

Written Statement of the European Union (annexes 1 to 6 not reproduced)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
BY: CEAUC

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL
FISHERIES COMMISSION (SRFC)
(CASE NO.21)**

WRITTEN STATEMENT BY THE EUROPEAN COMMISSION
ON BEHALF OF THE EUROPEAN UNION

29 NOVEMBER 2013

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Annex 1	Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (...). OJ L 286 , 29.10.2008 P. 1. ("the IUU Regulation")	65
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Annex 3	Commission Decision of 26 November 2013 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 (...). OJ C 346, 27.11.2013, p.26 ("second Article 32 decision")	72
Annex 4	Commission Implementing decision of 26 November 2013 identifying the third countries that the Commission considers as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 (...). OJ C 346, 27.11.2013, p. 2 ("first Article 31 Decision")	74
Annex 5	Bilateral Fisheries Partnership Agreements (FPAs) signed by the European Union with States members of the SRFC	Footnotes 18, 37, 38.
Annex 6	Commission Implementing Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 131, 29.5.2010 (consolidated version) and latest amendments made by Commission Implementing Regulation (EU) No 672/2013 of 15 July 2013, OJ L 193, 16.7.2013, p. 6 (not yet included in the consolidated version)	Footnote 26, 32.

LIST OF ABBREVIATIONS AND ACRONYMS USED

CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
EEZ	Exclusive Economic Zone
FAO Compliance Agreement	FAO Agreement to Promote Compliance with International conservation and Management Measures by Fishing Vessels on the High Seas
FAO	Food and Agriculture Organisation
FPA	Fisheries Partnership Agreement
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
IPOA-IUU	FAO International Plan Of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing (2001)
IUU	Illegal, Unreported and Unregulated
LOSC, the Convention	The United Nation Convention on the Law of the Sea (Law Of the Sea Convention) (1982)
MCA Convention	Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (Convention on Minimal Conditions of Access) (2012)
NAFO	Northwest Atlantic Fisheries Organisation
NEAFC	North East Atlantic Fisheries Commission
RFMO	Regional Fisheries Management Organisation
SEAFO	South-East Atlantic Fisheries Organisation
SIOFA	South Indian Ocean Fisheries Agreement
SPRFMO	South Pacific Regional Fisheries Management Organisation
SRFC	Sub-Regional Fisheries Commission
UN	The United Nations
UNGA	United Nations General Assembly
The Union	The European Union
UNFSA, UN Fish Stocks Agreement	Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea Of 10 December 1982 Relating to the Conservation and Management of straddling fish stocks and highly migratory fish stocks (1995)
VMS	Vessels Monitoring System
WCPFC	Western and Central Pacific Fisheries Commission

CHAPTER I

INTRODUCTION

1. On 28 March 2013, the International Tribunal for the Law of the Sea (hereinafter "ITLOS" or "the Tribunal") received a request for an advisory opinion from the Sub-Regional Fisheries Commission¹ (hereinafter SRFC). The request was based on a resolution adopted during the fourteenth extraordinary session (25-29 March 2013) of the Conference of Ministers of the SFRC, which authorized the Permanent Secretary of the SRFC to seize the Tribunal of the following questions:
 1. "What are the obligations of the flag State in cases where IUU fishing activities are conducted within the Exclusive Economic Zones of third party States?
 2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
 3. Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
 4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?"
2. By its order of 24 May 2013, the President of the Tribunal fixed 29 November 2013 as the time-limit within which written statements may be presented to the Tribunal, in accordance with Article 133(3) of the Rules of the Tribunal.
3. The European Union², a Party to both the United Nations Law of the Sea Convention (hereinafter "LOSC" or "the Convention"), and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter "UN Fish Stocks Agreement" or the "UNFSA"), respectfully submits the following observations.

¹ The Sub-Regional Fisheries Commission member States are: the Republic of Guinea, the Republic of Cape Verde, the Republic of Gambia, the Republic of Guinea-Bissau, the Islamic Republic of Mauritania and the Republic of Senegal.

² The European Union is founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union (as last amended) and has legal personality. Its member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

CHAPTER II

JURISDICTION AND ADMISSIBILITY

I. Jurisdiction

4. This submission is without prejudice to the question of the jurisdiction of the Tribunal to examine the request for an advisory opinion in respect of the questions raised before it.

II. Admissibility

5. Pursuant to Article 138 (1) of the Rules of the Tribunal, "[t]he Tribunal may give an advisory opinion", which implies *inter alia* that it has discretion in regard to the admissibility of individual questions. In the case of the present request, doubts can be entertained as to whether the questions addressed to the Tribunal should be admitted, especially in the form in which they stand at present. In this respect, the following remarks may be made.
6. Firstly, the questions do not relate to any specific international convention or agreement or part of it. This poses a problem since State participation in international agreements differs from one agreement to another, and thus the rules that bind them can, inevitably, be different. Thus, the answers to the questions inevitably vary depending on the particular legal instrument and whether a State is party to it. For instance:
 - in respect of the Convention, all the Member States of the SRFC are Contracting Parties;
 - in respect of the UN Fish Stocks Agreement ("UNFSA")³, however, two of the Member States of the SRFC are Contracting Parties (Guinea, Senegal), two are signatories (Guinea-Bissau, Mauritania) while two of them (Cape Verde, Sierra Leone) have not signed it.
7. In addition, it may also be noted, in the light of the Technical Note submitted by the Permanent Secretariat of the SRFC relating to the questions, that:
 - the International Plan of Action (IPOA-IUU)⁴ is a voluntary instrument, and
 - the Agreement on the Port States Measures⁵ is not yet in force.
8. Thus, the diversity of legal instruments applying to different States, including the SRFC Contracting Parties themselves, poses a particular difficulty as regards the possibility for the Tribunal to focus its reply in the appropriate way.

³ Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of straddling fish stocks and highly migratory fish stocks (1995)

⁴ FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing (2001)

⁵ FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009)

