

**Written Statement of the Federated States of Micronesia**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE  
SUB-REGIONAL FISHERIES COMMISSION (SRFC)**

WRITTEN STATEMENT OF THE FEDERATED STATES OF MICRONESIA

29 NOVEMBER 2013

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## CHAPTER 1

## REQUEST FOR AN ADVISORY OPINION

1. On March 27, 2013, the Permanent Secretary of the Sub-Regional Fisheries Commission (SRFC), an intergovernmental organization based in Africa and composed of seven African coastal States,<sup>1</sup> submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS).<sup>2</sup> The request presents the following four questions for consideration by ITLOS:
  - 1) What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?
  - 2) To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
  - 3) Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
  - 4) What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?
2. On May 24, 2013, in Order 2013/2,<sup>3</sup> ITLOS agreed to issue the advisory opinion requested by the SRFC. Furthermore, as stated in the same Order, ITLOS invited UNCLOS States Parties and a number of intergovernmental organizations with fisheries agendas to “present written statements on the questions submitted to [ITLOS] for an advisory opinion.” The written statements must be received by ITLOS no later than November 29, 2013.
3. As this is the first time that the full ITLOS has been asked to issue an advisory opinion, the Federated States of Micronesia (FSM) will discuss the question of whether the full ITLOS has the jurisdiction to issue the advisory opinion requested by the SRFC.

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<sup>1</sup> Members include the Republic of Guinea, the Republic of Cape Verde, the Republic of the Gambia, the Republic of Guinea Bissau, the Republic of Mauritania, the Republic of Senegal, and the Republic of Sierra Leone.

<sup>2</sup> Request for Advisory Opinion, with as annex the Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC), *accessed at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Request\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf) (last visited Nov. 23, 2013).

<sup>3</sup> For the full Order, *see* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/C21\\_Ord\\_2013-2\\_24.05\\_E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/C21_Ord_2013-2_24.05_E.pdf) (last visited Nov. 23, 2013).

**CHAPTER 2****JURISDICTION**

4. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) authorizes the Seabed Disputes Chamber of ITLOS to issue advisory opinions when certain requirements are met.<sup>4</sup> The Seabed Disputes Chamber is a smaller grouping of ITLOS judges that adjudicate cases regarding the exploration and exploitation of the International Seabed Area; the Chamber is not the full ITLOS. Indeed, UNCLOS does not explicitly authorize the full ITLOS to issue advisory opinions.
5. However, Article 138(1) of the Rules of ITLOS provides that ITLOS “may give an advisory opinion on a legal question if an international agreement related to the purposes of [UNCLOS] specifically provides for the submission to [ITLOS] of a request for such an opinion.”<sup>5</sup>
6. Thus, in the present matter, ITLOS must determine whether the request by the SRFC contains “a legal question” or questions, and whether the request was submitted pursuant to “an international agreement related to the purposes of [UNCLOS].”
7. It is the position of the FSM that the request by the SRFC satisfies the test in Article 138(1) of the Rules of ITLOS. The request presents four questions on legal obligations, legal rights, and legal liabilities of flag States and coastal States with regard to illegal, unregulated, and unreported fishing, as well as on the legal rights and obligations of coastal States pertaining to the sustainable management of shared fish stocks and fish stocks of common interest. Additionally, the request was submitted by the SRFC pursuant to the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Mineral Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC (MCA Convention). The MCA Convention regulates the fishing activities of SRFC Members in their Exclusive Economic Zones (EEZs). Such regulation is clearly related to “the purposes of [UNCLOS],” which include rules for the conservation and management of fish and other living resources in the EEZs of States Parties. Furthermore, Article 33 of the MCA Convention specifically entitles the SRFC’s Conference of Ministers to authorize the Permanent Secretary of the SRFC to request an advisory opinion from ITLOS. The SRFC Conference of Ministers duly authorized the Permanent Secretary of the SRFC to request such an advisory opinion, and the Permanent Secretary made such a request on March 27, 2013.

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<sup>4</sup> United Nations Convention on the Law of the Sea art. 191, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>5</sup> Rules of the International Tribunal for the Law of the Sea art. 138(1).

**CHAPTER 3****APPLICABLE LAW**

8. Pursuant to Article 138(3) of the Rules of ITLOS, when giving an advisory opinion, ITLOS must apply *mutatis mutandis* the provisions of the Rules regulating the issuing of advisory opinions by the Seabed Disputes Chamber.<sup>6</sup> Those Rules include Article 130(1), which states that the Seabed Disputes Chamber “shall . . . be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute” of ITLOS.<sup>7</sup>
9. The Statute of ITLOS is contained in Annex VI of UNCLOS. According to Article 38 of the Statute, the Seabed Disputes Chamber (and, by extension, ITLOS), when crafting a validly requested advisory opinion, must apply the provisions of Article 293 of UNCLOS.<sup>8</sup> Article 293(1) of UNCLOS states that “[a] court or tribunal having jurisdiction under this section shall apply [UNCLOS] and other rules of international law not incompatible with [UNCLOS].”<sup>9</sup>
10. Thus, it is the intent of the FSM, when submitting its views on the four questions in Case No. 21, to highlight and discuss provisions of UNCLOS as well as other multilateral, regional, and subregional agreements and arrangements that are not incompatible with UNCLOS. It is also the intent of the FSM to highlight and discuss domestic legislation of the FSM to the extent that such legislation reflects and implements the international legal obligations of the FSM.

