing industry;

(c) improve the welfare and livelihoods of fishers and fishing communities;

(d) prevent, deter and eliminate illegal, unreported and unregulated fishing, including by promoting the establishment and maintenance of effective monitoring, control, and surveillance systems;

(e) build the institutional capabilities of Participating Parties, *inter alia*, to conduct research, collect and analyse data, improve networking and collaboration among Participating Parties, formulate and implement policies and make decisions;

(f) integrate environmental, coastal and marine management considerations into fisheries policy so as to safeguard fisheries and associated ecosystems from anthropogenic threats and to mitigate the impacts of climate change and natural disasters;

(g) transform the fisheries sector towards being market-oriented, internationally-competitive and environmentally-sustainable, based on the highest international standards of quality assurance and sanitary and phytosanitary systems;

(h) strengthen, upgrade and modernise fisheries legislation; and

(i) facilitate the establishment of a regime for SPS for the fisheries sector.

Article 5 Fundamental Principles

The following fundamental principles shall guide the implementation of this Agreement:

(a) use of the best available scientific information in fisheries management decision-making, taking into consideration traditional knowledge concerning the resources and their habitats as well as environmental, economic and social factors;

(b) application of internationally-recognised standards and approaches, in particular the precautionary approach to fisheries management and the ecosystem approach to fisheries management;

(c) the principle that the level of fishing effort should not exceed that commensurate with the sustainable use of fisheries resources;

(d) the participatory approach, including consideration of the particular rights and special needs of traditional, subsistence, artisanal and small scale fishers;

(e) principles of good governance, accountability and transparency, including the equitable allocation of rights, obligations, responsibilities and benefits; and

(f) the principle of subsidiarity, in particular that the Competent Agency will only perform those tasks which cannot be more effectively achieved by individual Participating Parties.

Article 6 Scope

6.1. The Agreement shall apply to: the development and management of fisheries and aquaculture; the conservation, sustainable development and management of fisheries resources and related ecosystems; the production, processing, marketing and trading of fishery and aquaculture products; and to the welfare of fishers.

6.2. The Agreement shall 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.

Article 7 General Undertakings on Implementation

7.1. Participating Parties shall take all appropriate measures to secure the fulfilment of obligations arising under this Agreement and shall abstain from any measures which could jeopardise the attainment of its objectives.

7.2. Participating Parties undertake to adopt, as appropriate, detailed rules for the implementation of this Agreement, in particular by preparing Protocols in accordance with Article 20.

7.3. Participating Parties undertake to establish or designate a regional organisation as the Competent Agency with responsibility for implementing this Agreement and, as appropriate, any Protocols adopted under it and, if necessary, to establish such an organisation by means of a Protocol adopted under Article 20.

Article 8 Role of the Competent Agency

8.1. The Competent Agency, where requested by one or more Participating Parties, and in accordance with the principle of subsidiarity in Article 5(f), shall cooperate with and provide assistance to those Participating Parties in order to support them in achieving the objectives of this Agreement or in discharging their obligations under it.

8.2. The functions which may be performed by the Competent Agency pursuant to Article 8.1, shall include:

(a) providing technical assistance and advice in connection with the implementation of this Agreement, including where appropriate technical assistance and advice on national policy, management or law or on subregional, regional or global policy, management or law;

(b) making recommendations on any of the matters referred to in paragraph (a);

(c) coordinating or undertaking data collection, research and development activities;

(d) providing coordination or cooperation facilities, services or mechanisms, as may be required to fulfil the objectives of this Agreement;

(e) identifying and mobilising technical and financial resources, in collaboration with multilateral and bilateral donor agencies, to build the research, administrative and management capacities of Participating Parties;

(f) supporting Participating Parties in their relations with Third States, directly or in relevant international organisations, including by providing representation at the international level of the Participating Parties collectively;

(g) any other functions which may be requested by one or more Participating Parties for purposes related to implementation of this Agreement.

8.3. In providing assistance and facilitation under Article 8.1 and in carrying out its functions under this Agreement, the Competent Agency shall:

(a) give effect, as far as possible, to the Vision, Goal and Objectives set out in Article 4; and

(b) be guided by the Principles set out in Article 5 and by applicable principles set out in the Community Agricultural Policy and the Fisheries Management and Development provisions of the Revised Treaty and by principles provided for in any other applicable international agreements concerning fisheries.

8.4. Participating Parties and the Competent Agency shall agree on rules of procedure, including as necessary any budgetary contributions or other financial regulations, for the carrying out functions by the Competent Agency under this Agreement.

8.5. The Participating Parties shall review the role and functions set out for the Competent Agency by this Agreement and if necessary shall modify, supplement or remove those functions by means, as appropriate, of a Protocol adopted under Article 20 or by amendment to this Agreement under Article 22.

Article 9 Access to Fisheries Resources

9.1. Without prejudice to the jurisdiction and authority of Participating Parties over fisheries resources in areas under their national jurisdiction, and existing obligations under the Revised Treaty, Participating Parties may consider entering into:

(a) arrangements, including access agreements, with other Participating Parties for the purpose of providing access to fishing opportunities in their waters; and

(b) such arrangements or access agreements with Third States or international organisations; and

in doing so, subject to the limits of their capabilities, shall take account of the applicable provisions of the United Nations Convention on the Law of the Sea and other instruments, including the objective of optimum utilisation and the provision of access to surplus fisheries resources.

9.2. Participating Parties shall seek to:

(a) develop opportunities and to promote the equal participation of Participating Parties in fisheries on the high seas, and

(b) develop opportunities in areas within the national jurisdiction of Third States,

and to this end shall collaborate directly or through the Competent Agency and other competent regional and international fisheries bodies.

Article 10 Fisheries Sector Development

Participating Parties, to the extent of their capabilities, will endeavour to promote and adopt measures to enhance the development of the fisheries and aquaculture sectors and to improve the welfare and socio-economic conditions of fishers and fishing communities, including, *inter alia*, by:

(a) improving the business, financial and insurance environment;

(b) promoting and facilitating joint ventures;

(c) promoting access to training;

(d) supporting capital investment;

(e) promoting the involvement of stakeholders, in particular in planning and management activities, including by supporting the formation and strengthening of fisherfolk organisations; and

(f) supporting and protecting the rights of traditional, subsistence, artisanal and small-scale fishers.

Article 11 Statistics and Research

The Participating Parties, acting directly and, where appropriate, in collaboration with other Participating Parties, Third States, the Competent Agency or relevant international organisations, and in an effort to achieve the objectives of this Agreement, are required, *inter alia,* to:

(a) collect and compile fisheries catch and fishing effort, registration and licensing data as well as biological, ecological, economic, social, aquaculture and any other relevant data;

(b) conduct research in order to:

i) ascertain the status of fish stocks;

ii) determine the effects of environmental changes on fisheries and aquatic ecosystems;

iii) analyse the effectiveness of management and conservation measures;

iv) evaluate the social and economic performance of fisheries and aquaculture;

v) determine the development potential of underutilised and unutilised fisheries resources; and

vi) otherwise contribute to the fulfilment of an objective of this Agreement;

(c) develop and maintain national and regional databases relating to (a) and (b) and develop and adopt appropriate standards for data and information sharing ; and

(d) analyse data and information collected and, subject to any confidentiality requirements, to disseminate it periodically to Participating Parties and the Competent Agency.

Article 12 Conservation and Management of Fisheries Resources

12.1. The Participating Parties shall formulate, adopt, implement and revise conservation and management measures and, where appropriate, fisheries management and development plans on the basis of the best available information, including traditional knowledge.

12.2. The Participating Parties shall formulate, adopt and implement conservation and management measures and development strategies on the basis of:

(a) fisheries management and development plans and other fishery-specific conservation, management and recovery plans;

(b) the Fundamental Principles set out in Article 5; and

(c) as appropriate, other provisions of this Agreement and other relevant international standards in fisheries management.

12.3. In implementing Article 12.1, Participating Parties shall, where appropriate, seek to adopt harmonised measures, legislation, plans or strategies.

12.4. The Participating Parties shall cooperate with regional fisheries management organisations and, as appropriate, other international organisations in the management of shared, straddling and highly migratory fish stocks.

12.5. Participating Parties shall discourage the use of measures and practices that will contribute to unsustainable fishing.

Article 13 Registration and Licensing

13.1. Participating Parties shall take into account the status of available fisheries resources and existing fishing capacity when registering and licensing fishing vessels, fishers and other operators in the fisheries and aquaculture sector.

13.2. In order to maintain the balance between fishing capacity and fisheries resources, Participating Parties, to the extent of their capabilities, shall, *inter alia*:

(a) establish and maintain a national register of fishing vessels flying its flag;

(b) establish and maintain a national licensing system for fishing vessels flying its flag;

(c) establish and maintain a record of licences or authorisations issued to fishing vessels, fishers and other operators in the fisheries and aquaculture sector; and

(d) cooperate with the Competent Agency to establish and maintain a regional fishing fleet register.

13.3. In implementing Article 13.2, Participating Parties, where appropriate through the Competent Agency, shall consider the development of harmonised procedures or common standards in relation to licensing systems.

13.4. The Participating Parties shall, in accordance with agreed procedures, share with the Competent Agency information collected through the national registers established under Article 13.2(a) and the records under Article 13.2(c) for the purpose of maintaining a regional register under Article 13.2(d).

Article 14 Inspection, Enforcement and Sanctions

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;

(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.

14.3. In implementing Article 14.1, Participating Parties shall, *inter alia*:

(a) 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;

(b) establish an appropriate vessel monitoring system to monitor the position and activity of vessels flying their flag;

(c) adopt port and "at sea" inspection schemes;

(d) take inspection and enforcement measures necessary to ensure compliance with the rules of this Agreement;

(e) ensure that appropriate and effective measures are taken against violators of the applicable rules and in particular that such measures are capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements and of producing results proportionate to the seriousness of such infringements.

Article 15 Confidentiality and Intellectual Property Rights

15.1. Participating Parties shall retain ownership of any data, information or product made available to other Participating Parties or to the Competent Agency as a result of the implementation of this Agreement.

15.2. All intellectual property rights in data, documents and products developed by the Competent Agency in the course of implementing this Agreement shall, subject to and in accordance with any relevant contractual obligation, belong to the Competent Agency.

15.3. All intellectual property rights in data, documents and products developed by the Competent Agency from material made available by one or more Participating Parties shall jointly belong to the Competent Agency and the Participating Parties involved.

15.4. The Competent Agency shall make available to public institutions and others, for non-commercial and educational purposes, such of its informational products as it considers appropriate.

15.5. The Competent Agency and Participating Parties shall maintain the confidentiality of any proprietary information or any other information provided on a confidential basis by any other Participating Party and shall refrain from disclosing such information to third parties or using it for purposes other than those for which it was provided.

15.6. The identity of individuals from whom research data or information is obtained shall be kept strictly confidential. No information revealing the identity of any individual shall be included in any report or other communication, unless the individual concerned has given prior consent in writing to such inclusion.

Article 16 Dissemination of Information

16.1. Participating Parties shall disseminate to other Participating Parties and to the Competent Agency:

(a) statistical data on fisheries;

(b) information on research findings;

(c) information on proposed management programmes;

(d) information resulting from implementation of management programmes; and

(e) information on the activities taken for the implementation of this Agreement.

16.2. Participating Parties and the Competent Agency shall disseminate relevant information to stakeholders to enable them to be familiar with regional and international developments in fisheries and thereby facilitate informed decision-making and widespread acceptance of and participation in this Agreement.

16.3. Participating Parties shall promptly notify the Competent Agency and other Participating Parties of any localised threats, whether actual or potential, to their fisheries and marine ecosystems which may cause harm to the fisheries resources, environment or economic interest of other Participating Parties.

16.4. Nothing in this Agreement shall be deemed to require a Participating Party, in fulfilment of its obligations under this Agreement, to supply information, the disclosure of which is contrary to its national security interests.

Article 17 Public Awareness

The Participating Parties shall promote public awareness of good conservation, exploitation and management policies and practices in relation to this Agreement by, *inter alia:*

(a) informing stakeholders of the status of this Agreement;

(b) strengthening regional and subregional institutions working with citizens, especially fishers and fishing communities, with a view to increasing knowledge and understanding of methods of conserving, sustaining and preserving living aquatic resources and of avoiding overexploitation of them;

(c) collaborating with relevant educational institutions to introduce sustainable use of living aquatic resources into their programmes;

(d) establish research and education programmes to raise awareness of the impact of global warming, climate change, sea level rise and other environmental changes on the fisheries sector; and

(e) promoting recognition of the Caribbean Sea as a special area in the context of sustainable development.

Article 18 Marketing and Trade of Fisheries Resources

18.1. The Participating Parties, acting where appropriate in collaboration with other Participating Parties, Third States, the Competent Agency or relevant international organisations, and in an effort to achieve the objectives of this Agreement, shall develop, *inter alia*:

(a) harmonised food quality assurance legislation;

(b) harmonised intra-regional SPS measures;

(c) common marketing standards for fisheries and aquaculture products; and

(d) national or common policies, measures and standards to:

i) encourage stable market conditions;

ii) promote the production and marketing of fishery products;

iii) develop new and existing markets in fishery products including external markets for the Caribbean region's fisheries products;

iv) enhance intelligence on developments in internal and external markets at all levels;

v) facilitate trade between the Participating Parties;

vi) strengthen relevant human, institutional and technological capacities, including the transfer and development of relevant technologies; and

vii) otherwise improve the management of fish-handling practices, marketing or trade in the Participating Parties.

18.2. In implementing Article 18.1, Participating Parties shall act consistently with their obligations under relevant international agreements, and in particular those under the Revised Treaty and the World Trade Organisation agreements, where applicable, and shall also take into account relevant international standards on trade, marketing and SPS.

Article 19 Links with International Organisations

In order to promote the objectives of this Agreement, the Competent Agency shall facilitate the development of strategic alliances and partnerships with relevant agencies created by multilateral environmental agreements as well as regional fisheries

management organisations and arrangements and other relevant national, regional and international agencies and organisations, whether governmental or non-governmental.