9. Secondly, and in the same vein, the questions do not, in their current form, call for the Tribunal to exercise its functions of "interpretation and application" of legal provisions of an international agreement. In this respect, the questions, as they stand, are only remotely connected with the judicial functions of interpretation and application of legal rules.
10. In the case of ITLOS, Article 288 of the LOSC, while referring to the "interpretation or application" of international agreements in the context of disputes, seems also relevant for advisory opinions. The need to "interpret or apply" law can be considered an expression of a general principle of law governing judicial functions and thus it is pertinent to advisory opinions as well.
11. More specifically, the expression of such a general principle in Article 288 of the LOSC is made relevant to advisory opinions through the cross-references in Article 138(3) of the Rules of the Tribunal. Article 138(3) provides that Articles 130 to 137 of the Rules (which relate to the Seabed Disputes Chamber) shall apply *mutatis mutandis*. In this respect, it may be noted that Article 130 provides that the Sea Bed Chamber shall "apply this section" and "be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of the Rules applicable in contentious cases".
12. Thus, it can be considered that the judicial function in general concerns the interpretation or application of applicable legal rules, and the replies to the questions should be limited within the scope of such function, as appropriate. In this respect it should also be underlined that the advisory opinions cannot be used to undermine or circumvent the applicable dispute settlement provisions of the bilateral or multilateral instruments in place (consultations, conciliation, arbitration, recourse to courts etc.), nor be used to replace or extend the law-making powers that the parties to such agreements explicitly confer on them.
13. Thirdly, there are no facts provided in connection with the questions raised. Even in the case of advisory opinions, factual background is important especially if the factual aspects are inherently connected with the rules themselves and their application.
14. For instance, the interpretation and application of Article 94(1) of the LOSC, which lays down the duties of flag States ("Every State shall effectively exercise its jurisdiction and control ..."), would require factual information in order to assess whether such jurisdiction or control had been effectively exercised. By its nature it is a reflexive rule, which depends on the factual context, and which can also develop and evolve over time.
15. *A fortiori*, an assessment of issues of liability is closely connected with factual situations. An assessment of a breach and a determination of appropriate legal consequences for that breach is based on specific facts. Since no facts have been provided, any assessment of aspects of liability, even in general terms, is difficult.
16. Consequently, the request for an advisory opinion should be more closely related to the interpretation or application of specific legal obligations, in particular the MCA Convention⁶ or the LOSC. In the present case, the questions are not directly related to the interpretation or application of the provisions of either of these conventions. Instead, the questions are formulated very broadly, which causes difficulties for responding to them in an appropriate manner. This can also undermine the practical meaningfulness of the Tribunal's Opinion for different members of the international community, bearing in mind

⁶ Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (2012).

their different legal obligations. Such considerations raise doubts as to the admissibility of such broadly formulated questions in the present case.

17. Considering the general nature of the questions, especially the fact that they do not concern the interpretation or application of any particular instrument or a part of it, and given the lack of sufficient factual context, the Tribunal should examine carefully whether the questions, especially in the form in which they have been submitted by the SRFC, are admissible.

CHAPTER III

RESPONSES TO THE QUESTIONS

I. Substance

A. Structure of the Statement by the European Union on the proposed replies to the questions by the SRFC

18. In order to answer the questions in a useful manner, it is necessary to consider the overall balance between rights and obligations of flag States and of coastal States respectively, as provided by international law in the field of the conservation and exploitation of marine living resources, and more specifically in the context of monitoring and enforcement against Illegal, Unreported and Unregulated (“IUU”) fishing.
19. To do so, this statement will proceed by analysing the applicable provisions of the LOSC and of other instruments and agreements which are relevant *ratione materiae* for providing answers to the questions before the Tribunal.
20. Within the framework of the Convention, the European Union is a contracting party to several agreements establishing Regional Fisheries Management Organisations (“RFMOs”) and is convinced of the important role that such organisations can play in ensuring that States and organisations cooperate to achieve sustainable management of fisheries, and in developing practices increasingly recognised by the International Community. The European Union has also concluded a number of bilateral Fisheries Partnership Agreements (“FPAs”) which reflect relevant international practice and can thus contribute to the advisory task of the Tribunal. Lastly, the FAO International Plan of Action to prevent, deter and eliminate Illegal, Unreported and Unregulated Fishing (“IPOA-IUU”) should be taken into account, while having regard to the non-binding nature of its provisions. The European Union has indeed accorded great importance to this instrument and has given effect to most of its provisions in its internal legislation.
21. As already noted before, not all States are parties to the agreements and instruments which will be mentioned in the present statement. Not all the provisions quoted are therefore automatically applicable to all States. Nevertheless, besides the binding force they might have among the States parties, such instruments can provide useful guidance when interpreting the relevant provisions of the Convention. It should also be recalled again that the questions asked by the SRFC States do not specify the provisions the interpretation or application of which is sought, nor provide any facts related to them.

B. The concept of IUU fishing

22. The concept of IUU fishing expresses a global concern to ensure sustainable fisheries resources in both the high seas and areas under national jurisdiction⁷. It is addressed each

⁷ See for instance Resolution A/RES/67/79 of 2012, point 48 :

“[the United Nations General Assembly] Emphasizes once again its serious concern that illegal, unreported and unregulated fishing remains one of the greatest threats to fish stocks and marine ecosystems and continues to have serious and major implications for the conservation and management of ocean resources, as well as the food security and the economies of many States, particularly developing States, and renews

year in the United Nations General Assembly Resolutions on sustainable fisheries, which treat it as being one of the greatest threats to marine ecosystems and having continuous and major implications for the conservation and management of ocean resources.⁸ In its introduction, the IPOA-IUU, which is a voluntary FAO instrument addressing IUU fishing, specifically states that IUU fishing "undermines efforts to conserve and manage fish stocks in all capture fisheries".

23. The term IUU fishing is neither used in the LOSC (1982), nor in the UN Fish Stocks Agreement (1995). Later, during the Review Conference of the UN Fish Stock Agreement, IUU fishing was identified as a problem that undermines the provisions of the Agreement, and which needs to be addressed by States collectively⁹. The term has established itself in common use only subsequently¹⁰ and can be summarized as relating to one or the other of the following phenomena¹¹:

- Fishing in areas under national jurisdiction without the authorisation of the coastal State;
- Fishing which contravenes or undermines conservation and management;
- Failure to effectively exercise the required jurisdiction or control over vessels and nationals;
- Failure to fully and accurately meet fishery and fishing vessel data reporting requirements.

24. The notion of IUU fishing is defined in the IPOA-IUU, which is a voluntary instrument, as follows:

"3.1 Illegal fishing refers to activities:

its call upon States to comply fully with all existing obligations and to combat such fishing and urgently to take all necessary steps to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;"

⁸ UNGA resolution A/RES/62/177 (2008), paragraph 37

⁹ UN, *Report of the Second Informal Consultations of the States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, New York, USA, 23–25 July 2003, ICSP2/UNFSA/REP/INF.1 August 2003, para. 14; *See also* reports of the Third, Fourth, and Fifth Informal Consultations of the States Parties to the UN Fish Stocks Agreement; UNGA, *Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, New York, USA, 22–26 May 2006, Prepared by the President of the Conference with the Assistance of the Secretariat, A/CONF.210/2006/15, June 2006.

¹⁰ See agenda item on 'Illegal, Unregulated and Unreported Fishing in the Convention Area', in CCAMLR, *Report of Sixteenth Meeting of the Commission, Hobart, Australia, 27 October – 7 November 1997* (Hobart: CCAMLR, 1997), paragraph 8(7)–8(14), p.25–26; see D. Agnew, 'The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme', *Marine Policy*, Vol. 24, 2000, pp. 361–374.

¹¹ See also the "High Seas Task Force (2006), *Closing the net: Stopping illegal fishing on the high seas*", Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University.