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<sup>6</sup> Id., art. 138(3).

<sup>7</sup> Id., art. 130(1).

<sup>8</sup> Annex VI, UNCLOS, *supra* note 4, art. 38.

<sup>9</sup> UNCLOS, *supra* note 4, art. 293(1).

**CHAPTER 4****OBSERVATIONS ON THE QUESTIONS****General Comments**

11. Before presenting its observations on the four questions to be addressed by ITLOS, the FSM wishes to make a number of general comments.
12. The modern-day international law of the sea establishes a system that attempts to balance the interests of coastal States wishing to exploit the resources in their national waters; of distant water fishing States, as well as geographically disadvantaged and landlocked States, wishing to exploit resources in the waters of other States; and of all States wishing to exploit the resources of the high seas, which were traditionally viewed as an inexhaustible common heritage of mankind, and which are now understood to be finite and deserving special protection by all interested States. In order for this system to work, cooperation between interested and affected States is paramount.
13. Fisheries are the primary means by which States exploit the living resources in their national waters, the national waters of other amenable States, and the high seas. Seafaring societies—particularly those from small islands and other coastal regions—have looked to the seas for sustenance for ages. Such exploitation was traditionally done in a sustainable manner, cognizant of the need to preserve living maritime resources so that future generations could sustain themselves from the same.
14. Over time, seafaring societies began to exploit fisheries not just for sustenance, but also for trade. Today, the global trade in fisheries is a major economic driver, leading to financial gain as well as posing a significant threat to the sustainability of fish stocks.
15. The FSM, a sovereign island State that controls nearly 3 million square kilometers of the Pacific Ocean, occupies an important position in the intersection between sustenance and trade in the world's fisheries. The FSM's collective maritime area is one of the largest and most productive in the Western and Central Pacific Ocean (WCPO), attracting interest from far-flung fishing States as well as from fishing States in the region. Understandably, the FSM depends heavily on its fisheries for income and food security; marine fisheries comprise 80% of the FSM's total exports and provide approximately 110kg of protein consumption per capita in the FSM, a remarkably high number compared to the consumption patterns of most other countries. Of particular importance for the FSM is the exploitation and management of tuna stocks in the FSM's waters; the vast majority of the fisheries activities in the FSM's waters target tuna, bringing in nearly 150,000 tonnes in annual catch.
16. The FSM also participates actively in regional fisheries management organizations and subregional agreements that regulate the exploitation of shared fish stocks and other fish stocks of common interest in the WCPO, including fish stocks in the high seas areas in the WCPO. Only through close cooperation with other coastal States, distant water

fishing States, and other States interested in exploiting the fisheries of the WCPO can those stocks be managed in a sustainable manner.

17. One of the gravest threats to the sustainability of the fisheries in the FSM's waters and in the broader WCPO is illegal, unreported, and unregulated (IUU) fishing. IUU fishing undermines national and regional attempts to manage fisheries in a sustainable and economically advantageous manner, especially the fisheries of small island developing States like the FSM that have limited technical capacity to deter and eliminate such practices. IUU fishing depresses trade in fisheries, threatens to collapse entire fish stocks, and violates the careful balance of interests crafted by the modern-day international law of the sea. IUU fishing flaunts the rules by which all parties interested in exploiting fisheries must play in order to ensure that all parties benefit from the ocean's bounty while maintaining the sustainable management of the targeted fisheries.
18. There is a pressing need for a clear and comprehensive presentation of the relevant multilateral, regional, subregional, bilateral, and national laws and policies regulating IUU fishing and ensuring the sustainable management of fish stocks of common interest. An advisory opinion by ITLOS will ideally make that presentation. Thus, the FSM welcomes the opportunity to submit its observations on the four questions posed by ITLOS in Case Number 21.