Article 20 Protocols

20.1. Participating Parties undertake to prepare Protocols relating to:

(a) the Competent Agency;

(b) research on fisheries and associated ecosystems;

(c) harmonisation of fisheries legislation;

(d) cooperation in monitoring, control and surveillance to combat illegal, unregulated and unreported fishing;

(e) establishment of a common fisheries zone;

(f) aquaculture;

(g) establishment of a regional fisheries management organisation or arrangement;

(h) sanitary and phytosanitary measures;

(i) data and information sharing;

(j) enforcement;

(k) settlement of disputes; and

(l) any other matter for which protocols are necessary for the implementation of this Agreement.

20.2. Pending the preparation of the Protocols set out in Article 20.1, Participating Parties may cooperate on arrangements of a provisional nature in the above fields.

20.3. Participating Parties shall agree, with respect to each Protocol, on the procedure for the preparation and adoption of each Protocol.

20.4. Protocols which have been concluded under this Agreement shall form an integral part of this Agreement and, unless expressly provided otherwise, a reference to this Agreement includes a reference to the Protocols.

Article 21 Reporting, Review and Development

21.1. The Competent Agency shall submit annual reports to the Council for Trade and Economic Development (COTED) and the Council for Foreign and Community Relations (COFCOR) on the implementation of this Agreement.

21.2. Participating Parties shall, in light of changing circumstances, and in any event no later than 5 years after its entry into force, review this Agreement, as may be required to achieve its vision, goal and objectives.

21.3. The review and development referred to in Article 21.2 may include, *inter alia*:

(a) consultation with stakeholders to assess the impacts of this Agreement and, if required, development of proposals for its implementation or amendment;

(b) provision by the Competent Agency of technical support for the consultations and the analysis of the consultation results in order to inform decision-making;

(c) such other formal procedures or other methods as Participating Parties consider necessary to facilitate the implementation of this Agreement.

Article 22 Amendments

22.1. A Participating Party may, by written communication addressed to the Secretary-General, propose an amendment to this Agreement.

22.2. This Agreement may be amended by the unanimous decision of the Participating Parties.

22.3. An amendment to this Agreement shall enter into force one month after the date on which the last Participating Party has signed the amendment or such other date as the Participating Parties have agreed.

Article 23 Dispute Settlement

The procedures for the settlement of disputes set out in the Revised Treaty shall apply *mutatis mutandis* to the settlement of disputes concerning the interpretation or application of this Agreement, whether or not the parties to the dispute are Parties to the Revised Treaty.

Article 24 Depositary

The Secretary-General shall be the depositary of this Agreement and any amendments or revisions thereto. The depositary shall register this Agreement with the Secretary-General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

Article 25 Signature

This Agreement is open for signature by any Member of the Caribbean Community.

Article 26 Accession

Members of the Caribbean Community and, subject to the consent of a majority of Participating Parties, any other Caribbean State or Territory, may accede to this Agreement after it has entered into force.

Instruments of Accession shall be deposited with the Secretary-General who shall transmit certified copies to Participating Parties.

Article 27 Entry into Force

This Agreement shall enter into force signature by eight Members of the Caribbean Community under Article 25.

Article 28 Withdrawal

28.1. A Participating Party may withdraw from this Agreement by giving written notice to the Secretary-General. The withdrawal shall take effect one year after the date of notification unless the notification specifies a later date.

28.2. A notification given under Article 28.1 may be cancelled at any time before it becomes effective by giving further written notice to the Secretary-General.

28.3. The Secretary-General shall promptly notify the other Participating Parties of any notification received under Article 28.1 or 28.2.

28.4. Withdrawal from this Agreement shall not:

(a) affect any financial obligations incurred by the withdrawing Participating Party prior to its withdrawal becoming effective; or

(b) remove or limit any obligations in respect of confidentiality of data or intellectual property rights to which the withdrawing Participating Party was subject prior to its withdrawal becoming effective.

IN WITNESS WHEREOF the Participating Parties, being duly authorised thereto, have appended their signature to this Agreement.

DONE AT , this day of Two Thousand and Eleven.

Annex 6

"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

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

The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources

I. Introductory remarks

It is well known that the current state of global fisheries is alarming. Experts agree that the causes of unsustainable fisheries are complex and due to many factors: illegal fishing; overfishing; inadequate or ineffectively implemented conservation and management measures; disregard for the interdependency of marine living resources; and environmental degradation, to mention but a few. The main factor may be illegal, unregulated and unreported fishing ("IUU fishing"). What has become clear to the international community in the last few years is that IUU fishing not only seriously undermines efforts to conserve and manage fishery resources but also has serious economic implications for some of the poorest countries in the world, which are dependent on fisheries for their food, livelihood and revenue, to quote from *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 (page 16).*

Customary international and treaty law have developed sophisticated legal regimes governing the utilization and management of maritime resources. At the heart of the oceans regimes are the fundamental freedoms of the high seas, which include freedom of navigation and freedom of fishing. All States have the freedoms of the high seas, which they exercise primarily through the vessels flying their flags. The management of living resources rests with organs and institutions of the international community. Since the adoption of the rudimentary rules in this respect by the United Nations Convention on the Law of the Sea ("the Convention"), several international instruments have been developed. Compared with the Convention, those instruments follow a different, more ecologically-oriented approach. In the exclusive economic zones, the management of marine living resources falls under the competence of the respective coastal State. However, when drawing up appropriate measures, coastal States do not have total freedom. In coastal and archipelagic waters, it is again the coastal States which manage marine resources. In these areas the influence of international law is limited. In general, it is safe to say that international law distributes the prescriptive and the executive functions for the management of marine living resources between coastal States, organs and institutions of the international

community and flag States. It is obvious that such a system, involving several actors, requires dispute-settlement mechanisms. Before I deal with the potential role of the International Tribunal for the Law of the Sea in this respect, let me briefly explain the distribution of competences as outlined by the Convention and later modified or supplemented by specific international agreements.

II. The sectoral approach to fishing

a) *In the territorial sea and archipelagic waters*

The territorial sea and archipelagic waters are part of the territory of a coastal State. As a rule, fishing activities in these two maritime zones fall under the exclusive jurisdiction of the coastal State. The Convention does not give coastal States specific guidance as to how to exercise their law-making jurisdiction over the management and conservation of living resources in these zones. Foreign vessels exercising the right of innocent passage in the territorial sea and through archipelagic waters are not allowed to engage in fishing activities. In addition, foreign ships exercising the right of innocent passage have to comply with the laws and regulations of the coastal State with respect to the conservation of the living resources of the sea and the prevention of infringement of fisheries laws and regulations. It may, however, be argued that, in exercising their sovereign rights as concerns marine living resources, coastal or archipelagic States have to take into account article 193 of the Convention. According to that provision, they have the sovereign right to exploit their natural resources in accordance with their environmental policies and their duty to protect and preserve the marine environment. This means that the respective international rules on the protection of the marine environment come into play. Those international rules were very basic when the Convention was adopted, now they are beginning to take on substance.

b) *In the exclusive economic zone*

The main competence for establishing legislative measures for the conservation and management of living resources in the exclusive economic zone falls on the coastal State. Paragraph 4 of article 62 of the Convention confirms the

primacy of the competence of the coastal State to regulate fishing in the exclusive economic zone for aspects such as fishing licences, fishing gear, fishing season, etc. The list contained in article 62, paragraph 4, is not exhaustive. However, when designing its policy on the management of living resources in the exclusive economic zone, a coastal State is not totally free, as article 61, paragraph 2, of the Convention clearly indicates. The coastal State must ensure that the living resources in the exclusive economic zone are not overexploited. There is also the obligation to maintain populations at or restore them to levels which can produce the maximum sustainable yield, taking account of the interdependence of stocks and any internationally recommended minimum standard.

Under article 73 of the Convention, the coastal State has the right to enforce fisheries and conservation regulations in the exclusive economic zone. Paragraph 1 of article 73 authorizes the coastal State to take such measures as may be necessary to ensure compliance with its laws and regulations, including boarding, inspection, arrest and judicial proceedings.

The coastal State's jurisdiction to legislate and enforce laws and regulations in the exclusive economic zone is a logical and perfect corollary to its exclusive sovereign rights to explore, exploit, manage and conserve living resources in that zone. These jurisdictional competences have to be respected by the flag State, which has to make every effort to ensure that coastal States implement them efficiently.

What is the role in this respect of flag States whose vessels fish in exclusive economic zones of other States? The Convention says nothing explicitly on this subject. Nevertheless, the role of the flag State is not as restricted as is it may seem. It 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. To uphold that obligation, two lines of argument may be invoked. The first is that international law, based at it is upon the sovereign equality of States and mutual respect, requires States to make every effort to ensure that no activities are carried out under their jurisdiction that might undermine activities which are performed by others covered by their jurisdiction and which are in conformity with international law. Secondly, as far as the protection of the marine environment is concerned, it may be argued that there

is a mutual obligation to reinforce each other's efforts to manage and conserve the marine environment. It may further be argued that every effort made to conserve and manage marine living resources – be it at national or international level – also serves common interests. This again would call for mutual respect and the enforcement of national measures.

In the case of straddling fish stocks, the Convention goes a step further. Article 63 of the Convention calls for cooperation between the flag State and the coastal State in the area adjacent to the exclusive economic zone, but not within the exclusive economic zone itself. This is in keeping with the principle of exclusivity of coastal States' rights and jurisdiction over living resources in the EEZ. Article 63 of the Convention has been criticised for not providing substantive guidance as to how the problems of regulating migratory stocks should be addressed.

Flag States whose nationals fish for highly migratory species that occur both within the exclusive economic zone and beyond have a duty to cooperate with the coastal State directly or through appropriate international organizations, to ensure that such species are preserved and used optimally throughout the region. If there is no regional organization, the flag State whose nationals harvest such species and the coastal State should cooperate to establish an organization in the region and participate in its work (Convention, article 64, paragraph 1).

c) On the high seas

Article 87 provides that States are free to fish on the high seas but, as article 116 of the Convention states, the freedom to fish is not absolute: it is subject to the following limitations:

- the State's treaty obligations;
- the rights, duties and interests of coastal States provided for, *inter alia*, in article 63, paragraphs 1 and 2 (for stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it) and articles 64 to 67 (highly migratory species, marine mammals, anadromous stocks, catadromous species); and
- the provisions of the Convention on the conservation and management

of the living resources of the high seas (articles 117 to 120).

The specific provisions of articles 63 and 64 to 67 ensure that the conservation and management of particular fish stocks in the exclusive economic zone and in areas of the high seas are harmonized.

The Convention provides the general obligation for all States to take measures to ensure that their nationals fishing on the high seas conserve the living resources thereof. Article 118 requires States to cooperate in the conservation and management of living resources in the high seas. The same article requires States whose nationals exploit identical or different living resources in the same area to enter into negotiations in order to take the measures necessary for the conservation of the living resources concerned. States should, as appropriate, cooperate to establish subregional or regional fisheries organization to that end. Article 119 shows that the principle upon which the conservation and management measures should be based is that of the best scientific evidence available.

Articles 117 to 120 underscore the obligation to cooperate of flag States or States whose nationals fish on the high seas. The duty imposed on flag States to cooperate with other States in order to conserve and manage fisheries in areas of the high seas confirms the law of nationality of ships and exclusive flag-State jurisdiction as contained in articles 91 and 94 of the Convention. Order on the oceans with respect to high seas fisheries is maintained principally through flag States.

III. Obligations of flag States under 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)

Unlike the Convention, the Fish Stocks Agreement provides an elaborate list of measures which the flag State is obliged to take. The listing of the duties of the flag State does not mean that the Fish Stocks Agreement does not conform to or goes beyond the Convention. On the contrary, it confirms and strengthens the well-established law on nationality of ships and the principle of exclusive flag-State jurisdiction on the high seas as set forth in article 91 of the Convention and elaborated in article 94.

Part V of the Fish Stocks Agreement lists the duties of the flag State as regards the observation and implementation of rules in order to ensure that vessels flying its flag do not undermine conservation and management objectives in the high seas areas. Article 18, paragraph 2, of the Fish Stocks Agreement requires the flag State to authorize vessels flying its flag to fish on the high seas only when it can exercise its responsibilities in respect of such vessels effectively. Measures to control the vessels flying the flag of Contracting States include: i) granting fishing licences; ii) establishing regulations concerning the terms and conditions of the licence; iii) prohibiting unlicensed or irregularly licensed vessels from fishing; iv) ensuring that vessels flying its flag do not carry out unauthorized fishing in waters of national jurisdiction; v) establishing a national record of vessels authorized to fish on the high seas and granting access to that information to interested States; vi) requiring vessels to be marked appropriately; vii) establishing systems for determining the position of vessels and catches of targeted and non-targeted species; viii) requirements for verifying the catch through observer programmes and inspection schemes; and ix) controlling, monitoring and surveillance of fishing and related activities (Fish Stocks Agreement, article 18, paragraph 3).

Flag States principally remain responsible for enforcing compliance with conservation and management measures on the high seas. However, if the relevant fishing area is covered by a regional fisheries arrangement, the duly authorized inspector of a member State of that regional fisheries arrangement is authorized to board and inspect fishing vessels of another State to ensure compliance (Fish Stocks Agreement, article 21, paragraph 1). If there are clear grounds for believing that a vessel has engaged in fishing activities contrary to conservation and management measures for a particular high seas fishing area, the inspecting State should secure evidence and promptly notify the flag State of the alleged violation (Fish Stocks Agreement, article 21, paragraph 5).

IV. Obligations of flag States under the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)

The Compliance Agreement confirms the law of nationality of ships and exclusive flag State jurisdiction, as contained in article 91 and elaborated in article 94 of the Convention, and the obligation of States to conserve and manage fisheries in areas of the high seas, as contained in article 118 of the Convention. Nevertheless, the value of the Compliance Agreement goes beyond the reiteration of long-established laws and principles. It is the first global instrument that details the duties of the flag State with respect to vessels fishing on the high seas in the context of conservation and management of fisheries. These duties concern not only ship registration and fishing licences but now also include the obligation to exchange and provide information. Fisheries experts have emphasized how critical appropriate information is for the implementation and enforcement of conservation and management measures.