- 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
 - 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
 - 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
- 3.2 Unreported fishing refers to fishing activities:
- 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
 - 3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
- 3.3 Unregulated fishing refers to fishing activities:
- 3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
 - 3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law."
25. The IPOA-IUU calls on States to coordinate their activities and cooperate directly, and as appropriate through relevant regional fisheries management organisations (RFMOs), in preventing, deterring and eliminating IUU fishing (Point 28). This call reflects the international cooperation duties enshrined in Articles 61(2), 63(1) and (2), and 64(1) of the LOSC.
26. Article 1(e) of the 2009 FAO Port States Measures Agreement, which is not yet in force, refers for the definition of IUU fishing to the IPOA-IUU.

C. Question 1: What are the obligations of the flag State in cases where IUU fishing activities are conducted within the Exclusive Economic Zones of third party States?

27. Although the focus of Question 1 is on flag State obligations (and Question 4 mainly concerns the coastal States' obligations) the respective obligations of flag States for IUU activities in the EEZ of another State (the coastal State) and the coastal States' own responsibilities are closely related, and therefore Question 1 has to be considered in conjunction with Question 4. Both aspects are crucial in addressing IUU fishing.
28. It should be emphasized that the coastal State plays the central role in the conservation and management of living resources in the EEZ. Article 61(1) and (2) of the LOSC provide indeed that the coastal State "shall determine the allowable catch" of the living resources "taking into account the best scientific evidence available to it" and "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation". Vessels operating in the EEZ of other States are also under the enforcement jurisdiction of the coastal State. Article 73(1) of LOSC states as follows: "(t)he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." The coastal States' enforcement jurisdiction is limited to the sovereign rights under the EEZ concept and has a functional nature.
29. While article 73 of the Convention speaks of rights (or powers) of coastal States, which implies a prominent role for the coastal State, the exercise of such rights also inevitably entails some responsibilities¹², and should be interpreted in connection with articles 56 (*Rights, jurisdiction and duties of the coastal State in the EEZ*) and 61 (*Conservation of the living resources*). The existence of an EEZ presupposes that it is claimed by the coastal State. Once a coastal State has legitimately claimed an EEZ, it becomes subject to the duties laid down in general in article 56 and, specifically in the field of fisheries, in article 61. It follows that the coastal State has a prominent operational responsibility to act in cases of suspected IUU fishing activities in its EEZ, including drawing the attention of the flag State to such activities.

¹² As it has been noted in the FAO document "Implementation of the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing"- Technical guidelines for responsible fisheries n. 9:

"Within areas under national jurisdiction, IUU fishing undermines international standards concerning the rights and responsibilities of coastal States with respect to living marine resources. The 1982 UN Convention recognizes the sovereign rights of coastal States to explore, exploit, conserve and manage those resources in areas under their jurisdiction. **With those rights come responsibilities**, as set forth in the 1982 UN Convention and elaborated in subsequent instruments, to adopt and implement appropriate measures to conserve and manage those resources." (emphasis added).

FAO technical guidelines for responsible fisheries n. 9, available at <http://www.fao.org/docrep/005/Y3536E/Y3536E00.HTM> as of 25 November 2013.

30. This prominent role of the coastal State does not exempt the flag State from its general duty to effectively exercise its jurisdiction and control over vessels flying its flag, in accordance with Article 94 LOSC. Nor does it exempt the flag State from its general duty of cooperation.
31. These general flag State duties are applicable regardless of maritime zones and they apply even if a vessel operates in the EEZ of another State¹³. This is a corollary of the right of the State to grant its nationality to ships. Under the Convention, it is for every State to regulate the conditions for the grant of its nationality to ships, for their registration and for the right to fly its flag (Article 91 LOSC). This right to give its nationality to vessels is subject to various flag State obligations laid down in the Convention as well as other international instruments.
32. Article 94 of LOSC lays down these general flag State duties as follows:
1. "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
 2. In particular every State shall:
 - maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
 - assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship."
33. If a State believes that proper jurisdiction and control with respect to a ship have not been exercised, it "may report the facts to the flag State". Upon receiving such report "the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation" (Article 94(6) LOSC).
34. The above general flag State duties do not address fishing vessels or fishing activities specifically. They are nevertheless key provisions for addressing IUU fishing. As it has been stated in a presentation by the then President of the Tribunal, Rüdiger Wolfrum, that in the EEZ of third countries, 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. To uphold that obligation, two lines of argument may be invoked. The first is 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. Secondly, as far as the protection of the marine environment is concerned, it may be argued that there is a mutual obligation to reinforce each other's efforts to manage and conserve the marine environment. It may further be argued that every effort made to conserve and manage marine living resources – be it at national or international level – also

¹³ Article 58(2) of UNCLOS as regard rights and duties of other States in the EEZ: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part."

serves common interests. This again would call for mutual respect and the enforcement of national measures.”¹⁴

35. In addition, it is appropriate to consider the UNFSA. Said agreement, as well as several other binding and non-binding instruments¹⁵ set out specific duties of flag States for fishery activities. Most of such duties are related to high seas, but others are relevant to the EEZs of other States.

36. Part V of the UNFSA concerns duties of the flag States. Article 18(1) of the Agreement should be highlighted in this regard. It provides that:

“[a] state whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with sub regional and regional conservation and management measures and do not engage in any activity which undermines the effectiveness of such measures.”

Article 18(2) states, moreover, that a State shall authorize the use of its vessels for fishing on the high seas only “where it is able to exercise effectively its responsibilities in respect of such vessels” under the Convention and that Agreement.

37. Article 18(3) UNFSA lays down a series of regulatory duties for the flag State in respect of controlling vessels flying its flag. Some of these flag State duties are limited to the high seas, others are relevant vis-à-vis the EEZs of other States. In this regard, Article 18(3)(b)(i) and (iv) and Article 18(3)(i) provide that the measures to be taken by the flag States shall include, for instance, the:

“(b) establishment of regulations:

(i) to apply terms and conditions to the licence, authorisation or permit sufficient to fulfill any subregional, regional or global obligations of the flag States

(iv) to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under national jurisdiction of other States”.

....

(i) regulation of fishing activities to ensure compliance with sub-regional, regional or global measures ...”

38. It should be emphasized that Article 18(3)(b)(iv) UNFSA reflects the so-called “poaching resolutions” (49/116, 51/36 and 52/29) which the UN General Assembly adopted in 1994 and 1997 with the aim of fighting against illegal fishing in the waters under the jurisdiction of coastal States. Several RFMOs Conventions and/or measures also reflect these resolutions¹⁶.

¹⁴ Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York, 21 June 2007 – “The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources”

¹⁵ See e.g. the FAO Compliance Agreement (in force since 24 April 2003) Article III, IPOA-IUU (voluntary instrument), Sections 34-50, FAO Code of Conduct, Section 8.2.

¹⁶ See, for example, Article 25, paragraph 1(b) of SPRFMO Convention, Article 24, paragraph 1(b) of WCPFC Convention, Article 14, paragraph 4 of SEAFO Convention, Article 11, paragraph 1(b) of SIOFA Convention, Section 1, paragraph d of ICCAT Recommendation 03-12 and Section 1 paragraph h of IOTC Resolution 11/03.