#### **Preliminary Observations**

19. As a preliminary matter, ITLOS should clearly define "IUU fishing." The major multilateral treaties on the law of the sea—including UNCLOS—do not explicitly define IUU fishing, leading to much confusion among policy makers. Some States view IUU fishing as affecting only high seas fisheries, while other States expand IUU fishing to include inappropriate activities in the EEZs and even territorial seas and internal waters of coastal States.<sup>10</sup>
20. It is the position of the FSM that the best source for defining IUU fishing is the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).<sup>11</sup> The IPOA-IUU was developed by the Food and Agriculture Organization of the United Nations (FAO)—for which fisheries research and management is a core mandate—and adopted by the FAO's Committee on Fisheries (COFI) in 2001. The IPOA-IUU describes the concept of IUU fishing and presents possible measures to tackle IUU fishing at the national level, as well as through Regional Fisheries Management Organizations (RFMOs) and Regional Economic Integration Organizations (REIOs).<sup>12</sup> The definition of IUU fishing in the IPOA-IUU is also adopted wholesale in a number of other major fisheries management instruments, including the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal,

<sup>10</sup> For the purpose of this statement, EEZs and other maritime zones are defined according to their respective definitions in UNCLOS.

<sup>11</sup> Food and Agriculture Organization of the United Nations, *International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing*, Rome, Italy, June 23, 2001 [hereinafter IPOA-IUU].

<sup>12</sup> In the IPOA-IUU, the term "regional" encompasses "sub-regional." *Id.*, para. 6(b).

Unreported and Unregulated Fishing;<sup>13</sup> and in Regulation No. 1005/2008 of the Council of the European Union establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.<sup>14</sup>

21. According to Paragraph 3 of the IPOA-IUU:

3.1 Illegal fishing refers to activities:

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

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<sup>13</sup> Food and Agriculture Organization of the United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing art. 1(e), Nov. 22, 2009 [hereinafter Port State Measures Agreement]. The Port State Measures Agreement has not yet entered into force.

<sup>14</sup> See Council Regulation (EC) 1005/2008, art. 2, Sept. 29, 2008.

conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.<sup>15</sup>

22. As the IPOA-IUU clearly indicates, IUU fishing encompasses activities in the national waters of a State as well as on the high seas (to the extent that the fishing activities on the high seas are regulated by relevant RFMOs).
23. Although the IPOA-IUU is a recommendatory soft law instrument that is non-binding on States, it consolidates the learned opinion of fisheries experts from the FAO that represent all of the world's major maritime regions and who are familiar with the pressing need to tackle IUU fishing in those regions. The FAO's COFI (which adopted the IPOA-IUU and commended it to States) is the "only global inter-governmental forum where major international fisheries and aquaculture problems and issues are periodically examined and recommendations are addressed to governments, regional fishery bodies, NGOs, fish workers, FAO and the international community."<sup>16</sup> Additionally, there is no singular multilateral treaty or other hard law multilateral instrument explicitly obligating States Parties to eradicate IUU fishing. Furthermore, despite its soft law status, the IPOA-IUU "hardens" when it is adopted by States, RFMOs, and REIOs and incorporated into their respective approaches to IUU fishing.<sup>17</sup> To wit, the FSM adopted the IPOA-IUU in 2005 as the basis for its National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (NPOA-IUU). The FSM updated its NPOA-IUU in 2012.
24. As another preliminary matter, the FSM's references in this statement to UNCLOS, the IPOA-IUU, and other international, regional, bilateral, and national instruments, measures, arrangements, and plans of action presuppose that States under discussion are bound by those instruments, measures, arrangements, and plans, where appropriate. A State may be bound either because it has explicitly ratified, accepted, and/or adopted a particular instrument, measure, arrangement, or plan; or because an instrument, measure, arrangement, or plan contains provisions that reflect customary international law and therefore apply automatically to all States unless explicitly rejected.<sup>18</sup>

<sup>15</sup> IPOA-IUU, *supra* note 11, para. 3.

<sup>16</sup> About COFI, <http://www.fao.org/cofi/cofi2012/en/> (last visited Nov. 23, 2013).

<sup>17</sup> For examples of States adopting and implementing the IPOA-IUU domestically, see National Plans of Action, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, <http://www.fao.org/fishery/ipoa-iuu/npoa/en> (last visited Nov. 23, 2013).

<sup>18</sup> The FSM is either a State Party to, or has endorsed or otherwise applied, a number of major international and regional fisheries instruments, measures, arrangements, and plans, including: UNCLOS; the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; the 1992 Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement; the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; the 2000 Convention for the Conservation and Management of Highly Migratory Stocks in the Western and Central Pacific Ocean; the 1982 Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest; the United Nations Food and Agriculture Organization Code of Conduct for Responsible Fisheries; and the IPOA-IUU.