Article III of the Compliance Agreement sets out the responsibility of the flag State concerning conservation and management measures in areas of the high seas. Each party is obliged to take the necessary steps to ensure that fishing vessels flying its flag do not engage in activities that undermine the effectiveness of international conservation and management measures. In particular, no party should allow any fishing vessel entitled to fly its flag to fish in the seas or to be used for fishing on the high seas without the authorization of that party (Compliance Agreement, article III, paragraph 2). When granting authorization to carry out fishing, the party must be satisfied that it is able to exercise effectively its responsibilities over the vessel pursuant to the Compliance Agreement (article III, paragraph 3). Parties also have a duty not to authorize fishing vessels previously registered in another territory that undermined international conservation and management measures to be used for fishing on the high seas unless certain conditions are met (Compliance Agreement, article III, paragraph 5,).

Aside from providing details of flag State responsibility over fishing vessels on the high seas, the Compliance Agreement also puts additional pressure on flag States in that it requires them to take enforcement measures. Such measures could

include, where appropriate, making the contravention of the provisions of the Agreement an offence under national legislation (Compliance Agreement, article III, paragraph 8). In addition, the Compliance Agreement requires that "[t]he sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas".

The other duties of the flag State under the Compliance Agreement concern the free exchange of information about the high seas. The flag State is responsible for ensuring that the requirements for marking vessels and obtaining information from the vessel about fishing operations, catches and landings are carried out (Compliance Agreement, article III, paragraphs 6 and 7).

V. Obligations of flag States concerning the conservation and management of fisheries in regional fisheries instruments

The main objective of many regional fisheries instruments is the conservation of marine living resources in the convention area covered by the regional instrument. Several of those instruments mention specific duties which flag States have to fulfil in respect of conservation and management of marine living resources, but in most cases they are directed to coastal States.

VI. The potential role of third party dispute settlement, in particular the International Tribunal for the Law of the Sea

a) *Introduction*

I hope I have illustrated sufficiently clearly the complex interaction between coastal States, institutions of the international community and flag States which is necessary for the management of marine living resources. Evidently, in such a system, disputes may arise concerning:

- the interpretation or application of the respective rules of the international instruments referred to;

- the fulfilment of its obligations by a flag State; and

- the appropriateness of measures taken by the coastal State (legislative or enforcement measures).

I shall deal with these questions from three angles; namely, by briefly describing the functions of ITLOS in general; by elaborating on them on the basis of article 73 of the Convention; and, finally, by briefly explaining the decision of the Tribunal in the bluefin tuna cases.

According to article 288 of the Convention, the International Tribunal for the Law of the Sea has jurisdiction over disputes concerning the interpretation and application of the Convention, "disputes" meaning legal disputes. However, measures taken by a coastal State or a flag State – be it at legislative or executive level – concerning the management of living resources fall squarely under that provision. There is, however, a caveat to be taken into account as far as coastal States are concerned. Article 297, paragraph 3, of the Convention exempts certain disputes concerning the management of living resources from compulsory dispute settlement. If such an exemption is invoked, the dispute should be submitted to compulsory conciliation.

I must also to refer to article 290, paragraph 1, of the Convention. In a dispute involving the management of marine living resources, the International Tribunal for the Law of the Sea can prescribe provisional measures, which it has done. The orders issued in that respect are binding. I would like to draw your attention to one fact. According to article 290, paragraph 1, of the Convention, provisional measures may be prescribed not only to protect the rights of either party but also to prevent serious harm to the marine environment. The protection of a stock from total depletion would meet that criterion. However, it should not be assumed that disputes concerning the management of living resources will generally be directed against coastal States. It is equally possible to challenge before the Tribunal the activities of flag States – or rather the lack of measures ensuring that the rules concerning the protection and proper management of fishery resources are fully and efficiently

implemented. I hope I have made it clear that 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. In particular as far as IUU fishing is concerned, port States play an increasing role in the implementation of the rules governing the elimination of IUU fishing as their purpose is to prohibit the landing of fish whose origin is clearly documented and show that it was harvested legally. Dispute-settlement procedures may be the most appropriate means of preventing the development of ports where fishing inspections do not live up to the applicable international standards.

As already indicated, disputes concerning high seas fisheries may be submitted to the Tribunal on the basis of the Fish Stocks Agreement as, for disputes concerning its interpretation or application, that agreement incorporates the mechanism set out in Part XV of the Convention. That mechanism applies to disputes between States parties to the Fish Stocks Agreement, whether or not they are parties to the Law of the Sea Convention (article 30). In addition, the jurisdiction of the Tribunal may also cover disputes concerning subregional, regional or global fisheries agreements relating to straddling or highly migratory fish stocks, since the Fish Stocks Agreement makes the Part XV mechanism applicable to them. In addition, parties may have recourse to the Tribunal with respect to disputes relating to fisheries whenever these disputes concern the interpretation or application of the provisions of the Convention, subject to the limitations and exceptions contained therein. Furthermore, parties may, at any time, conclude a special agreement to submit a fisheries dispute to the Tribunal and parties have done so on one occasion, namely, the case concerning swordfish stocks [*Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*].

I should also like to draw your attention to article 31 of the Fish Stocks Agreement, which provides for the prescription of provisional measures. That provision is *lex specialis* with regard to article 290 of the Convention. It differs from the latter in two respects: according to article 31, paragraph 2, provisional measures may also be prescribed to prevent damage to the stocks in question as well as in situations referred to in article 7, paragraph 5, of the Agreement (compatibility of conservation and management measures) and in article 16, paragraph 2, thereof

(measures to be taken in high seas areas entirely surrounded by the exclusive economic zone of one State). It is safe to say that article 31 of the Fish Stocks Agreement is a further innovative development waiting to be used by States.

b) *Article 73 of the Convention*

I should like to be more specific and deal with the competences of the Tribunal as far as article 73 of the Convention is concerned.

That article deals with the measures a coastal State may take to 'ensure compliance with the laws and regulations adopted by it in conformity with this Convention'. Paragraph 3 states that violations of fisheries laws in the exclusive economic zone may not include imprisonment. However, there are other provisions of relevance in the Convention. Yet more have been established in specific international arrangements.

Whenever measures to enforce the national rules on the management and conservation of marine living resources in an exclusive economic zone are enforced against foreign vessels, they may be challenged before the Tribunal. In such a case, the adjudicative body in question may consider whether such laws were adopted in accordance with the Convention. The functions of the Tribunal in that respect are similar to those which national constitutional or supreme courts exercise at national level.

However, the Tribunal may be seized not only of cases where enforcement measures have been taken but also in those where there are doubts as to whether action or inaction on the part of coastal States or flag States is considered not to conform to the rules on the management and conservation of marine living resources. The Fish Stocks Agreement has broadened and detailed respective obligations and thus the potential of the Tribunal for the Law of the Sea.

c) *The* Southern Bluefin Tuna Cases

The *Southern Bluefin Tuna Cases* were submitted by New Zealand and Australia under article 290, paragraph 5, of the Convention. The applicants alleged that Japan had breached its obligations under articles 64 and 116 to 119 of the Convention in relation to the conservation and management of southern bluefin tuna

by failing to adopt the necessary conservation measures for its nationals fishing on the high seas, as required by article 119 of the Convention. I would like to emphasize that the cases confirm the point I made earlier, namely that flag States have an obligation to adopt conservation measures. The adoption of such measures requires not only that they be implemented and appropriate legislation be adopted but also that the necessary control and monitoring measures be taken. Such measures – or the lack thereof – can be challenged *in abstracto* and in specific situations, as in the bluefin tuna cases.

New Zealand and Australia further alleged that Japan had failed to cooperate with them in good faith and invoked article 64 of the Convention, which deals with fishing in exclusive economic zones. This was an interesting allegation since it assumed that specific obligations would ensue from the flag States' duty to cooperate with coastal States, as envisaged in article 64 of the Convention.

Let me indicate how the Tribunal dealt with these two allegations. It did not really decide on the first one. This may be due to several reasons, one of them being that Japan had undertaken to stop its experimental fishing for southern bluefin tuna. But the Tribunal made a pronouncement on the second allegation, stating that Japan had failed to comply with its obligation to cooperate under articles 64 and 118 of the Convention, which requires parties to cooperate in the conservation and management of marine living resources. I believe this decision was a good reflection of the growing need to conserve and manage marine living resources and the Tribunal's commitment to that cause.

Although the Tribunal's decision provoked the question as to whether in fact it had jurisdiction, the measures it prescribed prevailed. Recently, the Tribunal was informed that cooperation between States and entities fishing for bluefin tuna has intensified as a result of the Order of the Tribunal.

VII. Conclusion

To summarize briefly: the United Nations Convention on the Law of the Sea and subsequent international instruments provide detailed rules concerning the management and conservation of marine living resources. They oblige coastal States and the flag States of fishing vessels, in particular to cooperate to ensure that the

management and conservation measures the latter have taken are fully and efficiently implemented. The International Tribunal for the Law of the Sea has jurisdiction to ensure that this system of obligations is applied in accordance with the relevant legal instruments. The rules on provisional measures provide the Tribunal with the necessary tools to act expeditiously and prevent damage to fish stocks.

Annex 7

EXTRACT FROM *THE FLAG STATE'S OBLIGATIONS FOR MERCHANT VESSELS*, BERNAERTS' GUIDE TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

VESSELS

Issue	Flag State Obligations - Merchant Vessels	Other Circumstances
Jurisdiction	*General* Vessels are subject to exclusive jurisdiction of flag state on the high seas (Article 92, Paragraph 1) (For pollution measures in general, see Articles 194, Subparagraph 3(b); 211; 217) *Particular* Flag state required to assume jurisdiction under its internal law with respect to administrative, technical, and social matters *Collision incidents on the high seas* - In respect to penal jurisdiction: arrest/ detention flag state (Article 97, Paragraph 3) - Penal and disciplinary matters exclusive jurisdiction of flag state (Article 97, Paragraph1) *except:* withdrawal of certificates issued by other states (Article 97, Paragraph 2) - Inquiry (Administrative jurisdiction) (Article 94, Paragraph 7)	Except in cases expressly provided for in international treaties and this Convention (Article 92, Paragraph 1; e g , Articles 99-111, Articles 218 and 221) - In penal cases, home state can institute proceedings against its nationals (Article 97, Paragraph 1) - Inquiry by other states possible (Article 94, Paragraph 7)
Administration	*Registration* - Fix conditions for grant of nationality (Article 91, Paragraph 1) - Maintain a register of ships (Article 94, Subparagraph 2(a)) - Inspect before registration (Article 94, Subparagraph 4(a)) - Issue flag documents (Article 91, Paragraph 2) *Other measures* - Require master to help persons in danger or distress (Article 98, Subparagraphs 1 (a-b)) and assist in collision cases - Investigate allegations of improper control (Article 94, Paragraph 6)	- Registration may take place only where "genuine link" (Article 91, Paragraph 1) - Nationality follows flag (Articlel 91, Paragraph 1) - "Treatment" as ship without nationality (Article 92, Paragraph 2)
Technical Matters	Required to ensure - Construction, equipment, seaworthiness, manning, training of crew, use of signals, maintenance of communication, collision prevention (Article 94, Paragraph 3) - Inspection at intervals (Article 94, Subparagraph 4(a)) - Charts, nautical publications, navigational equipment is on board (Article 94, Subparagraph 4(a))	Flag state measures are to - Comply with generally accepted international regulations, procedure and practice (Article 94, Paragraph 5) - Ensure appropriate crew qualification and numbers of crew (Article 94, Subparagraph 4(b)) - Ensure that crew is conversant with and required to observe international regulations. safety, collision, pollution, radio communication (Article 94, Subparagraph 4(c))
Social Matters	- Labour conditions (Article 94, Paragraph 3)	
WARSHIPS, etc.: Immunity (Articles 89-90), Pollution (Articles 236, 304) *VESSELS OF UNITED NATIONS,* etc. Article 93		

Annex 8

MARITIME DELIMITATION TREATY BETWEEN JAMAICA AND THE REPUBLIC OF COLOMBIA (1993)

Maritime delimitation treaty between Jamaica and the Republic of Colombia, 12 November 1993

The Government of Jamaica and the Government of the Republic of Colombia;

Considering the bonds of friendship existing between both countries;

Recognizing the common interests of both countries in considering issues related to the rational exploitation, management and conservation of the maritime areas between them, including questions relating to the exploitation of living resources;

Acknowledging the interests which both countries have in concluding a maritime delimitation treaty;

Taking into account recent developments in the law of the sea;

Desirous of delimiting the maritime areas between both countries on the basis of mutual respect, sovereign equality and the relevant principles of international law;

Agree as follows:

Article 1

The maritime boundary between Jamaica and the Republic of Colombia is constituted by geodesic lines drawn between the following points:

	Latitude (North)	Longitude (West)
1.	14° 29' 37"	78° 38' 00"
2.	14° 15' 00"	78° 19' 30"
3.	14° 05' 00"	77° 40' 00"
4.	14° 44' 10"	74° 30' 50"

5. From point 4, the delimitation line proceeds by a geodesic line in the direction to another point with coordinates 15° 02' 00"N, 73° 27' 30"W, as far as the delimitation line between Colombia and Haiti is intercepted by the delimitation line to be decided between Jamaica and Haiti.

Article 2

Where hydrocarbon or natural gas deposits, or fields are found on both sides of the delimitation line established in article 1, they shall be exploited in a manner such that the distribution of the volumes of the resource extracted from said deposits or fields is proportional to the volume of the same which is correspondingly found on each side of the line.

Article 3

1. Pending the determination of the jurisdictional limits of each Party in the area designated below, the Parties agree to establish therein a zone of joint management, control, exploration and exploitation of the living and non-living resources, hereafter called "The Joint Regime Area".

(a) The Joint Regime Area is established by the closed figure described by the lines joining the following points in the order in which they occur. The lines so joining the listed points are geodesic lines unless specifically stated otherwise.

Point	Latitude (North)	Longitude (West)
1.	16° 04' 15"	79° 50' 32"
2.	16° 04' 15"	79° 29' 20"
3.	16° 10' 10"	79° 29' 20"
4.	16° 10' 10"	79° 16' 40"
5.	16° 04' 15"	79° 16' 40"
6.	16° 04' 15"	78° 25' 50"
7.	15° 36' 00"	78° 25' 50"
8.	15° 36' 00"	78° 38' 00"
9.	14° 29' 37"	78° 38' 00"
10.	15° 30' 10"	79° 56' 00"
11.	15° 46' 00"	80° 03' 55"

The limit of the Joint Regime Area then continues along the arc of 12 nautical miles radius centred on a point at 15° 47' 50"N, 79° 51' 20"W, such that it passes to the west of Serranilla Cays to a point at 15° 58' 40"N, 79° 56' 40"W. The figure is then closed by the geodesic line to point 1.