39. Furthermore, Part VI of the UNFSA contains provisions relating to compliance and enforcement. Article 19 concerns compliance and enforcement by the flag State, and provides *inter alia* as follows:

1. "A State shall ensure compliance by vessels flying its flag with sub-regional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks. To this end, that State shall:
 - (a) enforce such measures irrespective of where violations occur;
 - (b) investigate immediately and fully any alleged violation of sub-regional or regional conservation and management measures ..., and report promptly to the State alleging the violation and the relevant sub-regional or regional organisation or arrangement on the progress and outcome of the investigation;
 - (c) require any vessels flying its flag to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation;
 - (d) if satisfied that sufficient evidence is available in respect of an alleged violation, refer the case to its authorities with a view of instituting proceedings without delay in accordance with its law ...
2. All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities ..."

40. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the "FAO Compliance Agreement")¹⁷ in force since 24 April 2003, provides in its Article III(8) that flag States shall take further enforcement action against vessels flying their flag, where appropriate, by making contraventions against that Agreement an offence in national law.

41. Furthermore, also RFMOs put in place certain management and conservation measures for the fisheries under their purview in order to achieve their objectives. These provisions bind those states that are Members and Cooperating Non-Contracting Parties to the RFMOs. The level of specificity varies from one RFMO to another. In general, the responsibility of the flag State is to ensure that vessels flying its flag are in compliance with the rules of the RFMO, like resolutions on vessel monitoring systems ("VMS"), on transshipment and on the vessel register, which are measures that are put in place to help prevent IUU fishing, and where the responsibility of the flag State in ensuring compliance is a key element. This is particularly relevant in the cases of RFMOs whose Convention Areas cover both sea areas under national jurisdiction of the coastal States as well as High Seas areas (e.g. ICCAT, IOTC, WCPFC, NEAFC).

¹⁷ The European Union notes that among the States of the SRFC, only Senegal and Cape Verde are Contracting Parties to the FAO Compliance Agreement.

42. Besides provisions on the duties of the flag States, the UNFSA also contains provisions relating to international cooperation in enforcement with other States, acting in various capacities. Its Article 20 provides inter alia:

"(1) States shall cooperate ... to ensure compliance with and enforcement of subregional and regional conservation and management measures for straddling fish stocks and high migratory fish stocks.

....

(4) States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.

...

(6) Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal State, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. The flag State shall cooperate with the coastal State in taking appropriate enforcement action in such cases ..."

43. The IPOA-IUU, a voluntary instrument, provides (sections 34-50) for further flag State responsibilities with regard to fishing vessel registration, maintenance of records of fishing vessels and authorisations to fish. Coastal State measures are contained in section 51 and include measures such as effective monitoring, control and surveillance of fishing activities in the EEZ and cooperation and information of other States. Section 84 provides moreover that, when a State fails to ensure that its vessels do not engage in IUU fishing activities, States that are members of a RFMO "should draw the problem to the attention of that State". If the problem is not rectified, members of the RFMO may adopt appropriate measures.
44. Finally, in this regard, the practice of Fisheries Partnership Agreements (FPAs) to which the European Union is a party, respect the principle of the LOSC and seek to promote sustainable fisheries and to contribute to the fight against IUU practices. They could be taken into consideration as part of relevant international practice. Generally, such agreements provide clauses drafted along these lines:

*"The fishing activities governed by this Agreement shall be subject to the laws and regulations in force in ... [Coastal State party to the FPA which grants access to Member States' flagged vessels]"*¹⁸.

¹⁸ See for instance, to limit the examples to the States parties to the SRFC for the sake of brevity (**Annex 5**):

- Article 5 of the FPA with Mauritania, concluded by Council Regulation 1801/2006, (Official Journal ("OJ") of the European Union, L 343, 8.12.2006, p. 1);
- Article 5(2) of the FPA with Cape Verde, concluded by Council Regulation (EC) No 2027/2006 of 19 December 2006, (OJ L 414 of 30.12.2006);
- Article 3(1) of the Agreement between the Government of the Republic of Senegal and the European Economic Community on fishing off the coast of Senegal, concluded by Council Regulation (EEC) No 2212/80 of 27.6.80 (OJ L 226 of 29.8.80.) – no Protocol in force

45. This reflects an established practice to submit the EU vessels (i.e. vessels flying the flag of Member States of the European Union) operating in EEZs to the laws and regulations of the coastal States. Such agreements entrust the coastal State with the task of enforcing its own laws and regulations in its EEZ, provided that they are compatible with the agreements themselves.
46. In conclusion, it can be concluded from this overview that in the high seas it is for the flag State to exercise its primary regulatory and enforcement duties to ensure that vessels flying its flag do not engage in IUU fishing.
47. In respect of possible IUU fishing in areas under the national jurisdiction of coastal States, the flag State's regulatory and enforcement jurisdiction continues to apply, provided that this does not conflict with the central duties and responsibilities of the coastal States within those areas, in particular as regards the exercise of the sovereign rights that the coastal State enjoys for exploiting, conserving and managing the living natural resources. Without prejudice to the coastal State's jurisdiction, the flag State has also the responsibility to provide for investigations and to institute proceedings in respect of vessels flying its flag that have engaged in IUU fishing, while duly taking into account the enforcement actions possibly applied by the coastal State vis-à-vis that vessel.
48. The flag State also has a further obligation to cooperate with the coastal States where its fishing vessels conduct such fishing activities.

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

49. Following from the previous question, the second question queries the extent of flag State liability for IUU fishing activities conducted by vessels sailing under its flag in both the high seas and in the EEZs of third States.
50. On the one hand, as the Permanent Court of International Justice has held, "vessels in the high seas are subject to no authority except that of the State whose flag they fly"¹⁹. It follows that the flag State, except where otherwise provided by the LOSC, must have exclusive jurisdiction and enforcement powers over such vessels in the high seas, as necessary to comply with its international obligations, notably those in Section 2 of Part VII of the Convention.
51. On the other hand, in the EEZ of a third State, the flag State is not freed from its relevant obligations and its role runs in parallel with the central role of the coastal State as examined in Question 1.
52. The observations below first recall briefly the basic rules of state responsibility, and then provide a brief overview on the practice of listing IUU vessels and countries non-cooperating in the fight against IUU fishing, in order to illustrate the characteristic means by which flag State responsibilities regarding IUU fishing are given effect today.

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- Article 3(1) of the Agreement between the European Economic Community and the Government of the Republic of the Gambia on fishing off the Gambia, concluded by Council Regulation (EC) No 1580/87 of 2.6.87 OJ L 146 of 6.6.87 – no Protocol in force
 - Article 5(1) of the FPA with Guinea Bissau, concluded by Council Regulation 241/2008 of 17.03.2008 (OJ L75 of 18.3.2008)

¹⁹ International Court of Justice (ICJ), *The case of the Lotus, Turkey v. France*, File E. c. Docket XI, Judgment No. 9, 7 September 1927, point 64.