### Question 1

**What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States?**

25. To determine the obligations of a flag State in cases where IUU fishing activities are conducted in the EEZ of third party States, it is important to reiterate the meaning of “flag State.” Under international law, a ship assumes the nationality of the State which authorizes the ship to fly its State flag.<sup>19</sup> That State becomes the “flag State” for the ship, thereby triggering a host of legal obligations for the flag State with respect to the activities of the ship bearing its nationality. The flag State is also entitled to set the conditions for its grant of nationality to a ship, including imposing restrictions on the activities in which that ship may engage.<sup>20</sup>
26. In the context of fishing, a flag State typically applies its treaty obligations and its national laws and regulations regarding fishing activities to ships bearing the State’s flag. However, increasingly, ships fly so-called “flags of convenience,” wherein those ships assume the nationalities of States to which they have minimal genuine links, and which in turn do very little to ensure full compliance of those ships with relevant national and international fisheries laws and regulations.
27. It is also important to highlight the balance of interests between flag States and coastal States with regard to the exploitation of resources in EEZs. According to UNCLOS, a coastal State has “sovereign rights” for exploring, exploiting, conserving, and managing the living resources in its EEZ.<sup>21</sup> The coastal State is obligated to determine the “maximum sustainable yield” of its EEZ’s living resources and establish appropriate conservation and management measures that prevent the excessive exploitation of those resources.<sup>22</sup> However, that coastal State must also have “due regard to the rights and duties of other States” in the exploration and exploitation of those same resources.<sup>23</sup> To discharge this obligation, the coastal State must ensure the “optimal utilization” of its living resources.<sup>24</sup> If the coastal State determines that it does not have the capacity to fully exploit the total allowable catch of a particular living resource in its EEZ, the State must allow other States to exploit that resource, as long as the total allowable catch does not exceed the maximum sustainable yield of the resource.<sup>25</sup> This balance of interests is at the heart of fishing license agreements between vessels of flag States and third-party coastal States, and it is this balance that is threatened by IUU fishing.
28. UNCLOS, despite its breadth, does not directly address the issue of flag State obligations for ships engaged in IUU fishing in the waters of third party States. Article 94 of

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<sup>19</sup> See, e.g., UNCLOS, *supra* note 4, art. 91(1).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, art. 56(1)(a).

<sup>22</sup> *Id.*, art. 61.

<sup>23</sup> *Id.*, art. 56(2).

<sup>24</sup> *Id.*, art. 62.

<sup>25</sup> *Id.*

UNCLOS lays out a number of duties that a flag State assumes upon conferring its nationality on a ship, but those duties are primarily concerned with maintaining a registry of its flagged ships; ensuring the safety of its flagged ships and their crews while at sea; and holding inquiries whenever its flagged ships cause harm or damage to the nationals, ships, and marine environments of other States.<sup>26</sup>

29. A number of provisions in UNCLOS deal indirectly with flag State obligations for IUU fishing in the EEZs of third party coastal States. According to Article 58(3) of UNCLOS, a flag State that rightfully exploits the living resources of a third party coastal State “shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State.”<sup>27</sup> Presumably, then, if the third party coastal State adopts laws and regulations targeting IUU fishing in its EEZ, then the flag State is obligated to ensure that its flagged vessels comply with those laws and regulations.
30. Furthermore, according to Article 73 of UNCLOS, a coastal State has the authority to take a number of measures—including “boarding, inspection, arrest, and judicial proceedings”—to ensure that fishing vessels comply with the State’s laws and regulations in its EEZ.<sup>28</sup> In order to honor the coastal State’s sovereign rights in its EEZ, the flag State of a fishing vessel that is boarded, inspected, arrested, and/or subject to judicial proceedings by the third party coastal State must cooperate with the coastal State, assuming that the coastal State’s actions are valid. Presumably, then, if the coastal State carries out investigatory and enforcement proceedings against a flagged vessel for IUU activities that violate the coastal State’s laws and regulations, the flag State’s obligation to cooperate are triggered.
31. Coastal State laws and regulations may expressly impose specific obligations on flag States for the IUU fishing activities of its flagged vessels in the EEZs of those third party coastal States. Coastal States that adopt and implement the IPOA-IUU may very well retain and apply its provisions calling on flag States to exert tighter control over their flagged vessels in order to prevent their engagement in IUU fishing; to avoid flagging vessels with established records of IUU fishing; and to ensure that their flagged vessels fishing beyond the flag States’ waters are authorized to do so by the flag States. If a coastal State enters into a fishing license agreement with a flag State, the coastal State can impose such provisions as obligations on the flag State.
32. A coastal State may also adopt and implement the FAO’s Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.<sup>29</sup> The Model Scheme, *inter alia*, prohibits the landing of fish caught in IUU fishing activities. Although the Model Scheme, like the IPOA-IUU, is a non-binding soft law instrument, it acquires normative force when implemented by a coastal State, particularly if it is enhanced

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<sup>26</sup> *Id.*, art. 94.

<sup>27</sup> *Id.*, art. 58(3).

<sup>28</sup> *Id.*, art. 73.

