

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,

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

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

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

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.

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

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.

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.

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

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

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 Tuna-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

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:

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

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

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

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.

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

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*:

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

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

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

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

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

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

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 environment²⁸⁵ (Emphasis added).

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.