53. In the Convention several provisions address the issue of responsibility and liability in connection with specific issues²⁰. In the general provisions, Article 304 of LOSC in particular states that “[t]he 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.”
54. Article 35 of the UN Fish Stocks Agreement provides that “States Parties to the Agreement are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement”. There is no further elaboration of the scope and content of the liability of States Parties in this regard. Therefore, the customary rules regarding international responsibility of States over vessels flying their flags apply in this respect.
55. These general rules of international law have been codified in particular in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a text adopted by the International Law Commission (2001)²¹. According to these Draft Articles, State liability requires first of all an internationally wrongful act. Article 2 of the Draft Articles sets two necessary conditions for a certain conduct (an action or omission), to be considered an internationally wrongful act of a State: (a) such conduct must be “attributable” to the State under international law, and (b) it must constitute a “breach” of an international obligation.
56. In this regard, it suffices to recall, first, that the conduct involving IUU fishing practices of privately owned vessels cannot be directly and automatically attributed to their flag State. Such an attribution requires that the concerned practices are sufficiently connected with the failure of the flag State to carry out its international obligations.
57. Secondly, a wrongful act requires a breach of an international obligation such as flag State duties under the LOSC or the UN Fish Stocks Agreement, which have been outlined earlier. In this respect, it is not the IUU fishing activity as such which constitutes a breach of an international obligation of the flag State, but its own conduct in respect of the IUU fishing which is subject to specific international obligations concerning the flag State. It is a separate question whether a vessel is engaged in illicit activity under domestic law of the coastal State or of its flag State.
58. As set out in the observations on Question 1, the flag State duties established in Article 94 of the LOSC include regulatory and control functions as well as duties of cooperation and enforcement.
59. With regard to the duty of flag States to control their vessels, the 2012 Report of the Secretary General of the United Nations (A/67/315) states:

"Effective flag State control is essential in addressing IUU fishing, which continues to deprive many countries of a crucial natural resource and remains a persistent threat to their sustainable development. In the light of the failure of some flag States

²⁰ See for example: Article 106: liability for seizure without adequate grounds; Article 139: responsibility to ensure compliance and liability for damages; in part XII, relating to protection and reservation of the marine environment, Article 232: liability of States arising from enforcement measures, and Article 235: responsibility and liability.

²¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001)

- to ensure effective control over their vessels, additional and complementary measures have been necessary, including coastal-, port- and trade-related measures."
60. While that general scheme of international responsibility remains fully applicable, it is important to note, however, that the practice followed to address IUU fishing has taken a specific direction. Such practice points in particular towards the establishment of lists of IUU vessels and the establishment of lists of non-compliant or non-cooperating countries, including in their capacity as flag States, in the fight against IUU fishing activities²². These kinds of measures are also foreseen in the IPOA-IUU and the relevant UN General Assembly Resolutions²³.
61. Today all RFMOs of which the European Union is a Member (with the exception of SIOFA) have put in place a system of listing IUU vessels²⁴. These RFMOs have also established a policy of transmitting their lists to other RFMOs. This can indicate that listing of such vessels now enjoys widespread acceptance and support by the international community in as much as the conceptual side of such measures is concerned. By contrast, actual application of these measures (i.e. listing of vessels), has been decreasing in recent years. In such RFMO practice, IUU fishing may result in listing of the vessel, but not in direct monetary penalties on the vessel or the flag State. Typically the RFMO IUU measures entail the obligation for the parties to take certain measures, including trade-related measures, against the IUU listed vessels (see for instance the case of IATTC)²⁵.

²² Listing vessels was constantly cited by the by the United nations General Assembly in its resolutions on sustainable fisheries as follows: "*collaborate in efforts to address these types of fishing activities, including, inter alia, the development and implementation of vessel monitoring systems and the listing of vessels in order to prevent illegal, unreported and unregulated fishing activities and, where appropriate and consistent with international law, trade monitoring schemes, including to collect global catch data, through subregional and regional fisheries management organizations and arrangements;*" From Resolution A/RES/59/25 (2005).

²³ See for instance United Nations General Assembly Resolution A/RES/67/79, 30 April 2013, § 51; IPOA-IUU Section 81.4 and 84.

²⁴ See for example: IATTC Resolution C-05-07; IOTC Resolution 11/03; ICCAT Recommendations 09-10, 11-18; Articles 53 and 54 of Chapter VIII of the NAFO Conservation and Enforcement Measures; Article 44 of Chapter VII of NEAFC Control Scheme; GFCM recommendation GFCM/33/2009/8 on the establishment of a list of vessels presumed to have carried out fishing in the CFCM area repealing recommendation GFCM/2006/4; SEAFO Conservation and Management Measure CMM 1.04; WCPFC CMM 2010-06; CCAMLR Conservation Measures 10-06 and 10-07.

²⁵ Point 9 of IATTC Resolution C-005-07

"CPCs shall take all necessary measures, under their applicable legislation and pursuant to paragraphs 56 and 66 of the IPOA-IUU, to:

- a. ensure that vessels flying their flag do not transship with vessels on the IATTC IUU Vessel List;
- b. ensure that vessels on the IATTC IUU Vessel List that enter ports voluntarily are not authorized to land or transship therein;
- c. prohibit the chartering of a vessel on the IATTC IUU Vessel List;
- d. refuse to grant their flag to vessels on the IATTC IUU Vessel List, unless the vessel has changed owner, and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel or, having taken into account all relevant facts, the flag CPC determines that granting the vessel its flag will not result in IUU fishing;
- e. prohibit commercial transactions, imports, landings and/or transshipment of species covered by the IATTC Convention from vessels on the IATTC IUU Vessel List;
- f. encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the IATTC Convention caught by vessels on the IATTC IUU Vessel List;
- g. collect, and exchange with other CPCs, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the IATTC Convention from vessels on the IATTC IUU Vessel List."