<sup>29</sup> Food and Agriculture Organization of the United Nations, *Model Scheme on port State measures to combat illegal, unreported and unregulated fishing*, Rome, Italy, Mar. 2005.

through coastal State legislation. If a coastal State adopts laws and regulations that restrict or prohibit the landing of fish caught in its EEZ through IUU activities, the flag State of a fishing vessel that engages in such activities is obligated to cooperate with the coastal State and comply with its restriction/prohibition, even if it means assuming responsibility for disposing of the catch of those vessels in a proper manner away from the ports of the coastal State.<sup>30</sup>

33. In February 2013, the FAO finalized the development of Voluntary Guidelines for Flag State Performance after a five-year, intensive intergovernmental consultative process.<sup>31</sup> The Guidelines (which COFI will consider for adoption at its session in June 2014) call on flag States to adopt performance assessment criteria for their flagged fishing vessels that deter their engagement in IUU fishing. The Guidelines suggest suitable criteria as well as procedures for carrying out their assessment. The Guidelines explicitly call on flag States to “prevent, deter and eliminate IUU fishing and fishing related activities in support of such fishing.” Finally, the Guidelines encourage cooperation between flag States and third party coastal States in bolstering flag State obligations for, and supporting coastal State deterrence of, IUU fishing in the national waters of those coastal States. Although the Guidelines are yet another soft law instrument (and although the Guidelines have not yet been endorsed by COFI), they underscore the growing acknowledgement in the international community of the central role that flag States must play in combating IUU fishing.
34. In producing its advisory opinion, ITLOS should be cognizant of the lacuna that exists in international law regarding flag State obligations in cases where IUU fishing activities occur within the EEZs of third party coastal States. ITLOS should examine the growing normative value of the various soft law instruments promulgated by international organizations such as the FAO that highlight the environmental and economic dangers of IUU fishing and prescribe obligations for flag States, even in an exhortatory manner. In the absence of sweeping hard law multilateral instruments, flag States and third party coastal States increasingly rely on such soft law instruments when crafting their own domestic laws and regulations targeting IUU fishing.<sup>32</sup>

## Question 2

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

35. Unlike Question 1, Question 2 is not limited to IUU fishing activities in the EEZs of third party coastal States. Read broadly, Question 2 may encompass IUU fishing activities on the high seas as well as in the territorial seas and internal waters of third party coastal

<sup>30</sup> See also Port State Measures Agreement, *supra* note 13.

<sup>31</sup> See Food and Agriculture Organization of the United Nations, *Voluntary Guidelines for Flag State Performance*, Rome, Italy, Feb. 8, 2013.

<sup>32</sup> Many of today’s main soft law instruments regulating fisheries (as well as a number of hard law instruments) build on the foundation established by the FAO in its seminal Code of Conduct for Responsible Fisheries. See Food and Agriculture Organization of the United Nations, *Code of Conduct for Responsible Fisheries*, Rome, Italy, Oct. 31, 1995.

States. Question 2 may also encompass IUU fishing activities conducted by fishing vessels in the national waters of their flag States. For the purposes of this statement, and in light of the FSM's national interests, the FSM's response to Question 2 will be limited to the consideration of flag State liability for IUU fishing activities conducted by its flagged vessels in the high seas, as well as in the EEZs of third party coastal States. The FSM's response will highlight flag State liability for IUU fishing activities in violation of RFMO measures regulating the high seas, and will not consider measures by sub-regional fisheries management organizations (SFMOs).

36. In order to determine flag State liability for IUU fishing activities by flagged vessels, it is necessary to first determine the obligations of flag States with regard to their flagged vessels, especially in relation to IUU fishing. For an examination of flag State obligations for IUU fishing conducted by their flagged vessels in the EEZs of third party coastal States, see paras. 29-33 of this statement.
37. UNCLOS offers several provisions regarding flag State obligations for the fishing activities of their flagged vessels on the high seas. According to Article 116, States "have the right for their nationals to engage in fishing on the high seas,"<sup>33</sup> but this right is subject to other "treaty obligations"<sup>34</sup> and "the rights and duties as well as the interests of coastal States."<sup>35</sup> According to Article 117, "States have the duty to take, or co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."<sup>36</sup> According to Article 118, "States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas."<sup>37</sup> Taken together, these UNCLOS provisions impose obligations on, *inter alia*, flag States to ensure that their flagged vessels respect the rights, duties, and interests of coastal States to certain high seas fisheries. The provisions also impose obligations on flag States to cooperate with coastal States to establish measures that conserve and manage fish stocks in the high seas. Flag States have the corollary obligation of ensuring that their flagged vessels comply with those conservation and management measures.
38. UNCLOS establishes bare provisions regulating high seas fisheries. After the adoption of UNCLOS, high seas fisheries faced collapse as fishing States exploited them free of strict restrictions under UNCLOS (or any other major international law instrument). To remedy that lacuna, States adopted the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA).<sup>38</sup> UNFSA authorizes the establishment of RFMOs to regulate high seas fisheries of common interest, particularly

<sup>33</sup> UNCLOS, *supra* note 4, art. 116.

<sup>34</sup> *Id.*, art. 116(a).

<sup>35</sup> *Id.*, art. 116(b).

<sup>36</sup> *Id.*, art. 117.