(b) The Joint Regime Area excludes the maritime area around the cays of Serranilla Bank comprised within the outermost arc of the circle of 12 nautical miles radius centred at a point 15° 47' 50"N, 79° 51' 20"W, such that it passes to through points 15° 46' 00"N, 80° 03' 55"W and 15° 58' 40"N, 79° 56' 40"W.

(c) The Joint Regime Area will also exclude the maritime area around the cays of Bajo Nuevo comprised within the outermost arc of the circle of 12 nautical miles radius centred at the point 15° 51' 00"N, 78° 38' 00"W.

2. In the Joint Regime Area, the Parties may carry out the following activities:

(a) Exploration and exploitation of the natural resources, whether living or non-living, of the waters superjacent to the seabed and the seabed and its subsoil, and other activities for the economic exploitation and exploration of the Joint Regime Area;

(b) The establishment and use of artificial islands, installations and structures;

(c) Marine scientific research;

(d) The protection and preservation of the marine environment;

(e) The conservation of living resources;

(f) Such measures as are authorized by this Treaty, or as the Parties may otherwise agree for ensuring compliance with and enforcement of the regime established by this Treaty.

3. Activities relating to exploration and exploitation of non-living resources, as well as those referred to in paragraph 2 (c) and (d), will be carried out on a joint basis agreed by both Parties.

4. The Parties shall not authorize third States and international organizations or vessels of such States and organizations to carry out any of the activities referred to in paragraph 2. This does not preclude a Party from entering into, or authorizing arrangements for leases, licences, joint ventures and technical assistance programmes in order to facilitate the exercise of the rights pursuant to paragraph 2, in accordance with the procedures established in article 4.

5. The Parties agree that in the Joint Regime Area, each Party has jurisdiction over its nationals and vessels flying its flag or over which it exercises management and control in accordance with international law.

Provided that in any case where it is alleged by one Party that nationals or vessels of the other Party have breached, or are breaching the provisions of this Treaty and any measures adopted by the Parties for their implementation, the Party alleging the breach shall bring it to the attention of the other Party, following which both Parties shall forthwith commence consultations with a view to arriving at an amicable settlement within 14 days.

On receipt of the allegation, the Party to whose attention the allegation has been brought shall, without prejudice to the consultations referred to in the above paragraph:

(a) In relation to an allegation that a breach has been committed, ensure that the activities, the subject-matter of the allegation, do not recur;

(b) In relation to an allegation that a breach is being committed, ensure that the activities are discontinued.

6. The Parties agree to adopt measures for ensuring that nationals and vessels of third States comply with any regulations and measures adopted by the Parties for implementing the activities set out in paragraph 2.

Article 4

1. The Parties agree to establish a Joint Commission, hereinafter called "The Joint Commission", which shall elaborate the modalities for the implementation and the carrying out of the activities set out in paragraph 2 of article 3, the measures adopted pursuant to paragraph 6 of article 3, and carry out any other functions which may be assigned to it by the Parties for the purpose of implementing the provisions of this Treaty.

2. The Joint Commission shall consist of one representative of each Party, who may be assisted by such advisers as is considered necessary.

3. Conclusions of the Joint Commission shall be adopted by consensus and shall be only recommendations to the Parties. Conclusions of the Joint Commission when adopted by the Parties shall become binding on the Parties.

4. The Joint Commission shall begin its work immediately on the entry into force of this Treaty and shall, unless the Parties agree otherwise, conclude the tasks identified in paragraph 1 of this article within six months from the commencement of its work.

Article 5

Geodetic data are based on the World Geodetic System (1984).

Article 6

For illustrative purposes only, the delimitation line and the Joint Regime Area are shown on a United States Defence Mapping Agency Chart 402, which is attached. In the event of conflict between the coordinates and the Chart, the coordinates will prevail.

Article 7

Any dispute between the Parties on the interpretation or application of this Treaty shall be settled by agreement between the two countries in accordance with the means for the peaceful settlement of disputes provided for by international law.

Article 8

This Treaty shall be subject to ratification.

Article 9

This Treaty shall enter into force on the date of exchange of instruments of ratification.

Article 10

Done in English and Spanish, each text being equally authentic.

IN WITNESS WHEREOF, the Ministers for Foreign Affairs of both countries have signed the present Treaty.

DONE at Kingston this 12th day of November 1993.

Annex 9

EXCLUSIVE ECONOMIC ZONE CO-OPERATION TREATY BETWEEN THE REPUBLIC OF GUYANA AND THE STATE OF BARBADOS (2003)

2. Barbados and Guyana

Exclusive Economic Zone Co-Operation Treaty between the Republic of Guyana and the State of Barbados concerning the Exercise of Jurisdiction in their Exclusive Economic Zones in the Area of Bilateral Overlap within Each of their Outer Limits and beyond the Outer Limits of the Exclusive Economic Zones of Other States, 2 December 2003 [17]

The Republic of Guyana and the State of Barbados (hereinafter referred to as the Parties);

Reaffirming the friendly relations between them;

Mindful of their long-standing spirit of bilateral co-operation and good-neighbourliness;

Emphasizing the universal and unified character of the United Nations Convention on the Law of the Sea (hereinafter referred to as the Convention) and its fundamental importance for the maintenance and strengthening of international peace and security, as well as for the sustainable development of the oceans and seas;

Recognizing that the delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution;

Recognizing the relevance and applicability of paragraph 3 of Article 74 of the Convention, which establishes that, pending such delimitation, States, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement;

Recognizing that such provisional arrangements shall be without prejudice to the final delimitation;

Confirming their intention to act in accordance with generally accepted principles of international law and the Convention;

Mindful of the legitimate interests of other States and the need to respect the rights and duties of other States in conformity with generally accepted principles of international law and the Convention;

Acknowledging the existence of an area of bilateral overlap within the outer limits of their exclusive economic zones and beyond the outer limits of the exclusive economic zones of other States;

Desirous of establishing a precise and equitable regime for the orderly and co- operative exercise of jurisdiction in the area of bilateral overlap of their exclusive economic zones, whilst taking into account the legitimate interests of other States;

Conscious of the need to agree upon the environmentally responsible management and the sustainable development of living and non-living natural resources in this area; and

Acting in accordance with the spirit of friendship and solidarity in the Caribbean Community and the Organization of American States;

Have agreed as follows:

Article 1. Co-operation Zone

1. This Treaty establishes and regulates, in accordance with generally accepted principles of international law and the Convention, a co-operation zone (hereinafter referred to as the Co-operation Zone) for the exercise of joint jurisdiction, control, management, development, and exploration and exploitation of living and non-living natural resources, as well as all other rights and duties established in the Convention, within the area over which a bilateral overlap occurs between their exclusive economic zones and beyond the outer limits of the exclusive economic zones of other States.

2. This Treaty and the Co-operation Zone established thereunder are without prejudice to the eventual delimitation of the Parties' respective maritime zones in accordance with generally accepted principles of international law and the Convention.

3. The Parties agree that nothing contained in the Treaty nor any act done by either Party under the provisions of the Treaty will represent a derogation from or diminution or renunciation of the rights of either Party within the Co-operation Zone or throughout the full breadth of their respective exclusive economic zones.

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[17] Original: English.

Article 2. The Geographical Extent of the Co-operation Zone

1. The Parties agree that the Co-operation Zone is the area of bilateral overlap between the exclusive economic zones encompassed within each of their outer limits measured to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and beyond the outer limits of the exclusive economic zones of other States at a distance of 200 nautical miles measured from the baselines from which their territorial sea is measured. For the purposes of this Treaty, the term "exclusive economic zone" and its legal regime shall have the meaning ascribed to them in Part V of the Convention.

2. The precise geographical extent of the Co-operation Zone is defined in Annex 1 to this Treaty.

3. The Parties contemplate that they may, by agreement at a later date, delimit an international maritime boundary between them.

Article 3. Exercise of Civil and Administrative Jurisdiction in the Co-operation Zone

1. The Parties shall exercise joint civil and administrative jurisdiction within and in relation to the Co-operation Zone. In exercising their jurisdiction the Parties shall act at all times in accordance with generally accepted principles of international law and the Convention.

2. The exercise of joint jurisdiction by the Parties in any particular instance shall be evidenced by their agreement in writing, including by way of an exchange of diplomatic notes.

3. For further clarity, the failure of the Parties to reach agreement in writing in relation to the exercise of their joint jurisdiction in the Co-operation Zone in any particular instance means that neither Party can exercise its jurisdiction in that instance.

Article 4. Rights and Duties of Other States in the Co-operation Zone

1. The Parties shall have due regard to the rights and duties of other States in the Co- operation Zone in accordance with generally accepted principles of international law and the Convention, and in particular the provisions of Article 58 of the Convention.

Article 5. Jurisdiction over Living Natural Resources

1. The Parties shall exercise joint jurisdiction over living natural resources within the Co-operation Zone. In exercising their joint jurisdiction, the Parties shall act at all times in accordance with generally accepted principles of international law and the Convention, including the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

2. In order to exercise environmentally responsible management and to ensure sustainable development in the Co-operation Zone, the exercise of joint jurisdiction over living resources by the Parties in any particular instance shall be governed by a Joint Fisheries Licensing Agreement and evidenced by their agreement in writing, including by way of an exchange of diplomatic notes as provided in Article 3.

3. Within three months of the date on which this Treaty enters into force, the Parties shall in good faith commence the negotiation of a Joint Fisheries Licensing Agreement within the Co-operation Zone.

4. Either Party shall be entitled to enforce the provisions of the Joint Fisheries Licensing Agreement against any persons through the application of its relevant national law. Each Party undertakes to inform the other in writing of such enforcement.

5. For further clarity, the failure of the Parties to reach agreement in writing in relation to the exercise of their joint jurisdiction over living resources in the Co-operation Zone in any particular instance means that neither Party can exercise its jurisdiction in that instance.

6. The Parties shall take steps to co-ordinate between them the management of the living natural resources within the Co-operation Zone subject to their obligations under any relevant agreement to which they are both parties.

Article 6. Jurisdiction over Non-Living Natural Resources

1. The Parties shall exercise joint jurisdiction over non-living natural resources within the Co-operation Zone. In exercising their joint jurisdiction, the Parties shall act at all times in accordance with generally accepted principles of international law and the Convention.

2. The exercise of joint jurisdiction over non-living resources by the Parties in any particular instance shall be managed by a Joint Non-Living Resources Commission and evidenced by their agreement in writing, including by way of an exchange of diplomatic notes as provided in Article

3. The Joint Non-Living Resources Commission shall be established at such time as agreed by the Parties.

4. For further clarity, the failure of the Parties to reach agreement in writing in relation to the exercise of their joint jurisdiction over non-living resources in the Co-operation Zone in any particular instance means that neither Party can exercise its jurisdiction in that instance.

5. Any single geological structure or field of non-living natural resources that lies wholly within the Co-operation Zone shall be shared equally between the Parties.

6. For the purpose of this Article 6, any single geological structure or field of non-living natural resources that lies in whole or in part across the outer limit of the Co-operation Zone shall be considered to straddle the Co-operation Zone.

7. Any single geological structure or field of non-living natural resources that straddles the outer limit of the Co-operation Zone from the exclusive economic zone of either Party shall be apportioned between them based on unitisation arrangements, as specifically provided by the Joint Non-Living Resources Commission.

8. Marine scientific research, exploration and exploitation or development of non- living natural resources that lie wholly within the Co-operation Zone shall only take place with the agreement of both Parties as provided in Article 3. If no such agreement is reached, no scientific research, exploration, exploitation or development can take place.

9. Each Party shall provide the other with the results of any scientific research or exploration as soon as possible after the conclusion of any survey.

Article 7. Jurisdiction over Security Matters

1. The Parties acting in good faith shall establish the procedures for the conduct of activities to police the Co-operation Zone.

2. Within three months of the date on which this Treaty enters into force, the Parties shall in good faith commence the negotiation of a security agreement in relation to activities to be undertaken within the Co-operation Zone, which may address among others:

(a) Enforcement of regulations over natural resources;

(b) Terrorism;

(c) Prevention of illicit narcotics trafficking;

(d) Trafficking in firearms, ammunition, explosives and other related materials;

(e) Smuggling;

(f) Piracy;

(g) Trafficking in persons; and

(h) Maritime policing and search and rescue.

3. Until a security agreement as contemplated in Article 7 (2) is in force, and unless otherwise provided for in this Treaty, each Party shall unilaterally exercise defence and criminal jurisdiction within and in relation to the Co-operation Zone to the same extent that it may do so within and in relation to that part of its exclusive economic zone that lies outside the Co-operation Zone.

Article 8. Protection of the Marine Environment of the Co-operation Zone

1. The Parties shall, consistent with their international obligations, endeavour to co-ordinate their activities so as to adopt all measures necessary for the preservation and protection of the marine environment in the Co-operation Zone.

2. The Parties shall provide each other as soon as possible with information about actual or potential threats to the marine environment in the Co-operation Zone.

Article 9. Consultation and Communications

1. Either Party may request consultations with the other Party in relation to any matter arising out of this Treaty or otherwise concerning the Co-operation Zone.

2. The Parties shall designate their respective Ministers of Foreign Affairs to be responsible for all communications required under this Treaty, including under this Article 9, and Articles 3, 5,6 and 10. Either Party can change its designation upon written notice to the other Party.

Article 10. Dispute Resolution

1. Any dispute concerning the interpretation or application of the provisions of this Treaty shall be resolved by direct diplomatic negotiations between the two Parties.

2. If no agreement can be reached within a reasonable period of time, either Party may have recourse to the dispute resolution provisions contemplated under the Convention.

3. Any decision or interim order of any court or tribunal constituted pursuant to Article 10 (2) shall be final and binding on the Parties. The Parties shall carry out in good faith all such orders and decisions.

Article 11. Registration

Upon entry into force, this Treaty shall be registered with the Secretary-General of the United Nations in accordance with article 102 of the Charter of the United Nations and the Secretary-General of the Caribbean Community.