62. On the basis of the IUU vessels lists adopted by the different RFMOs, the European Commission has listed the same vessels on a Union list of IUU vessels²⁶.
63. Furthermore, RFMOs have given themselves powers also to take measures of identification of non-cooperating States which can result in consequential mandatory trade measures (see, for instance ICCAT²⁷). In respect with such RFMO measures, the European Union has adopted the corresponding trade measures²⁸.
64. Such measures, as well as trade related measures against third States, are also foreseen in domestic legislation notably of the European Union and the United States²⁹.
65. In the European Union, the key legislative instrument is Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (hereinafter referred as “the IUU Regulation”, see **Annex 1**), which seeks to implement the IPOA-IUU in the Union legal order.
66. In the IUU Regulation, recital (1), the starting point is that the European Union is a contracting party to the Convention, the UNFSA and the FAO Compliance Agreement. The Regulation makes clear, with reference to these international instruments, that “[t]hose provisions predominantly set out the principle that all States have a duty to adopt appropriate measures to ensure sustainable management of marine resources and to cooperate with each other to this end”. Recital (4) and (5) of the Regulation in turn demonstrate the intention of the Union to effectively implement the IPOA-IUU and to reinforce its effort against IUU fishing in the framework of RFMOs.
67. With regard to the responsibility of non-cooperating States in general (flag States, coastal States, port States or market States), Article 31(3) of the IUU Regulation provides that:
- “3. [a] third country may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing.”
68. The criteria for the identification of a non-cooperating third State is detailed in Article 31 (4) to (7), which provide as follows:
- “4. For the purposes of paragraph 3, the Commission shall primarily rely on the examination of measures taken by the third country concerned in respect of:
- (a) recurrent IUU fishing suitably documented as carried out or supported by fishing vessels flying its flag or by its nationals, or by fishing vessels operating in its maritime waters or using its ports; or

²⁶ See lastly Commission Implementing Regulation (EU) No 672/2013 of 15 July 2013 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 193, 16.7.2013, p. 6 (**Annex 6**).

²⁷ See point 5 of ICCAT Resolution Res 98-18 and Recommendations Rec 2000-15, Rec 1999-08 and Rec 1996-11.

²⁸ See Council Regulation (EC) No 826/2004 of 26 April 2004 prohibiting imports of Atlantic blue-fin tuna (*Thunnus thynnus*) originating in Equatorial Guinea and Sierra Leone and repealing Regulation (EC) No 2092/2000, OJ L 127, 29.4.2004, p. 19 and Council Regulation (EC) No 827/2004 of 26 April 2004 prohibiting imports of Atlantic bigeye tuna (*Thunnus obesus*) originating in Bolivia, Cambodia, Equatorial Guinea, Georgia and Sierra Leone and repealing Regulation (EC) No 1036/2001, OJ L 127, 29.4.2004, p. 21.

²⁹ For the United States of America, see for instance the « U.S High Seas Driftnet Fishing Moratorium Protection Act » (P.L. 104-43), codified as 16 U.S.C. 1826, (e); for the European Union, see *infra* in this statement.

(b) access of fisheries products stemming from IUU fishing to its market.

5. For the purposes of paragraph 3, the Commission shall take into account:
- (a) whether the third country concerned effectively cooperates with the Community, by providing a response to requests made by the Commission to investigate, provide feedback or follow-up to IUU fishing and associated activities;
 - (b) whether the third country concerned has taken effective enforcement measures in respect of the operators responsible for IUU fishing, and in particular whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied;
 - (c) the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered;
 - (d) for developing countries, the existing capacity of their competent authorities.
6. For the purposes of paragraph 3, the Commission shall also consider the following elements:
- (a) the ratification of, or accession of the third countries concerned to, international fisheries instruments, and in particular the UNCLOS, the UN Fish Stocks Agreement and the FAO Compliance Agreement;
 - (b) the status of the third country concerned as a contracting party to regional fisheries management organisations, or its agreement to apply the conservation and management measures adopted by them;
 - (c) any act or omission by the third country concerned that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures.
7. Where appropriate, specific constraints of developing countries, in particular in respect to monitoring, control and surveillance of fishing activities, shall be duly taken into consideration in the implementation of this Article.”

69. According to the IUU Regulation, the European Union first notifies the State of the possibility of being identified in accordance with the above criteria, requesting it to "take any necessary measures for the cessation of the IUU fishing activities in question and the prevention of any future such activities, and rectify any act or omission referred to" (Article 32).
70. If no such measures, or insufficient measures are taken, the State can be "identified" by the European Commission as a non-cooperating third country (Article 31), and the Commission proposes its placing on the list of non-cooperating third countries.
71. Finally, the Council of the European Union can, in accordance with Article 33, establish the list of non-cooperating third countries, with the consequence that the measures referred to in Article 38 of the IUU regulation apply to those countries. The application of

the latter provision entails import restrictions of fishery products caught by the fleet of the country in question and other measures³⁰ vis-à-vis those countries.

72. On 15 November 2012 the European Commission, under Article 32 of the IUU Regulation, formally notified eight third countries (Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu) of the possibility of them being identified and listed as non-cooperating States if they did not take measures in the fight against IUU fishing (See **Annex 2**). On 26 November 2013, the European Commission has communicated the same kind of notification to Curaçao, the Republic of Ghana and the Republic of Korea (See **Annex 3**).
73. Five of those countries with regard to which such procedure had started (Fiji, Panama, Sri Lanka, Togo and Vanuatu) made credible progress and the European Commission has extended the period to adapt their fisheries legal framework and control capacities in line with international requirements until end February 2014.
74. For the remaining three countries (Belize, Cambodia and Guinea) progress has not been satisfactory and on 26 November 2013 the European Commission identified them as non-cooperating third countries within the meaning of Article 31 (see the identification decision in **Annex 4**) and has simultaneously proposed to the Council of the European Union to list them as non-cooperating third countries³¹.
75. It is to be noted that the identification decision adopted on the basis of Article 31 of the IUU Regulation entails, inter alia, that by virtue of Article 18 the Member States of the European Union shall, where appropriate, refuse the importation, where they become aware the catch certificate has been validated by the authorities of a flag State identified as a non-cooperating State in accordance with Article 31.

³⁰ Article 38 – « Action in respect of non-cooperating third countries »

“The following measures shall apply to non-cooperating third countries:

1. the importation into the Community of fishery products caught by fishing vessels flying the flag of such countries shall be prohibited, and accordingly catch certificates accompanying such products shall not be accepted. In the event that the identification of a non-cooperating third country pursuant to Article 31 is justified by the lack of appropriate measures adopted by this third country in relation to IUU fishing affecting a given stock or species, the prohibition of importation may only apply in respect of this stock or species;
2. the purchase by Community operators of a fishing vessel flying the flag of such countries shall be prohibited;
3. the reflagging of a fishing vessel flying the flag of a Member State to such countries shall be prohibited;
4. Member States shall not authorise the conclusion of chartering agreements with such countries for fishing vessels flying their flag;
5. the exportation of Community fishing vessels to such countries shall be prohibited;
6. private trade arrangements between nationals of a Member State and such countries in order for a fishing vessel flying the flag of that Member State to use the fishing possibilities of such countries shall be prohibited;
7. joint fishing operations involving fishing vessels flying the flag of a Member State with a fishing vessel flying the flag of such countries shall be prohibited;
8. the Commission shall propose the denunciation of any standing bilateral fisheries agreement or fisheries partnership agreement with such countries which provides for termination of the agreement in case of failure to comply with undertakings made by them with regard to combating IUU fishing;
9. the Commission shall not enter into negotiations to conclude a bilateral fisheries agreement or fisheries partnership agreements with such countries.”

³¹ Proposal for a Council implementing Decision establishing a list of non-cooperating third countries, COM(2013)819 of 26 November 2013. Such document constitutes a preparatory step in the Union procedure for listing non-cooperating third countries and can be produced upon request (it will also be shortly available on the “EUR-lex” website: <http://eur-lex.europa.eu/en/index.htm>).