<sup>37</sup> *Id.*, art. 118.

<sup>38</sup> United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88 [hereinafter UNFSA].

in straddling fish stocks and highly migratory fish stocks. The RFMOs, in turn, have implemented most of the provisions of UNFSA.

39. UNFSA contains several extensive provisions regarding the obligations of flag States for the fishing activities of their flagged vessels in the high seas. According to Article 18, flag States must ensure that their flagged vessels comply with, and do not engage in activities that undermine, conservation and management measures adopted by RFMOs for high seas fisheries.<sup>39</sup> Flag States must also establish a bevy of regulations for their flagged vessels, including prohibiting the vessels from fishing on the high seas if they are not licensed or if they do so in a manner inconsistent with a license;<sup>40</sup> creating and maintaining a national registry of flagged vessels authorized to fish on the high seas, and providing access to the registry for interested States;<sup>41</sup> marking vessels and their fishing gear in a manner consistent with international norms;<sup>42</sup> mandating accurate recording and timely reporting of vessel positions and catches;<sup>43</sup> and verifying reported catches through onboard observers, vessel monitoring systems, monitoring of transshipment facilities, landing inspections, and other means,<sup>44</sup> as well as monitoring, controlling, and surveilling those vessels through similar means.<sup>45</sup>
40. When relevant RFMO conservation and management measures are violated by a flag State's flagged vessels, UNFSA obligates the flag State to take a number of actions to ensure the enforcement of those RFMO measures and the renewed compliance of their flagged vessels with those measures. Specifically, Article 19 obligates the flag State to, *inter alia*, "investigate immediately and fully" possible violations of RFMO measures by its flagged vessels and report promptly to the relevant RFMO about the results of the investigation;<sup>46</sup> compel the suspected vessels to surrender all relevant information to the investigating authority of the flag State;<sup>47</sup> impose appropriate sanctions on flagged vessels if they are deemed to have committed violations of RFMO measures;<sup>48</sup> and prohibit sanctioned flagged vessels from fishing on the high seas until such time that the vessels have complied with the relevant sanctions.<sup>49</sup>
41. Additionally, Article 20 of UNFSA obligates the flag State, when investigating alleged violations of RFMO measures by its flagged vessels, to share relevant information with interested States.<sup>50</sup> The flag State is also obligated to cooperate with a coastal State in the investigation of alleged unauthorized fishing of a flagged vessel in the national waters of the coastal State, including authorizing the coastal State to board and inspect the vessel

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<sup>39</sup> *Id.*, art. 18(1).

<sup>40</sup> *Id.*, art. 18(3)(b)(ii).

<sup>41</sup> *Id.*, art. 18(3)(c).

<sup>42</sup> *Id.*, art. 18(3)(d).

<sup>43</sup> *Id.*, art. 18(3)(e).

<sup>44</sup> *Id.*, art. 18(3)(f).

<sup>45</sup> *Id.*, art. 18(3)(g).

<sup>46</sup> *Id.*, art. 19(1)(b).

<sup>47</sup> *Id.*, art. 19(1)(c).

<sup>48</sup> *Id.*, art. 19(2).

<sup>49</sup> *Id.*, art. 19(1)(e).

<sup>50</sup> *Id.*, art. 20(3).

on the high seas, as well as taking appropriate enforcement action on its own.<sup>51</sup> Article 21 of UNFSA extends this obligation of cooperation to cases where the flagged vessel engages in fishing in the high seas in contravention of relevant RFMO measures.<sup>52</sup>

42. UNFSA has not been as widely ratified by States as UNCLOS, and the provisions of UNFSA do not have the same customary international law normative status as the major provisions of UNCLOS. However, UNFSA establishes rules for, *inter alia*, high seas fisheries that have been adopted and implemented by RFMOs around the world. Thus, even if a particular flag State is not a Party to UNFSA, the flag State will still have to comply with UNFSA provisions as they are implemented by RFMOs that regulate the high seas fisheries that the flag State's vessels fish.
43. Although UNCLOS and UNFSA establish a raft of obligations for flag States with regard to the IUU fishing activities of their flagged vessels in the high seas and in the EEZs of third party coastal States, neither instrument establishes clear rules of liability for flag States that fail to comply with those obligations. The primary focus today is on encouraging flag States to comply with their international obligations regarding the deterrence and elimination of IUU fishing activities by their flagged vessels.
44. Some RFMOs and coastal States have taken to black-listing flag States that are notoriously non-compliant with their IUU-related obligations. For example, the Council of Europe, pursuant to Council Regulation 1005/2008, maintains a list of flag States deemed to be "non-cooperating third countries."<sup>53</sup> A country gets on the list 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."<sup>54</sup> When a country gets on the list, the fishery products from the country's flagged products cannot be imported into the EC; EC operators cannot purchase any of the country's flagged vessels; and the EC will refuse to enter into a bilateral fisheries agreement or fisheries partnership agreement with such a country.<sup>55</sup>
45. A more common approach is to blacklist the vessels that engage in IUU fishing activities, while encouraging their flag States to properly monitor their flagged vessels and enforce relevant anti-IUU measures. Coastal States use their vessel IUU blacklists and the prospect of stiffer licensing fees in the future to apply political pressure on flag States (as well as the fishing industry) to curb IUU fishing.
46. It is the position of the FSM that in the absence of explicit direct obligations and/or liabilities imposed on a flag State by an instrument, measure, or other arrangement between the flag State, RFMOs and/or third party coastal States, a flag State has a due diligence obligation under international law to ensure that its flagged vessels do not engage in IUU fishing activities on the high seas and in the national waters of third party

