

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'ÉTAT CÔTIER PAR LES BATEAUX DE PÊCHE BÉNÉFICIAIRES 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

²⁸⁹ Available at http://www.spcsrp.org/medias/csrp/comm/25cc/CSRP_web_art_25e_sess_ext_cte_coord_justif_ex-e-cr.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 translation²⁹² 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.

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

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).

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

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

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 EEZ³⁰¹ 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

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,

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 rights³⁰⁸) 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

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

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 transshipment of fish hauls derived from IUU fishing activities (which is a major method for evading anti-IUU measures³¹³) must fall within this term. As such, if a foreign vessel engages in at-sea transshipment 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 transshipment 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

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

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 them³²² 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

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 legislate³²⁶ 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

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:

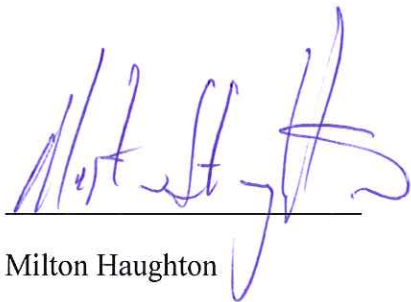
The most important rights of the coastal State relate to the right to prevent IUU fishing of its resources. This array of rights is extensive and exists concurrently and complementary to the flag State's jurisdiction over vessels flying its flag. The most important rights, which are to be exercised in 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

A handwritten signature in blue ink, appearing to read 'Milton Haughton', is written over a horizontal line.

Milton Haughton

Executive Director, Representative of
the Caribbean Regional Fisheries Mechanism