Article 12. Entry into Force and Duration

1. This Treaty shall enter into force 30 days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Treaty have been met.

2. This Treaty shall remain in force until an international maritime boundary delimitation agreement is concluded between the Parties.

3. This Treaty shall be subject to review at the request of either Party.

4. Any amendment to this Treaty shall be by mutual agreement through the exchange of diplomatic notes.

DONE at London on 2nd December, 2003, in two duplicate copies.

For the Republic of Guyana His Excellency Bharrat Jagdeo President

For the State of Barbados The Rt. Honourable Owen S. Arthur Prime Minister

Annex 10

CONVENTION FOR THE PROTECTION AND DEVELOPMENT OF THE MARINE ENVIRONMENT OF THE WIDER CARIBBEAN REGION (CARTAGEÑA 1983)

Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region

The Final Act of the Conference of the Plenipotentiaries on the Protection and Development of the Marine Environment of the Wider Caribbean Region

Cartagena de Indias, 24 March 1983

The Contracting Parties,

Fully aware of the economic and social value of the marine environment, including coastal areas, of the wider Caribbean region,

Conscious of their responsibility to protect the marine environment of the wider Caribbean region for the benefit and enjoyment of present and future generations,

Recognizing the special hydrographic and ecological characteristics of the region and its vulnerability to pollution,

Recognizing further the threat to the marine environment, its ecological equilibrium, resources and legitimate uses posed by pollution and by the absence of sufficient integration of an environmental dimension into the development process,

Considering the protection of the ecosystems of the marine environment of the wider Caribbean region to be one of their principal objectives,

Realizing fully the need for co-operation amongst themselves and with competent international organizations in order to ensure co-ordinated and comprehensive development without environmental damage,

Recognizing the desirability of securing the wider acceptance of international marine pollution agreements already in existence,

Noting however, that, in spite of the progress already achieved, these agreements do not cover all aspects of environmental deterioration and do not entirely meet the special requirements of the wider Caribbean region,

Have agreed as follows:

Article 1 CONVENTION AREA

1. This Convention shall apply to the wider Caribbean region, hereinafter referred to as "the Convention area" as defined in paragraph 1 of article 2.
2. Except as may be otherwise provided in any protocol to this Convention, the Convention area shall not include internal waters of the Contracting Parties.

Article 2 DEFINITIONS

For the purposes of this Convention:

1. The "Convention area" means the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 deg north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in article 25 of the Convention.
2. "Organization" means the institution designated to carry out the functions enumerated in paragraph 1 of article 15.

Article 3 GENERAL PROVISIONS

1. The Contracting Parties shall endeavour to conclude bilateral or multilateral agreements including regional or subregional agreements, for the protection of the marine environment of the Convention area. Such agreements shall be consistent with this Convention and in accordance with international law. Copies of such agreements shall be communicated to the Organization and, through the Organization, to all signatories and Contracting Parties to this Convention.
2. This Convention and its protocols shall be construed in accordance with international law relating to their subject-matter. Nothing in this Convention or its protocols shall be deemed to affect obligations assumed by the Contracting Parties under agreements previously concluded.
3. Nothing in this Convention or its protocols shall prejudice the present or future claims or the legal views of any Contracting Party concerning the nature and extent of maritime jurisdiction.

Article 4 GENERAL OBLIGATIONS

1. The Contracting Parties shall, individually or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.
2. The Contracting Parties shall, in taking the measures referred to in paragraph 1, ensure that the implementation of those measures does not cause pollution of the marine environment outside the Convention area.
3. The Contracting Parties shall co-operate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention.
4. The Contracting Parties shall take appropriate measures, in conformity with international law, for the effective discharge of the obligations prescribed in this Convention and its protocols and shall endeavour to harmonize their policies in this regard.
5. The Contracting Parties shall co-operate with the competent international, regional and subregional organizations for the effective implementation of this Convention and its protocols. They shall assist each other in fulfilling their obligations under this Convention and its protocols.

Article 5 POLLUTION FROM SHIPS

The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by discharges from ships and, for this purpose, to ensure the effective implementation of the applicable international rules and standards established by the competent international organization.

Article 6 POLLUTION CAUSED BY DUMPING

The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by dumping of wastes and other matter at sea from ships, aircraft or manmade structures at sea, and to ensure the effective implementation of the applicable international rules and standards.

Article 7 POLLUTION FROM LAND-BASED SOURCES

The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by coastal disposal or by discharges emanating from rivers, estuaries, coastal establishments, outfall structures, or any other sources on their territories.

Article 8 POLLUTION FROM SEA-BED ACTIVITIES

The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area resulting directly or indirectly from exploration and exploitation of the sea-bed and its subsoil.

Article 9 AIRBORNE POLLUTION

The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area resulting from discharges into the atmosphere from activities under their jurisdiction.

Article 10 SPECIALLY PROTECTED AREAS

The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species, in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas. The establishment of such areas shall not affect the rights of other Contracting Parties and third States. In addition, the Contracting Parties shall exchange information concerning the administration and management of such areas.

Article 11 CO-OPERATION IN CASES OF EMERGENCY

1. The Contracting Parties shall co-operate in taking all necessary measures to respond to pollution emergencies in the Convention area, whatever the cause of such emergencies, and to control, reduce or eliminate pollution or the threat of pollution resulting therefrom. To this end, the Contracting Parties shall, individually and jointly, develop and promote contingency plans for responding to incidents involving pollution or the threat thereof in the Convention area.
2. When a Contracting Party becomes aware of cases in which the Convention area is in imminent danger of being polluted or has been polluted, it shall immediately notify other States likely to be affected by such pollution, as well as the competent international organizations. Furthermore, it shall inform, as soon as feasible, such other States and competent international organizations of measures it has taken to minimize or reduce pollution or the threat thereof.

Article 12 ENVIRONMENTAL IMPACT ASSESSMENT

1. As part of their environmental management policies the Contracting Parties undertake to develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimize harmful impacts on the Convention area.
2. Each Contracting Party shall assess within its capabilities, or ensure the assessment of, the potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area.
3. With respect to the assessments referred to in paragraph 2, each Contracting Party shall, with the assistance of the Organization when requested, develop procedures for the dissemination of information and may, where appropriate, invite other Contracting Parties which may be affected to consult with it and to submit comments.

Article 13 SCIENTIFIC AND TECHNICAL CO-OPERATION

1. The Contracting Parties undertake to cooperate, directly and, when appropriate, through the competent international and regional organizations, in scientific research, monitoring, and the exchange of data and other scientific information relating to the purposes of this Convention.
2. To this end, the Contracting Parties undertake to develop and co-ordinate their research and monitoring programmes relating to the Convention area and to ensure, in co-operation with the competent international and regional organizations, the necessary links between their research centres and institutes with a view to producing compatible results. With the aim of further protecting the Convention area, the Contracting Parties shall endeavour to participate in international arrangements for pollution research and monitoring.
3. The Contracting Parties undertake to cooperate, directly and, when appropriate, through the competent international and regional organizations, in the provision to other Contracting Parties of technical and other assistance in fields relating to pollution and

sound environmental management of the Convention area, taking into account the special needs of the smaller island developing countries and territories.

Article 14 LIABILITY AND COMPENSATION

The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area.

Article 15 INSTITUTIONAL ARRANGEMENTS

1. The Contracting Parties designate the United Nations Environment Programme to carry out the following secretariat functions:
    a. To prepare and convene the meetings of Contracting Parties and conferences provided for in articles 16, 17 and 18;
    b. To transmit the information received in accordance with articles 3, 11 and 22;
    c. To perform the functions assigned to it by protocols to this Convention;
    d. To consider enquiries by, and information from, the Contracting Parties and to consult with them on questions relating to this Convention, its protocols and annexes thereto;
    e. To co-ordinate the implementation of cooperative activities agreed upon by the meetings of Contracting Parties and conferences provided for in articles 16, 17 and 18;
    f. To ensure the necessary co-ordination with other international bodies which the Contracting Parties consider competent.
2. Each Contracting Party shall designate an appropriate authority to serve as the channel of communication with the Organization for the purposes of this Convention and its protocols.

Article 16 MEETINGS OF THE CONTRACTING PARTIES

1. The Contracting Parties shall hold ordinary meetings once every two years and extraordinary meetings at any other time deemed necessary, upon the request of the Organization or at the request of any Contracting Party, provided that such requests are supported by the majority of the Contracting Parties.
2. It shall be the function of the meetings of the Contracting Parties to keep under review the implementation of this Convention and its protocols and, in particular:
    a. To assess periodically the state of the environment in the Convention area;
    b. To consider the information submitted by the Contracting Parties under article 22;
    c. To adopt, review and amend annexes to this Convention and to its protocols, in accordance with article 19;
    d. To make recommendations regarding the adoption of any additional protocols or any amendments to this Convention or its protocols in accordance with articles 17 and 18;
    e. To establish working groups as required to consider any matters concerning this Convention and its protocols, and annexes thereto;

f. To consider co-operative activities to be undertaken within the framework of this Convention and its protocols, including their financial and institutional implications, and to adopt decisions relating thereto;
g. To consider and undertake any other action that may be required for the achievement of the purposes of this Convention and its protocols.

Article 17 ADOPTION OF PROTOCOLS

1. The Contracting Parties, at a conference of plenipotentiaries, may adopt additional protocols to this Convention pursuant to paragraph 3 of article 4.
2. If so requested by a majority of the Contracting Parties, the Organization shall convene a conference of plenipotentiaries for the purpose of adopting additional protocols to this Convention.

Article 18 AMENDMENT OF THE CONVENTION AND ITS PROTOCOLS

1. Any Contracting Party may propose amendments to this Convention. Amendments shall be adopted by a conference of plenipotentiaries which shall be convened by the Organization at the request of a majority of the Contracting Parties.
2. Any Contracting Party to this Convention may propose amendments to any protocol. Such amendments shall be adopted by a conference of plenipotentiaries which shall be convened by the Organization at the request of a majority of the Contracting Parties to the protocol concerned.
3. The text of any proposed amendment shall be communicated by the Organization to all Contracting Parties at least 90 days before the opening of the conference of plenipotentiaries.
4. Any amendment to this Convention shall be adopted by a three-fourths majority vote of the Contracting Parties to the Convention which are represented at the conference of plenipotentiaries and shall be submitted by the Depositary for acceptance by all Contracting Parties to the Convention. Amendments to any protocol shall be adopted by a three-fourths majority vote of the Contracting Parties to the protocol which are represented at the conference of plenipotentiaries and shall be submitted by the Depositary for acceptance by all Contracting Parties to the protocol.
5. Instruments of ratification, acceptance or approval of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraph 3 shall enter into force between Contracting Parties having accepted such amendments on the thirtieth day following the date of receipt by the Depositary of the instruments of at least three fourths of the Contracting Parties to this Convention or to the protocol concerned, as the case may be. Thereafter the amendments shall enter into force for any other Contracting Party on the thirtieth day after the date on which that Party deposits its instrument.
6. After entry into force of an amendment to this Convention or to a protocol, any new Contracting Party to the Convention or such protocols shall become a Contracting Party to the Convention or protocol as amended.

Article 19 ANNEXES AND AMENDMENTS TO ANNEXES

1. Annexes to this Convention or to a protocol shall form an integral part of the Convention or, as the case may be, such protocol.
2. Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the adoption and entry into force of amendments to annexes to this Convention or to annexes to a protocol:
    a. Any Contracting Party may propose amendments to annexes to this Convention or to annexes to any protocol at a meeting convened pursuant to article 16;
    b. Such amendments shall be adopted by a three-fourths majority vote of the Contracting Parties to the instrument in question present at the meeting referred to in article 16;
    c. The Depositary shall without delay communicate the amendments so adopted to all Contracting Parties to the Convention;
    d. Any Contracting Party that is unable to accept an amendment to annexes to this Convention or to annexes to any protocol shall so notify the Depositary in writing within 90 days from the date on which the amendment was adopted;
    e. The Depositary shall without delay notify all Contracting Parties of notifications received pursuant to the preceding subparagraph;
    f. On expiration of the period referred to in subparagraph (d), the amendment to the annex shall become effective for all Contracting Parties to this Convention or to the protocol concerned which have not submitted a notification in accordance with the provisions of that subparagraph;
    g. A Contracting Party may at any time substitute an acceptance for a previous declaration of objection, and the amendment shall thereupon enter into force for that Party.
3. The adoption and entry into force of a new annex shall be subject to the same procedure as that for the adoption and entry into force of an amendment to an annex, provided that, if it entails an amendment to the Convention or to one of its protocols, the new annex shall not enter into force until such time as that amendment enters into force.
4. Any amendment to the Annex on Arbitration shall be proposed and adopted, and shall enter into force, in accordance with the procedures set out in article 18.

Article 20 RULES OF PROCEDURE AND FINANCIAL RULES

1. The Contracting Parties shall unanimously adopt rules of procedure for their meetings.
2. The Contracting Parties shall unanimously adopt financial rules, prepared in consultation with the Organization, to determine, in particular, their financial participation under this Convention and under protocols to which they are parties.

Article 21 SPECIAL EXERCISE OF THE RIGHT TO VOTE

In their fields of competence, the regional economic integration organizations referred to in article 25 shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to this Convention and to one or more protocols. Such organizations shall not exercise their right to vote if the member States concerned exercise theirs, and vice versa.

Article 22 TRANSMISSION OF INFORMATION

The Contracting Parties shall transmit to the Organization information on the measures adopted by them in the implementation of this Convention and of protocols to which they are parties, in such form and at such intervals as the meetings of Contracting Parties may determine.

Article 23 SETTLEMENT OF DISPUTES

1. In case of a dispute between Contracting Parties as to the interpretation or application of this Convention or its protocols, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.
2. If the Contracting Parties concerned cannot settle their dispute through the means mentioned in the preceding paragraph, the dispute shall upon common agreement, except as may be otherwise provided in any protocol to this Convention, be submitted to arbitration under the conditions set out in the Annex on Arbitration. However, failure to reach common agreement on submission of the dispute to arbitration shall not absolve the Contracting Parties from the responsibility of continuing to seek to resolve it by the means referred to in paragraph 1.
3. A Contracting Party may at any time declare that it recognizes as compulsory ipso facto and without special agreement, in relation to any other Contracting Party accepting the same obligation, the application of the arbitration procedure set out in the Annex on Arbitration. Such declaration shall he notified in writing to the Depositary, who shall communicate it to the other Contracting Parties.