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<sup>51</sup> *Id.*, art. 20(6).

<sup>52</sup> *Id.*, art. 21.

<sup>53</sup> Council Regulation (EC) 1005/2008, *supra* note 14, art. 31(1).

<sup>54</sup> *Id.*, art. 31(3).

<sup>55</sup> *Id.*, art. 38.

coastal States, as well as to adopt and enforce relevant domestic anti-IUU measures and anti-IUU measures imposed on the flag State by arrangement with relevant RFMOs. It is also the FSM's position that a flag State is not liable for the IUU fishing activities of its flagged vessels unless the flag State fails to exercise due diligence in monitoring their flagged vessels and enforcing sanctions and other measures on those vessels for their IUU fishing activities. Whether such liability should be discharged through monetary compensation, black-listing, economic reprisals, or other means may depend on the provisions of relevant fishing arrangements between RFMOs, coastal States, and the flag States.

47. The notion of due diligence under international law has been examined in a number of fora. For example, Article 3 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which were adopted by the International Law Commission (ILC) in 2001 and subsequently commended to Member States by the United Nations General Assembly, obligates a State from which hazardous activities originate to “take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”<sup>56</sup> The Commentary to Article 3 of the Draft Articles asserts that this obligation is “one of due diligence.”<sup>57</sup> Furthermore, the obligation “is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so.”<sup>58</sup> Rather, “the conduct of the State of origin . . . will determine whether the State has complied with its [due diligence] obligation.”<sup>59</sup>
48. Additionally, the International Court of Justice, in its Judgment in the *Pulp Mills on the River Uruguay* case, held that a State's specific obligation to “act with due diligence” involves “not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operations.”<sup>60</sup>
49. Furthermore, the Seabed Disputes Chamber of ITLOS, in its advisory opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, determined that UNCLOS States Parties that sponsor contractors to explore and exploit the International Seabed Area have an “obligation to ensure compliance by sponsored contractors with the terms of the contract [to explore and exploit the Area] and the obligations set out in [UNCLOS] and related instruments.”<sup>61</sup> To comply with this obligation, the sponsoring State must “make best possible efforts to

<sup>56</sup> International Law Commission, *Draft articles on prevention of transboundary harm from hazardous activities*, 2 Y.B. Int'l L. Comm'n 146, U.N. Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2).

<sup>57</sup> *Id.*, at 154.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14 (Apr. 20), at para. 197.

<sup>61</sup> Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Case No. 17 (Feb. 1, 2011), at para. 242(3).

secure compliance by the sponsored contractors,”<sup>62</sup> including the adoption of “measures within its legal system [that are] ‘reasonably appropriate.’”<sup>63</sup>

50. Although the notion of due diligence may morph over time and with different situations, it is the position of the FSM that due diligence under international law requires, at a minimum, that reasonable and appropriate steps are taken, in a vigilant manner, to ensure compliance with relevant requirements and restrictions.
51. To determine the extent of a flag State’s liability for violating its due diligence obligations, attention may be paid to the Draft Articles on Responsibility of States for Internationally Wrongful Acts,<sup>64</sup> which were adopted by the ILC in 2001, and which have been widely used in international legal disputes despite not being a binding hard-law instrument. The Draft Articles enshrine rules of customary international law regarding how States become liable for internationally wrongful acts, as well as how States may discharge that liability. According to the Draft Articles, a State commits an internationally wrongful act if the State engages in conduct consisting of an act or omission that is “attributable to the State under international law” and that “constitutes a breach of an international obligation of the State.”<sup>65</sup> An act or omission is attributable to a State if, *inter alia*, the act or omission is conducted by organs of the State.<sup>66</sup> According to the Draft Articles, the State is obligated to provide full reparation for the harm caused by its internationally wrongful act.<sup>67</sup> Per the Draft Articles, generally accepted forms of reparation for internationally wrongful acts include restitution,<sup>68</sup> compensation,<sup>69</sup> and satisfaction.<sup>70</sup> According to the Draft Articles, restitution—i.e., “re-establish[ing] the situation which existed before the wrongful act was committed”<sup>71</sup>—is the preferred form of reparation under customary international law and should be obtained unless it is “not materially impossible” or it involves “a burden out of all proportion to the benefit deriving from restitution instead of compensation.”<sup>72</sup>
52. Thus, with regard to flag States and IUU fishing activities, a flag State whose organs—e.g., a national fisheries management authority—fail to discharge their due diligence obligations under international law (including under UNCLOS, UNFSA, and arrangements with relevant RFMOs and coastal States) to monitor, eliminate, and enforce sanctions against the IUU fishing activities of their flagged vessels arguably engages in internationally wrongful acts for which it incurs State responsibility. Such a failure is an omission to act, which incurs the same liability as an actual action, according to the Draft

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> International Law Commission, *Draft articles on responsibility of States for internationally wrongful acts*, 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2).