76. Once the Council of the European Union has decided to list a country upon a proposal from the Commission, the further consequences of Article 38 would apply to the listed country.
77. The European Commission has carefully investigated the compliance record of the identified countries, and the degree of their commitment in fighting IUU fishing. The Commission systematically takes into account the global level of development of the countries and the ensuing constraints. The Union has developed an elaborate methodology to assess the fulfilment of countries' obligations in fisheries management under international law like the LOSC or the UN Fish Stock Agreement. The methodology includes an assessment of the provisions applicable to each State, and thus it takes duly into consideration whether a State is, or is not, a signatory to the Convention or other instruments and whether it has acceded to (or cooperates with) RFMOs, as well as its bilateral agreements.
78. When notifying a country of the possibility of it being identified, the Commission also proposes an action plan to improve the situation, and it actively cooperates with the country in question through an intensive dialogue, in order to address the issues and avoid proceeding to identification or the listing.
79. The IUU Regulation thus provides, in the Union legal order, a complete and detailed framework for assessing whether the "liability" - in the broad meaning which is adopted in the practice of the fight against IUU fishing as discussed in point 60 and 61 above - of the State in question is engaged. The system established by the IUU regulation is designed to ensure that such a liability is engaged only by systemic failures of the States in fighting against IUU fishing as flag, coastal, port or market State.
80. Therefore, isolated occurrences of IUU fishing would not necessarily result in the identification or listing of a flag State and would thus not *per se* engage the liability of the State. However it is possible for example that a State having few or no occurrences of IUU fishing by vessels flying its flag is nevertheless identified because it is an important market State or port State for products stemming from IUU fishing and it fails to fulfil its duties to that regard. Or a coastal State may be identified because it fails to monitor the fishing activities due to the lack of a regulatory framework or of enforcement powers. The assessment of the non-cooperating attitude depends ultimately on the facts of each case, provided that a general and systemic failure to fulfil the obligations as flag, coastal, port or market State can be demonstrated as required, for instance, by Article 31(3) of the Union's IUU Regulation, having regard to the criteria laid down in paragraphs (4) to (7) of that same provision.
81. In conclusion, the liability of flag States mainly consists in the identification and listing of such State as a non-cooperating country when systemic failures to comply with their international obligations in the fight against IUU fishing are demonstrated. Such identification or listing entails trade consequences.
82. More generally, an international practice of listing individual vessels engaged in IUU fishing and of identification or listing of non-cooperating States (acting in various capacities) is emerging, indicating the preferred form of reaction to IUU fishing activities by the International Community. The Union has given effect in its internal legal order to most provisions of the IPOA-IUU, including the listing of third countries non-cooperating in the fight against IUU fishing, *inter alia* because of their systemic failure as flag State, as defined in the IUU Regulation.

E. Question 3: Where a fishing licence 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?

83. The liability of the flag State or the international agency for the violation of the fisheries legislation of the coastal State depends on the content of the international agreement applicable to it, possibly including specific provisions regarding the liability of the flag State. In the absence of specific provisions, the general rules of international law on State responsibility for a breach by the State of its international obligations are applicable.
84. The European Union has concluded a large number of fishing agreements and protocols with other countries, including with some of the SRFC Member States³². These agreements regulate the access of EU vessels to the fishing zones of the partner countries. Such agreements do not establish a system of responsibility for possible violations, but they provide for rights and obligations for both parties and contain some specific duties for the Union.
85. Licenses for fishing in the fishing zones of other countries are issued by the respective coastal States. As regards the fishing authorisations, the EU's fisheries agreements³³ set out conditions and procedures for the issuance of fishing authorisations in line with the provisions of the Convention³⁴. The submission of the application for fishing authorisations is channelled by the relevant European Union authorities after the Commission has verified the compliance with all requirements and conditions set out in the specific agreement as well as with all other relevant requirements deriving from International and EU law, in particular in accordance with Article 6 of Council Regulation 1006/2008 (the "Fishing Authorisations Regulation")³⁵, with the decision to issue the authorisation remaining with the Coastal State.
86. Moreover, the FPAs may require the vessel to notify its catches to the coastal State authorities. The authorities reserve the right to suspend the fishing authorisation "until formalities have been completed and to apply the penalty laid down in current third countries' legislation to the ship-owner"³⁶.

³² See e.g. Council Regulation (EC) No 2027/2006 of 19 December 2006 on the conclusion of the Fisheries partnership agreement between the European Community and the Republic of Cape Verde, OJ L 414, 30.12.2006, p. 1 and Council Decision of 10 October 2011 on the conclusion of the Protocol agreed between the European Union and the Republic of Cape Verde setting out the fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement between the two parties currently in force, OJ L 269, 14.10.2011, p. 17 (Annex 6).

³³ See e.g. the Annex I of the EU agreement with Guinea-Bissau relating to the conditions governing fishing activities by Community vessels in the Guinea-Bissau fishing zone for the period 16 June 2007 to 15 June 2011, EU agreement with the Republic of Cape Verde (2006) and the EU agreement with the Islamic Republic of Mauritania (2006).

³⁴ The Convention requires the Coastal State to allow other States access to the surplus resources through agreements when it does not have the capacity to harvest the total allowable catch (article 62.2).

³⁵ Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters (...) OJ L 286 of 29.10.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0033:0044:EN:PDF>

³⁶ *Ibid*

87. The fisheries agreement may provide also that "the contracting parties... shall cooperate to prevent and combat IUU fishing, in particular through the exchange of information and close administrative cooperation"³⁷.
88. The FPA contracted by the Union often provide that must the Parties undertake to promote cooperation at sub regional level on responsible fishing and, in particular, within the framework of RFMOs.
89. It should be emphasized that the Union's fishing agreements do not contain specific provisions assigning liability to the flag States or the European Union for the violation by Union fishing vessels of the fisheries legislation of the coastal State. They lay down substantive rights and obligations as well as procedures relating to access to and operation of fishing activities. It is for the coastal State to issue fishing licences.
90. Since the Union is committed on the basis of its fishing agreements to "take appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries"³⁸, it investigates alleged violations of such legislation by Union vessels and takes additional measures as necessary. Such an obligation builds upon the general duty of States to ensure effective jurisdiction and control of vessels flying their flag, as laid down in Article 94 of the Convention.
91. The IUU Regulation establishes a Union system to prevent, deter and eliminate IUU fishing, including fishing activities which take place in the waters under the jurisdiction of third countries (Article 1). Accordingly, the Union and its Member States are obliged to carry out port inspections and verify catch certifications. The Regulation, as already highlighted in the reply to the previous questions, also establishes a procedure for placing vessels in an IUU vessels list, which can include vessels flying the flag of a Union Member State. This listing is followed by restrictions or prohibitions with regard to fishing authorisations, imports or granting of flags (Articles 9, 12, 27, 37 of the IUU Regulation).
92. To conclude on question 3, the European Union takes the view that where a fishing license is issued to a vessel within the framework of an international agreement, the obligations and rights of the coastal States and its contracting party depend on the contents of the agreement. In the absence of specific provisions related to liabilities, the general rules of international law governing in particular the responsibility of a flag State for its vessels apply in the EEZ of a third country.