Article 24 RELATIONSHIP BETWEEN THE CONVENTION AND ITS PROTOCOLS

1. No State or regional economic integration organization may become a Contracting Party to this Convention unless it becomes at the same time a Contracting Party to at least one protocol to the Convention. No State or regional economic integration organization may become a Contracting Party to a protocol unless it is, or becomes at the same time, a Contracting Party to the Convention.
2. Decisions concerning any protocol shall be taken only by the Contracting Parties to the protocol concerned.

Article 25 SIGNATURE

This Convention and the Protocol concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region shall be open for signature at Cartagena de Indias on 24 March 1983 and at Bogota from 25 March 1983 to 23 March 1984 by States invited to participate in the Conference of Plenipotentiaries on the Protection and Development of the Marine Environment of the Wider Caribbean Region, held at Cartagena de Indias from 21 to 24 March 1983. They shall also be open for signature between the same dates by any regional economic integration organization exercising competence in fields covered by the Convention and that Protocol and having at least one member State which

belongs to the wider Caribbean region, provided that such regional organization has been invited to participate in the Conference of Plenipotentiaries.

Article 26 RATIFICATION, ACCEPTANCE AND APPROVAL

1. This Convention and its protocols shall be subject to ratification, acceptance or approval by States. Instruments of ratification, acceptance or approval shall be deposited with the Government of the Republic of Colombia, which will assume the functions of Depositary.
2. This Convention and its protocols shall also be subject to ratification, acceptance or approval by the organizations referred to in article 25 having at least one member State a party to the Convention. In their instruments of ratification, acceptance or approval, such organizations shall declare the extent of their competence with respect to the matters governed by the Convention and the relevant protocol. Subsequently these organizations shall inform the Depositary of any substantial modification in the extent of their competence.

Article 27 ACCESSION

1. This Convention and its protocols shall be open for accession by the States and organizations referred to in article 25 as from the day following the date on which the Convention or the protocol concerned is closed for signature.
2. After entry into force of this Convention and of any protocol, any State or regional economic integration organization not referred to in article 25 may accede to the Convention and to any protocol subject to prior approval by three fourths of the Contracting Parties to the Convention or the protocol concerned, provided that any such regional economic integration organization exercises competence in fields covered by the Convention and the relevant protocol and has at least one member State belonging to the wider Caribbean region, that is a party to the Convention and the relevant protocol.
3. In their instruments of accession, the organizations referred to in paragraphs 1 and 2 shall declare the extent of their competence with respect to the matters governed by the Convention and the relevant protocol. These organizations shall also inform the Depositary of any substantial modification in the extent of their competence.
4. Instruments of accession shall be deposited with the Depositary.

Article 28 ENTRY INTO FORCE

1. This Convention and the Protocol concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region shall enter into force on the thirtieth day following the date of deposit of the ninth instrument of ratification, acceptance or approval of, or accession to, those agreements by the States referred to in article 25.
2. Any additional protocol to this Convention, except as otherwise provided in such protocol, shall enter into force on the thirtieth day following the date of deposit of the ninth instrument of ratification, acceptance, or approval of such protocol, or of accession thereto.

3. For the purposes of paragraphs 1 and 2, any instrument deposited by an organization referred to in article 25 shall not be counted as additional to that deposited by any member State of such organization.
4. Thereafter, this Convention and any protocol shall enter into force with respect to any State or organization referred to in article 25 or article 27 on the thirtieth day following the date of deposit of its instruments of ratification, acceptance, approval or accession.

Article 29 DENUNCIATION

1. At any time after two years from the date of entry into force of this Convention with respect to a Contracting Party, that Contracting Party may denounce the Convention by giving written notification to the Depositary.
2. Except as may be otherwise provided in any protocol to this Convention, any Contracting Party may, at any time after two years from the date of entry into force of such protocol with respect to that Contracting Party, denounce the protocol by giving written notification to the Depositary.
3. Denunciation shall take effect on the ninetieth day after the date on which notification is received by the Depositary.
4. Any Contracting Party which denounces this Convention shall be considered as also having denounced any protocol to which it was a Contracting Party.
5. Any Contracting Party which, upon its denunciation of a protocol, is no longer a Contracting Party to any protocol of this Convention, shall be considered as also having denounced the Convention itself.

Article 30 DEPOSITARY

1. The Depositary shall inform the Signatories and the Contracting Parties, as well as the Organization, of:
    a. The signature of this Convention and of its protocols, and the deposit of instruments of ratification, acceptance, approval or accession;
    b. The date on which the Convention or any protocol will come into force for each Contracting Party;
    c. Notification of any denunciation and the date on which it will take effect;
    d. The amendments adopted with respect to the Convention or to any protocol, their acceptance by the Contracting Parties and the date of their entry into force;
    e. All matters relating to new annexes and to the amendment of any annex;
    f. Notifications by regional economic integration organizations of the extent of their competence with respect to matters governed by this Convention and the relevant protocols, and of any modifications thereto.
2. The original of this Convention and of any protocol shall be deposited with the Depositary, the Government of the Republic of Colombia, which shall send certified copies thereof to the Signatories, the Contracting Parties, and the Organization.
3. As soon as the Convention and its protocols enter into force, the Depositary shall transmit a certified copy of the instrument concerned to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

In witness whereof the undersigned, being duly authorized by their respective Governments, have signed this Convention. Done at Cartagena de Indias this twenty-fourth day of March one thousand nine hundred and eighty-three in a single copy in the English, French and Spanish languages, the three texts being equally authentic.

Annex

ARBITRATION

Article 1

Unless the agreement referred to in article 23 the Convention provides otherwise, the arbitration procedure shall be conducted in accordance with articles 2 to 10 below.

Article 2

The claimant party shall notify the Secretariat that the parties have agreed to submit the dispute to arbitration pursuant to paragraph 2 or paragraph 3 of article 23 of the Convention. The notification shall state the subject-matter of arbitration and include, in particular, the articles of the Convention or the protocol, the interpretation or application of which are at issue. The Secretariat shall forward the information thus received to all Contracting Parties to the Convention or to the protocol concerned.

Article 3

The arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the chairman of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

Article 4

1. If the chairman of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of either party, designate him within a further two months period.
2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Secretary-General of the United Nations who shall designate the chairman of the arbitral tribunal within a further two

months' period. Upon designation, the chairman of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. After such period, he shall inform the Secretary-General of the United Nations, who shall make this appointment within a further two months' period.

Article 5

1. The arbitral tribunal shall render its decision in accordance with international law and in accordance with the provisions of this Convention and the protocol or protocols concerned.
2. Any arbitral tribunal constituted under the provisions of this annex shall draw up its own rules of procedure.

Article 6

1. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.
2. The tribunal may take all appropriate measures in order to establish the facts. It may, at the request of one of the parties, recommend essential interim measures of protection.
3. The parties to the dispute shall provide all facilities necessary for the effective conduct of the proceedings.
4. The absence or default of a party to the dispute shall not constitute an impediment to the proceedings.

Article 7

The tribunal may hear and determine counterclaims arising directly out of the subject-matter of the dispute.

Article 8

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

Article 9

Any Contracting Party that has an interest of a legal nature in the subject-matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 10

1. The tribunal shall render its award within five months of the date on which it is established unless it finds it necessary to extend the time-limit for a period which should not exceed five months.
2. The award of the arbitral tribunal shall be accompanied by a statement of reasons on which it is based. It shall be final and binding upon the parties to the dispute.
3. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another arbitral tribunal constituted for this purpose in the same manner as the first.

Annex 11

PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND WILDLIFE TO THE CONVENTION FOR THE PROTECTION AND DEVELOPMENT OF THE MARINE ENVIRONMENT OF THE WIDER CARIBBEAN REGION (1990)

PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND WILDLIFE TO THE CONVENTION FOR THE PROTECTION AND DEVELOPMENT OF THE MARINE ENVIRONMENT OF THE WIDER CARIBBEAN REGION

Adopted at Kingston on 18 January 1990

The Final Act of the Conference of Plenipotentiaries Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region

The Contracting Parties to this Protocol,

Being Parties to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena de Indias, Colombia on 24 March 1983,

Taking into account Article 10 of the Convention which requires the establishment of specially protected areas,

Having regard to the special hydrographic, biotic and ecological characteristics of the Wider Caribbean Region,

Conscious of the grave threat posed by ill-conceived development options to the integrity of the marine and coastal environment of the Wider Caribbean Region,

Recognizing that protection and maintenance of the environment of the Wider Caribbean Region are essential to sustainable development within the region,

Conscious of the overwhelming ecological, economic, aesthetic, scientific, cultural, nutritional and recreational value of rare or fragile ecosystems and native flora and fauna to the Wider Caribbean Region,

Recognizing that the Wider Caribbean Region constitutes an interconnected group of ecosystems in which an environmental threat in one part represents a potential threat in other parts,

Stressing the importance of establishing regional co-operation to protect and, as appropriate, to restore and improve the state of ecosystems, as well as threatened and endangered species and their habitats in the Wider Caribbean Region by, among other means, the establishment of protected areas in the marine areas and their associated ecosystems,

Recognizing that the establishment and management of such protected areas, and the protection of threatened and endangered species will enhance the cultural heritage and values of the countries and territories in the Wider Caribbean Region, and bring

increased economic and ecological benefits to them,

Have agreed as follows:

Article 1 Definitions

For the purpose of this Protocol:

a) "Convention" means the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, Colombia, March 1983);

b) "Action Plan" means the Action Plan for the Caribbean Environment Programme (Montego Bay, April 1981);

c) "Wider Caribbean Region" has the meaning given to the term "the Convention area" in Article 2 (1) of the Convention, and in addition, includes for the purposes of this Protocol:

   i) waters on the landward side of the baseline from which the breadth of the territorial sea is measured and extending, in the case of water courses, up to the fresh water limit; and

   ii) such related terrestrial areas (including watersheds) as may be designated by the Party having sovereignty and jurisdiction over such areas:

d) "Organization" means the body referred to in Article 2 (2) of the Convention;

e) "Protected area" means the areas accorded protection pursuant to article 4 of this Protocol;

f) "Endangered species" are species or sub-species of fauna and flora, or their populations, that are in danger of extinction throughout all or part of their range and whose survival is unlikely if the factors jeopardizing them continue to operate;

g) "Threatened species" are species or sub-species of fauna and flora , or their populations:

   i) that are likely to become endangered within the foreseeable future throughout all or part of their range if the factors causing numerical decline or habitat degradation continue to operate; or

   ii) that are rare because they are usually localized within restricted geographical areas or habitats or are thinly scattered over a more extensive range and which are potentially or actually subject to decline and possible endangerment or extinction.

h) "Protected species" are species or sub-species of fauna and flora, or their populations, accorded protection pursuant to Article 10 of this Protocol;

i) "Endemic species" are species or sub-species of fauna and flora, or their populations, whose distribution is restricted to a limited geographical area;

j) "Annex I" means the annex to the Protocol containing the agreed list of species of marine and coastal flora that fall within the categories defined in Article 1 and that require the protection measures indicated in Article 11(1)(a). The annex may include terrestrial species as provided for in Article 1(c)(ii);

k) "Annex II" means the annex to the Protocol containing the agreed list of species of marine and coastal fauna that fall within the category defined in Article 1 and that require the protection measures indicated in Article 11(1)(b). The annex may include terrestrial species as provided for in Article 1(c)(ii); and

l) "Annex III" means the annex to the Protocol containing the agreed list of species of marine and coastal flora and fauna that may be utilized on a rational and sustainable basis and that require the protection measures indicated in Article 11(1)(c). The Annex may include terrestrial species as provided for in Article 1(c)(ii).

Article 2 General Provisions

1. This Protocol shall apply to the Wider Caribbean Region as defined in Article 1(c).
2. The provisions of the Convention relating to its Protocols shall apply to this Protocol,including in particular, paragraphs 2 and 3 of Article 3 of the Convention.
3. The present Protocol shall not apply to warships or other ships owned or operated by a State while engaged in government non-commercial service. Nevertheless, each Party shall ensure through the adoption of appropriate measures that do not hinder the operation or operational capacities of vessels they own or operate, that they adhere to the terms of the present Protocol in so far as is reasonable and feasible.

Article 3 General Obligations

1. Each Party to this Protocol shall, in accordance with its laws and regulations and the terms of the Protocol, take the necessary measures to protect, preserve and manage in a sustainable way, within areas of the Wider Caribbean Region in which it exercises sovereignty, or sovereign rights or jurisdiction:

   a) areas that require protection to safeguard their special value; and

   b) threatened or endangered species of flora and fauna.

Each Party shall regulate and, where necessary, prohibit activities having adverse effects on these areas and species. Each Party shall endeavour to co-operate in the enforcement of these measures, without prejudice to the sovereignty, or sovereign rights or jurisdiction of other Parties. Any measures taken by such Party to enforce or to attempt to enforce the measures agreed pursuant to this Protocol shall be limited to those within the competence of such Party and shall be in accordance with international law.

Each Party, to the extent possible, consistent with each Party's legal system, shall manage species of fauna and flora with the objective of preventing species from becoming endangered or threatened.

Article 4 Establishment of Protected Areas

1. Each Party shall, when necessary, establish protected areas in areas over which it exercises sovereignty, or sovereign rights or jurisdiction, with a view to sustaining the natural resources of the Wider Caribbean Region, and encouraging ecologically sound and appropriate use, understanding and enjoyment of these areas, in accordance with the objectives and characteristics of each of them.

2. Such areas shall be established in order to conserve, maintain and restore, in particular:

   a) representative types of coastal and marine ecosystems of adequate size to ensure their long-term viability and to maintain biological and genetic diversity;

   b) habitats and their associated ecosystems critical to the survival and recovery of endangered, threatened or endemic species of flora or fauna;

   c) the productivity of ecosystems and natural resources that provide economic or social benefits and upon which the welfare of local inhabitants is dependent; and

   d) areas of special biological, ecological, educational, scientific, historic, cultural, recreational, archaeological, aesthetic, or economic value, including in particular, areas whose ecological and biological processes are essential to the functioning of the Wider Caribbean ecosystems.