³⁷ See for example Article 9 of the EU agreement with Guinea-Bissau (Annex 5).

³⁸ Article 5 relating to access by Community vessels to fisheries in the party fishing zone is common to the Fisheries Partnership Agreement between the European Community and the Republic of Guinea-Bissau for the period 16 June 2007 to 15 June 2011 (2007) (a following agreement is applicable for a period of one year starting from 16 June 2011 contains similar provisions), to the Fisheries Partnership agreement between the European Community and the Republic of Cape Verde (2006), the Fisheries partnership agreement between the Republic of Guinea and the European Community (2009) and the Fisheries Partnership agreement between the European Community and the Islamic Republic of Mauritania(2006). Article 3 of the Agreement between the European Economic Community and the Government of the Republic of the Gambia on fishing off the Gambia states for the same obligation as follows: " The Community undertakes to take all appropriate steps to ensure that its vessels adhere to the provisions of this agreement and the rules and regulations governing fishing activities in the Gambia's fishing zone" (Annex 5).

F. Question 4: What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

93. The coastal State has the central role in the exploitation, conservation and management of natural resources in its EEZ. The LOSC is the primary legal framework for coastal State measures to ensure sustainable management and conservation of living resources and specifically of shared stocks and stocks of common interest.
94. Article 56 of the Convention provides that in the EEZ the coastal State "has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources." It also has the jurisdiction, as provided for in the relevant provisions of the Convention, with regard to the protection and preservation of the marine environment (Article 56 (b)) as well as other rights and duties provided for in the Convention (Article 56 (c)).
95. Article 61 sets out the rights and duties of the coastal State in the conservation of living resources. Accordingly, the coastal State "shall determine the allowable catch" of the living resources of the EEZ taking into account the best scientific evidence available to it (Article 61(1) and (2)). The coastal State is also subject to the basic duty to "ensure through proper conservation and management measures" that the maintenance of the living resources is "not endangered by over-exploitation" (Article 61(2)). The coastal State and competent international organisations, whether sub-regional, regional or global, shall cooperate to this end (Article 61(2)). Such measures shall also be designed to maintain populations of harvested species at levels which can produce "the maximum sustainable yield" (Article 61(3)). The flag States shall cooperate with the coastal State regarding such measures.
96. According to Article 73, the coastal State has the right to enforce its laws and regulations relating to fisheries and conservation in its EEZ. Article 73(1) authorizes the coastal State to take such measures as may be necessary to ensure compliance with its laws and regulations, including boarding, inspection, arrest and judicial proceedings. The sovereign rights of the coastal States imply, in the field of fisheries, the prominent role of the coastal state and are accompanied by responsibilities as discussed above in paragraph 28 to 30.
97. In exercising its rights and duties under the Convention, the coastal State shall have "due regard" to the rights and duties of other States and it shall act in a manner compatible with the Convention (Article 56(2)).
98. Articles 63 and 64 of the LOSC lay down conservation and related duties concerning common stocks and highly migratory species. Article 63, concerning stocks occurring within the EEZs of two or more coastal States (trans boundary or shared stocks) or both within the EEZ and in an area beyond and adjacent to it ("straddling stocks" since the UN Fish Stocks Agreement), provides respectively that the coastal States "shall seek, either directly or through appropriate sub-regional or regional organisations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks"; and that the coastal State and the States fishing for such stocks in the adjacent area "shall seek, either directly or through appropriate sub regional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

99. In respect of highly migratory species, such as tuna, Article 64(1) of the Convention provides that "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work."
100. The UNFSA implements these provisions further by laying down the principles for the conservation and management of the fish stocks and by providing that the management must be based on the precautionary approach and the best available scientific information. While the Fish Stocks Agreement covers the high seas, some of the provisions are relevant to the areas within a national jurisdiction.
101. The UNFSA contains provisions which elaborate further on the duty of cooperation of States in order to ensure conservation and promotion of optimum utilisation of fisheries resources within and beyond the exclusive economic zones. In this respect, Article 5 lays down the general principles for conservation and management measures concerning straddling fish stocks and highly migratory fish stocks to be adopted by coastal states and States fishing on the high seas. These States have a duty to cooperate to achieve compatibility of measures in respect of such stocks (Article 7), failing the achievement of which dispute settlement mechanisms can be utilised. Article 8 lays down some additional cooperation duties for both coastal and fishing States to ensure effective conservation and management of these stocks, including by entering into good faith consultations relating to threats of over-exploitation and by becoming members of appropriate fisheries management organisations or arrangements.
102. RFMO management and conservation measures apply to all Members or Cooperating Non-contracting Parties to the RFMO. Their main responsibility is to cooperate and ensure the effective enforcement of the measures under their jurisdiction.
103. Regarding the rights and obligations of the coastal State in the conservation of living resources in the EEZ, the provisions of LOSC and of the UN Fish Stocks Agreement apply in the EEZ with regard to straddling and highly migratory species, as well as general obligations of good faith, conservation and cooperation.

II. Final remark

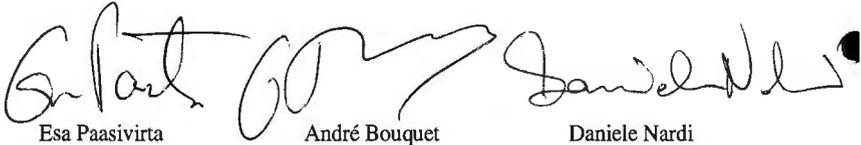
104. As appears from the above, the international obligations of States vary depending on their participation in particular conventions or other agreements, according to the principle *Pacta tertiū nec nocent nec prosunt*. The Convention provides the global legal base and framework, as it largely reflects rules of customary international law. Also all the Member States of the SRFC are parties to it.
105. On the other hand, a more limited number of States are parties to the UN Fish Stocks Agreement and this applies also to the SRFC Member States as indicated earlier (see above point 18). If the Tribunal decides to respond to the questions in the form in which they are posed to it (see above on admissibility), the Opinion should adequately reflect the different status of the different international obligations.

CHAPTER IV

SUMMARY AND CONCLUSION

106. In sum, the European Union respectfully proposes to answer the questions asked by the SRFC along the lines set out above.

The European Commission, on behalf of the European Union

Three handwritten signatures in black ink are arranged horizontally. The first signature on the left is for Esa Paasivirta, the middle one for André Bouquet, and the one on the right for Daniele Nardi. Each signature is written in a cursive, flowing style.

Esa Paasivirta

André Bouquet

Daniele Nardi

Agent

Co-Agent

Deputy Agent