Article 5 PROTECTION MEASURES

1. Each Party taking into account the characteristics of each protected area over which it exercises sovereignty, or sovereign rights or jurisdiction, shall, in conformity with its national laws and regulations and with international law, progressively take such measures as are necessary and practicable to achieve the objectives for which the protected area was established.

2. Such measures should include, as appropriate:

a) the regulation or prohibition of the dumping or discharge of wastes and other substances that may endanger protected areas;

b) the regulation or prohibition of coastal disposal or discharges causing pollution, emanating from coastal establishments and developments, outfall structures or any other sources within their territories;

c) the regulation of the passage of ships, of any stopping or anchoring, and of other ship activities, that would have significant adverse environmental effects on the protected area, without prejudice to the rights of innocent passage, transit passage, archipelagic sea lanes passage and freedom of navigation, in accordance with international law;

d) the regulation or prohibition of fishing, hunting, taking or harvesting of endangered or threatened species of fauna and flora and their parts or products;

e) the prohibition of activities that result in the destruction of endangered or threatened species of fauna or flora and their parts and products, and the regulation of any other activity likely to harm or disturb such species, their habitats or associated ecosystems;

f) the regulation or prohibition of the introduction of non-indigenous species;

g) the regulation or prohibition of any activity involving the exploration or exploitation of the sea-bed or its subsoil or a modification of the sea-bed profile;

h) the regulation or prohibition of any activity involving a modification of the profile of the soil that could affect watersheds, denudation and other forms of degradation of watersheds, or the exploration or exploitation of the subsoil of the land part of a marine protected area;

i) the regulation of any archaeological activity and of the removal or damage of any object which may be considered as an archaeological object;

j) the regulation or prohibition of trade in, and import and export of threatened or endangered species of fauna or their parts, products, or eggs, and of threatened or endangered species of flora or their parts or products, and archaeological objects that originate in protected areas;

k) the regulation or prohibition of industrial activities and of other activities which are not compatible with the uses that have been envisaged for the area by national measures and/or environmental impact assessments pursuant to Article 13;

l) the regulation of tourist and recreational activities that might endanger the ecosystems of protected areas or the survival of threatened or endangered species of flora and fauna; and

m) any other measure aimed at conserving, protecting or restoring natural processes, ecosystems or populations for which the protected areas were established.

Article 6 PLANNING AND MANAGEMENT REGIME FOR PROTECTED AREAS

1. In order to maximize the benefits from protected areas and to ensure the effective implementation of the measures set out in Article 5, each Party shall adopt and implement planning, management and enforcement measures for protected areas over which it exercises sovereignty, or sovereign rights or jurisdiction. In this regard, each Party shall take into account the guidelines and criteria formulated by the Scientific and Technical Advisory Committee as provided for in Article 21 and which have been adopted by meetings of the Parties.
2. Such measures should include:

   a) the formulation and adoption of appropriate management guidelines for protected areas;
   b) the development and adoption of a management plan that specifies the legal and institutional framework and the management and protection measures applicable to an area or areas;
   c) the conduct of scientific research on, and monitoring of, user impacts, ecological processes, habitats, species and populations; and the undertaking of activities aimed at improved management;
   d) the development of public awareness and education programmes for users, decision-makers and the public to enhance their appreciation and understanding of protected areas and the objectives for which they were established;
   e) the active involvement of local communities, as appropriate, in the planning and management of protected areas, including assistance to, and training of local inhabitants who may be affected by the establishment of protected areas;
   f) the adoption of mechanisms for financing the development and effective management of protected areas and facilitating programmes of mutual assistance;
   g) contingency plans for responding to incidents that could cause or threaten to cause damage to protected areas including their resources;
   h) procedures to permit, regulate or otherwise authorize activities compatible with the objectives for which the protected areas were established; and
   i) the development of qualified managers, and technical personnel, as well as appropriate infrastructure.

Article 7 Cooperation Programme for, and Listing of, Protected Areas

1. The Parties shall establish co-operation programmes within the framework of the Convention and the Action Plan and in accordance with their sovereignty, or sovereign rights or jurisdiction to further the objectives of the Protocol.

2. A co-operation programme will be established to support the listing of protected areas. It will assist with the selection, establishment, planning, management and conservation of protected areas, and shall create a network of protected areas. To this end, the Parties shall establish a list of protected areas. The Parties shall:

a) recognize the particular importance of listed areas to the Wider Caribbean Region;

b) accord priority to listed areas for scientific and technical research pursuant to Article 17;

c) accord priority to listed areas for mutual assistance pursuant to Article 18; and

d) not authorize or undertake activities that would undermine the purposes for which a listed area was created.

3. The procedures for the establishment of the list of protected areas are as follows:

a) The Party that exercises sovereignty, or sovereign rights or jurisdiction over a protected area shall nominate it to be included in the list of protected areas. Such nominations will be made in accordance with the guideline and criteria concerning the identification, selection, establishment, management, protection and any other matter adopted by the Parties pursuant to Article 21. Each Party making a nomination shall provide the Scientific and Technical Advisory Committee through the Organization with the necessary supporting documentation, including in particular, the information noted in Article 19 (2); and

b) After the Scientific and Technical Advisory Committee evaluates the nomination and supporting documentation, it will advise the Organization as to whether the nomination fulfills the common guidelines and criteria established pursuant to Article 21. If these guidelines and criteria have been met, the Organization will advise the Meeting of Contracting Parties who will include the nomination in the List of Protected Areas.

Article 8 Establishment of Buffer Zones

Each Party to this Protocol may, as necessary, strengthen the protection of a protected area by establishing, within areas in which it exercises sovereignty, or sovereign rights or jurisdiction, one or more buffer zones in which activities are less restricted than in the protected area while remaining compatible with achieving the purposes of the protected area.

Article 9 Protected Areas and Buffer Zones Contiguous to International Boundaries

1. If a Party intends to establish a protected area or a buffer zone contiguous to the frontier or to the limits of the zone of national jurisdiction of another Party, the two Parties shall consult each other with a view to reaching agreement on the measures to be taken and shall, inter alia, examine the possibility of the establishment by the other Party of a corresponding contiguous protected area or buffer zone or the adoption by it of any other appropriate measures including co-operative management programmes.
2. If a Party intends to establish a protected area or a buffer zone contiguous to the frontier or to the limits of the zone of national jurisdiction of a State that is not a Party to this Protocol, the

Party shall endeavour to work together with the competent authorities of that State with a view to holding the consultations referred to in paragraph 1.

3. Whenever it becomes known to a Party that a non-Party intends to establish a protected area or a buffer zone contiguous to the frontier or to the limits of the zone of national jurisdiction of a Party to this Protocol the latter shall endeavour to work together with that State with a view to holding the consultations referred to in paragraph 1.
4. If contiguous protected areas and/or buffer zones are established by one Party and by a State that is not a Party to this Protocol, the former should attempt, where possible, to achieve conformity with the provisions of the Convention and its Protocols.

Article 10 National Measures for the Protection of Wild Flora and Fauna

1. Each Party shall identify endangered or threatened species of flora and fauna within areas over which it exercises sovereignty, or sovereign rights or jurisdiction, and accord protected status to such species. Each Party shall regulate and prohibit according to its laws and regulations, where appropriate, activities having adverse effects on such species or their habitats and ecosystems, and carry out species recovery, management, planning and other measures to effect the survival of such species. Each Party, in keeping with its legal system, shall also take appropriate actions to prevent species from becoming endangered or threatened.
2. With respect to protected species of flora and their parts and products, each Party, in conformity with its laws and regulations, shall regulate, and where appropriate, prohibit all forms of destruction and disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in, such species.
3. With respect to protected species of fauna, each Party, in conformity with its laws and regulations, shall regulate, and where appropriate, prohibit:

   a) the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade in such species or their parts or products; and
   b) to the extent possible, the disturbance of wild fauna, particularly during the period of breeding, incubation, estivation or migration, as well as other periods of biological stress.

Each Party shall formulate and adopt policies and plans for the management of captive breeding of protected fauna and propagation of protected flora.

The Parties shall, in addition to the measures specified in paragraph 3, co-ordinate their efforts, through bilateral or multilateral actions, including if necessary, any treaties for the protection and recovery of migratory species whose range extends into areas under their sovereignty, or sovereign rights or jurisdiction.

The Parties shall endeavour to consult with range States that are not Parties to this Protocol, with a view to co-ordinating their efforts to manage and protect endangered or threatened migratory species.

The Parties shall make provisions, where possible, for the repatriation of protected species exported illegally. Efforts should be made by Parties to reintroduce such species to the wild, or if unsuccessful, make provision for their use in scientific studies or for public education purposes.

The measures which Parties take under this Article are subject to their obligations under Article 11 and shall in no way derogate from such obligations.

Article 11 CO-OPERATIVE MEASURES FOR THE PROTECTION OF WILD FLORA AND FAUNA

1. The Parties shall adopt co-operative measures to ensure the protection and recovery of endangered and threatened species of flora and fauna listed in Annexes I, II and III of the present Protocol.

   a) The Parties shall adopt all appropriate measures to ensure the protection and recovery of species of flora listed in Annex I. For this purpose, each Party shall prohibit all forms of destruction or disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in such species, their seeds, parts or products. They shall regulate activities, to the extent possible, that could have harmful effects on the habitats of the species.

   b) Each Party shall ensure total protection and recovery to the species of fauna listed in Annex II by prohibiting:

      i) the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade in such species, their eggs, parts or products;

      ii) to the extent possible, the disturbance of such species, particularly during periods of breeding, incubation, estivation or migration, as well as other periods of biological stress.

   c) Each Party shall adopt appropriate measures to ensure the protection and recovery of the species of flora and fauna listed in Annex III and may regulate the use of such species in order to ensure and maintain their populations at the highest possible levels. With regard to the species listed in Annex III, each Party shall, in co-operation with other Parties, formulate, adopt and implement plans for the management and use of such species, including:

      i) for species of fauna:

         a) the prohibition of all non-selective means of capture, killing, hunting and fishing and of all actions likely to cause local disappearance of a species or serious disturbance of its tranquility;

b) the institution of closed hunting and fishing seasons and of other measures for maintaining their population;
c) the regulation of the taking, possession, transport or sale of living or dead species, their eggs, parts or products;

iii) For species of flora, including their parts or products, the regulation of their collection, harvest and commercial trade.

2. Each Party may adopt exemptions to the prohibitions prescribed for the protection and recovery of the species listed in Annexes I and II for scientific, educational or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops. Such exemptions shall not jeopardize the species and shall be reported to the Organization in order for the Scientific and Technical Advisory Committee to assess the pertinence of the exemptions granted.

3. The Parties also shall:

a) accord priority to species contained in the annexes for scientific and technical research pursuant to Article 17;

b) accord priority to species contained in the annexes for mutual assistance pursuant to Article 18.

4. The procedures to amend the annexes shall be as follows:

a) any Party may nominate an endangered or threatened species of flora or fauna for inclusion in or deletion from these annexes, and shall submit to the Scientific and Technical Advisory Committee, through the Organization, supporting documentation, including, in particular, the information noted in Article 19. Such nomination will be made in accordance with the guidelines and criteria adopted by the Parties pursuant to Article 21;

b) the Scientific and Technical Advisory Committee shall review and evaluate the nominations and supporting documentation and shall report its views to the meetings of Parties held pursuant to Article 23;

c) the Parties shall review the nominations, supporting documentation and the reports of the Scientific and Technical Advisory Committee. A species shall be listed in the annexes by consensus, if possible, and if not, by a three-quarters majority vote of the Parties present and voting, taking fully into account the advice of the Scientific and Technical Advisory Committee that the nomination and supporting documentation meet the common guidelines and criteria established pursuant to Article 21;

d) a Party may, in the exercise of its sovereignty or sovereign rights, enter a reservation to the listing of a particular species in an annex by notifying the Depositary in writing within 90 days of the vote of the Parties. The Depositary shall, without delay, notify all Parties of reservations received pursuant to this paragraph;

e) a listing in the corresponding annex shall become effective 90 days after the vote for all Parties, except those which made a reservation in accordance with paragraph (d) of this Article; and

f) a Party may at any time substitute an acceptance for a previous reservation to a listing by notifying the Depositary, in writing. The acceptance shall thereupon enter into force for that Party.

5. The Parties shall establish co-operation programmes within the framework of the Convention and the Action Plan to assist with the management and conservation of protected species, and shall develop and implement regional recovery programmes for protected species in the Wider Caribbean Region, taking fully into account other existing regional conservation measures relevant to the management of those species. The Organization shall assist in the establishment and implementation of these regional recovery programmes.

Article 12 Introduction of Non-Indigenous or Genetically Altered Species

Each Party shall take all appropriate measures to regulate or prohibit intentional or accidental introduction of non-indigenous or genetically altered species to the wild that may cause harmful impacts to the natural flora, fauna or other features of the Wider Caribbean Region.

Article 13 ENVIRONMENTAL IMPACT ASSESSMENT

1. In the planning process leading to decisions about industrial and other projects and activities that would have a negative environmental impact and significantly affect areas or species that have been afforded special protection under this Protocol, each Party shall evaluate and take into consideration the possible direct and indirect impacts, including cumulative impacts, of the projects and activities being contemplated.
2. The Organization and the Scientific and Technical Advisory Committee shall, to the extent possible, provide guidance and assistance, upon request, to the Party making these assessments.

Article 14 EXEMPTIONS FOR TRADITIONAL ACTIVITIES

1. Each Party shall, in formulating management and protective measures, take into account and provide exemptions, as necessary, to meet traditional subsistence and cultural needs of its local populations. To the fullest extent possible, no exemption which is allowed for this reason shall:

a) endanger the maintenance or areas protected under the terms of this Protocol, including the ecological processes contributing to the maintenance of those protected areas; or

b) cause either the extinction of, or a substantial risk to, or substantial reduction in the number of, individuals making up the populations of species of fauna and flora within the protected areas, or any ecologically inter-connected species or population, particularly migratory species and threatened, endangered or endemic species.

Parties which allow exemptions with regard to protective measures shall inform the Organization accordingly.

Article 15 Changes in ihe Status if Protected Areas ir Protected Species

1. Changes in the delimitation or legal status of an area, or part thereof, or of a protected species, may only take place for significant reasons, bearing in mind the need to safeguard the environment and in accordance with the provisions of this Protocol and after notification to the Organization.
2. The status of areas and species should be periodically reviewed and evaluated by the Scientific and Technical Advisory Committee on the basis of information provided by Parties through the Organization. Areas and species may be removed from the area listing or Protocol annexes by the same procedure by which they were incorporated.

Article 16 Publicity, Information, Public Awareness and Education

1. Each Party shall give appropriate publicity to the establishment of protected areas, in particular to their boundaries, buffer zones, and applicable regulations, and to the designation of protected species, in particular to their critical habitats and applicable regulations.
2. In order to raise public awareness, each Party shall endeavour to inform the public as widely as possible, of the significance and value of the protected areas and species and of the scientific knowledge and other benefits which may be gained from them or any changes therein. Such information should have an appropriate place in education programmes concerning the environment and history. Each Party should also endeavour to promote the participation of its public and its conservation organizations in measures that are necessary for the protection of the areas and species concerned.

Article 17 Scientific, Technical and Management Research

1. Each Party shall encourage and develop scientific, technical and management-oriented research on protected areas, including, in particular, their ecological processes and

archaeological, historical and cultural heritage, as well as on threatened or endangered species of fauna and flora and their habitats.

2. Each Party may consult with other Parties and with relevant regional and international organizations with a view to identifying, planning and undertaking scientific and technical research and monitoring programmes necessary to characterize and monitor protected areas and species and to assess the effectiveness of measures taken to implement management and recovery plans.
3. The Parties shall exchange, directly or through the Organization, scientific and technical information concerning current and planned research and monitoring programmes and the results thereof. They shall, to the fullest extent possible, co- ordinate their research and monitoring programmes, and endeavour to standardize procedures for collecting, reporting, archiving and analyzing relevant scientific and technical information.
4. The Parties shall, pursuant to the provisions of paragraph 1 above, compile comprehensive inventories of:

   a) areas over which they exercise sovereignty, or sovereign rights or jurisdiction that contain rare or fragile ecosystems; that are reservoirs of biological or genetic diversity; that are of ecological value in maintaining economically important resources; that are important for threatened, endangered or migratory species; that are of value for aesthetic, recreational, tourist or archaeological reasons; and

   b) species of fauna or flora that may qualify for listing as threatened or endangered according to the criteria established under this Protocol.

Article 18 Mutual Assistance

1. The Parties shall co-operate, directly or with the assistance of the Organization or other relevant international organizations, in formulating, drafting, financing and implementing programmes of assistance to those Parties that express a need for it in the selection, establishment and management of protected areas and species.
2. These programmes should include public environmental education, the training of scientific, technical and management personnel, scientific research, and the acquisition, utilization, design and development of appropriate equipment on advantageous terms to be agreed among the Parties concerned.

Article 19 Notifications and Reports to the Organization

1. Each Party shall report periodically to the Organization on:

a) the status of existing and newly established protected areas, buffer zones and protected species in areas over which they exercise sovereignty or sovereign rights or jurisdiction; and
b) any changes in the delimitation or legal status of protected areas, buffer zones and protected species in areas over which they exercise sovereignty, or sovereign rights or jurisdiction.

2. The reports relevant to the protected areas and buffer zones should include information on:

a) name of the area or zone;
b) biogeography of the area or zone (boundaries, physical features, climate, flora and fauna);
c) legal status with reference to relevant national legislation or regulation;
d) date and history of establishment;
e) protected area management plans;
f) relevance to cultural heritage;
g) facilities for research and visitors; and
h) threats to the area or zone, especially threats which originate outside the jurisdiction of the Party.

3. The reports relevant to the protected species should include, to the extent possible, information on:

a) scientific and common names of the species;
b) estimated populations of species and their geographic ranges;
c) status of legal protection, with reference to relevant national legislation or regulation;
d) ecological interactions with other species and specific habitat requirements;
e) management and recovery plans for endangered and threatened species;
f) research programmes and available scientific and technical publications relevant to the species; and
g) threats to the protected species, their habitats and their associated ecosystems, especially threats which originate outside the jurisdiction of the Party.

4. The reports provided to the Organization by the Parties will be used for the purposes outlined in Articles 20 and 22.

Article 20 Scientific and Technical Advisory Committee

1. A Scientific and Technical Advisory Committee is hereby established.
2. Each Party shall appoint a scientific expert appropriately qualified in the field covered by the Protocol as its representative on the Committee, who may be accompanied by other experts

and advisors appointed by that Party. The Committee may also seek information from scientifically and technically qualified experts and organizations.

3. The Committee shall be responsible for providing advice to the Parties through the Organization on the following scientific and technical matters relating to the Protocol:

   a) the listing of protected areas in the manner provided for in Article 7;
   b) the listing of protected species in the manner provided for in Article 11;
   c) reports on the management and protection of protected areas and species and their habitats;
   d) proposals for technical assistance for training, research, education and management (including species recovery plans);
   e) environmental impact assessment pursuant to Article 13;
   f) the formulation of common guidelines and criteria pursuant to Article 21; and
   g) any other matters relating to the implementation of the Protocol, including those matters referred to it by the meetings of the Parties.

4. The Committee shall adopt its own Rules of Procedures.

Article 21 Establishment of Common Guidelines and Criteria

1. The Parties shall at their first meeting, or as soon as possible thereafter, evaluate and adopt common guidelines and criteria formulated by the Scientific and Technical Advisory Committee dealing in particular with:

   a) the identification and selection of protected areas and protected species;
   b) the establishment of protected areas;
   c) the management of protected areas and protected species including migratory species; and
   d) the provision of information on protected areas and protected species, including migratory species.

In implementing this Protocol, the Parties shall take into account these common guidelines and criteria, without prejudicing the right of a Party to adopt more stringent guidelines and criteria.

Article 22 Institutional Arrangements

1. Each Party shall designate a Focal Point to serve as liaison with the Organization on the technical aspects of the implementation of this Protocol.
2. The Parties designate the Organization to carry out the following Secretariat functions:

   a) convening and servicing the meetings of the Parties;
   b) assisting in raising funds as provided for in Article 24;

c) assisting the Parties and the Scientific and Technical Advisory Committee, in co-operation with the competent international, intergovernmental and non-governmental organizations in:

- facilitating programmes of technical and scientific research as provided for in Article 17;
- facilitating the exchange of scientific and technical information among the Parties as provided for in Article 16;
- the formulation of recommendations containing common guidelines and criteria pursuant to Article 21;
- the preparation, when so requested, of management plans for protected areas and protected species pursuant to Article 6 and 10 respectively;
- the development of co-operative programmes pursuant to Articles 7 and 11;
- the preparation, when so requested, of environmental impact assessments pursuant to Article 13;
- the preparation of educational materials designed for various groups identified by the Parties;
- the repatriation of illegally exported wild flora and fauna and their parts or products;

d) preparing common formats to be used by the Parties as the basis for notifications and reports to the Organization, as provided in Article 19;

e) maintaining and updating databases of protected areas and protected species containinginformation pursuant to Articles 7 and 11, as well as issuing periodically updated directories of protected areas and protected species;

f) preparing directories, reports and technical studies which may be required for the implementation of this Protocol;

g) co-operating and co-ordinating with regional and international organizations concerned with the protection of areas and species; and

h) carrying out any other function assigned by the Parties to the Organization.

Article 23 Meetings of ohe Parties

1. The ordinary meetings of the Parties shall be held in conjunction with the ordinary meetings of the Parties to the Convention held pursuant to Article 16 of the Convention. The Parties may also hold extraordinary meetings in conformity with Article 16 of the Convention. The meetings will be governed by the Rules of Procedure adopted pursuant to Article 20 of the Convention.
2. It shall be the function of the meetings of the Parties to this Protocol:

a) to keep under review and direct the implementation of this Protocol;

b) to approve the expenditure of funds referred to in Article 24;

c) to oversee and provide policy guidance to the Organization;

d) to consider the efficacy of the measures adopted for the management and protection of areas and species, and to examine the need for other measures, in particular in the form of annexes, as well as amendments to this Protocol or to its annexes;

e) to monitor and promote the establishment and development of the network of protected areas and recovery plans for protected species provided for in Articles 7 and 11;

f) to adopt and revise, as needed, the guidelines and criteria provided for in Article 21;

g) to analyze the advice and recommendations of the Scientific and Technical Advisory Committee pursuant to Article 20;

h) to analyze reports transmitted by the Parties to the Organization under Article 22 of the Convention and Article 19 of this Protocol, as well as any other information which the Parties may transmit to the Organization or to the meeting of the Parties; and

i) to conduct such other business as appropriate.

Article 24 Funding

In addition to the funds provided by the Parties in accordance with paragraph 2, Article 20 of the Convention, the Parties may direct the Organization, to seek additional funds. These may include voluntary contributions for purposes connected with the Protocol from Parties, other governments, government agencies, non- governmental, international, regional and private sector organizations and individuals.

Article 25 Relationship to Other Conventions Dealing With The Special Protection of Wildlife

Nothing in this Protocol shall be interpreted in a way that may affect the rights and obligations of Parties under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).

Article 26 Transitional Clause

1. The initial version of the annexes, which constitutes an integral part of the Protocol, shall be adopted by consensus at a Conference of Plenipotentiaries of the Contracting Parties to the Convention.

Article 27 Entry Into Force

1. The Protocol and its annexes, once adopted by the Contracting Parties to the Convention, will enter into force in conformity with the procedure established in paragraph 2 of Article 28 of the Convention.
2. The Protocol shall not enter into force until the initial annexes have been adopted in accordance with Article 26.

Article 28 Signature

This Protocol shall be open for signature at Kingston, from 18 January 1990 to 31 January 1990 and at Bogotá from 1February 1990 to 17 January 1991 by any party to the Convention.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective governments, have signed this Protocol.

Done at Kingston, on this eighteenth day of January one thousand nine hundred and ninety in a single copy in the English, French and Spanish languages, the three texts being equally authentic.

Annex 12

TABLE SUMMARIZING KEY PROVISIONS OF THE UNCLOS IN RELATION TO THE FIRST QUESTION

UNCLOS provision	Description
Article 192	The general, fundamental duty of States to protect and preserve the marine environment.
Article 58(3)	Duty of States to have due regard to the rights and duties of the coastal State.
Article 58(3)	Duty of States to comply with the laws and regulations adopted by the coastal State.
Article 62(4)	Nationals of flag States fishing in the EEZ are to comply with the coastal State's conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State
Article 64(1)(and article 118)	Duty of States to cooperate with the coastal State directly or through appropriate international organizations when fishing for highly migratory species that occur both within the EEZ and beyond. If there is no regional organisation, the flag state whose nationals harvest such species and the coastal State should cooperate to establish an organization in the region and participate in its work.
Articles 91 and 94	Duty of States to require a genuine link between the flag State and the ship and duty to exercise effectively its jurisdiction and control over vessels flying their flag.
Article 94(2)(a)	Duty of States to maintain a register containing the names and particulars of ships flying its flag.
Article 94(2)(b)	Duty of States to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
Article 94(6)	Duty of States to investigate if it receives a report from a third party State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised. If necessary, the State shall take any action necessary to remedy the situation.
Article 217	The duty incumbent on flag States to ensure compliance by vessels flying their flag with applicable international rules and standards, established through the competent international organization or general diplomatic conference.

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Articles 91 and 94	Duty of States to require a genuine link between the flag State and the ship and duty to exercise effectively its jurisdiction and control over vessels flying their flag.
Article 94(2)(a)	Duty of States to maintain a register containing the names and particulars of ships flying its flag.
Article 94(2)(b)	Duty of States to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
Article 94(6)	Duty of States to investigate if it receives a report from a third party State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised. If necessary, the State shall take any action necessary to remedy the situation.
Article 217	The duty incumbent on flag States to ensure compliance by vessels flying their flag with applicable international rules and standards, established through the competent international organization or general diplomatic conference.

Annex 13

TABLE SUMMARIZING KEY PROVISIONS OF THE UNCLOS IN RELATION TO THE SECOND QUESTION

UNCLOS provision	Description
Article 192	The general, fundamental duty of States to protect and preserve the marine environment.
Article 86	Sets out the territorial application of Part VII (High Seas). Part VII applies to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."
Article 87	Requires that the high seas are open to all States and includes a non-exhaustive list of freedoms, which includes the freedoms of navigation and of fishing (the latter expressly being subject to articles 116 to 120).
Article 89	Invalidates the claim of any State that purports to subject any part of the high seas to their own sovereignty.
Article 90	Right of every State to sail ships flying its flag on the high seas.
Articles 91 and 94	Duty of States to require a genuine link between the flag State and the ship and duty to exercise effectively its jurisdiction and control over vessels flying their flag.
Article 94(2)(a)	Duty of States to maintain a register containing the names and particulars of ships flying its flag.
Article 94(2)(b)	Duty of States to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
Article 94(6)	Duty of States to investigate if it receives a report from a third party State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised. If necessary, the State shall take any action necessary to remedy the situation.
Article 116	Further emphasises the right of the nationals of all States to fish on the high seas, subject to: any treaty obligation to the contrary; the rights duties and interests of coastal States (in particular, under articles 63(2) and 64 to 67 which covers straddling stocks, highly migratory species, marine mammals, anadromous stocks, and catadromous species); and the provisions of articles 117 to 120 regarding the conservation and management of the living resources of the high seas.
Article 117	The duty of all States to take, or to cooperate (actually and in good faith) 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.
Article 118	The duty of all States to cooperate (actually and in good faith)

	with other States with a view to taking the measures necessary for the conservation of the living resources concerned where their nationals exploit identical living resources, or different living resources in the same area. Where appropriate, this requires cooperation (actual and good faith) to establish subregional or regional fisheries organizations.
Article 119	Requires that conservation and management measures should be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, based on the best scientific evidence available, and take into account the effect of harvesting particular species on the ecosystem.
Article 120	Governs the conservation and management of marine mammals.
Article 217	The duty incumbent on flag States to ensure compliance by vessels flying their flag with applicable international rules and standards, established through the competent international organization or general diplomatic conference.