<sup>65</sup> *Id.*, art. 2.

<sup>66</sup> *Id.*, art. 4(1).

<sup>67</sup> *Id.*, art. 31(1).

<sup>68</sup> *Id.*, art. 35.

<sup>69</sup> *Id.*, art. 36.

<sup>70</sup> *Id.*, art. 37.

<sup>71</sup> *Id.*, art. 35.

<sup>72</sup> *Id.*

Articles. Furthermore, the flag State should take all necessary steps to provide restitution to the affected RFMOs and coastal States. Failing restitution, the flag State may have to provide compensation or—as a last resort—satisfaction (e.g., a formal apology).

### Question 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 fisheries legislation of the coastal State by the vessel in question?**

53. For its response to Question 3, the FSM limits itself to considering the liability of an international agency for IUU fishing activities conducted in the EEZ of the coastal State which issues the fishing license to the vessel that engages in the IUU fishing activities. For the FSM's views on the liability of a flag State for the IUU fishing activities of its flagged vessels in the national waters of the coastal States that issue fishing licenses to those vessels, see the FSM's response to Question 2 above.<sup>73</sup>
54. An international agency may secure an agreement with a coastal State that entitles fishing vessels under the control of the agency to receive licenses from the coastal State to fish in the national waters of the coastal State. The likeliest form of such an arrangement is a fisheries partnership agreement (FPA) between the agency and the coastal State.
55. An FPA typically obligates the fishing vessels of the international agency to comply with all relevant fisheries laws and regulations of the coastal State that is also party to the FPA. An FPA may also obligate the international agency to take measures to ensure the compliance of its fishing vessels with coastal State fisheries legislation.
56. When a fishing vessel violates any of the coastal State's fisheries laws and regulations while fishing in the coastal State's waters, that vessel engages in IUU fishing activities, thereby incurring potential liability as indicated in the FPA and other relevant agreements (including the fishing license granted to the vessel by the coastal State). However, the vessel's incurring of liability does not necessarily mean that the international agency that has an FPA with the coastal State also incurs liability for the vessel's IUU fishing activities.
57. Whether an international agency shall be held liable for the IUU fishing of its vessels in the national waters of a coastal State with which the agency has an FPA depends on the terms of the FPA as well as the relevant laws and regulations of the coastal State in question. It also depends on the laws and regulations of the international agency,

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<sup>73</sup> While the FSM's response to Question 2 includes situations involving fishing vessels whose flag States do not necessarily have bilateral fishing agreements with third party coastal States, the principles of obligation and liability apply similarly in both scenarios. Of course, if there is a bilateral fishing agreement between a flag State and a third party coastal State that imposes specific obligations and liabilities on the flag State for the conduct of its flagged vessels, then the terms of that agreement take precedence unless they violate peremptory norms of international law or are otherwise invalid.

although it is presumed that the relevant laws and regulations of the agency are compatible with (if not reflected in) the provisions of the FPA between the agency and the coastal State. Unlike a situation where IUU fishing activities are carried out by vessels flagged by a State that does not have an FPA with the victimized coastal State, the existence of an FPA between an international agency and the victimized coastal State ideally presents clear rules for imposing liability on the agency for the wrongful activities of its vessels.

58. It is the position of the FSM that when an FPA is silent as to whether an international agency party to the FPA is liable for the IUU fishing activities of its vessels in the national waters of a licensing coastal State, the international agency incurs liability in the same manner as a flag State incurs liability for the IUU fishing activities of its flagged vessels in the high seas and in the national waters of third party coastal States. Much like the flag States discussed in paras. 46-52 above, the international agency has a due diligence obligation under international law to monitor, deter, and enforce sanctions for the IUU fishing activities of the vessels it regulates under an FPA with a coastal State. If the agency fails to discharge that obligation, the agency incurs liability, for which it must make reparations.
59. In terms of determining whether an international agency has actually violated its due diligence obligation, as well as how the agency should make reparations, it may be instructive to consider the Draft Articles on the Responsibility of International Organizations,<sup>74</sup> which were adopted by the ILC in 2011, and which are closely modeled on the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts. If the agency acts or fails to act in a manner that is attributable to the agency under international law and that violates an international obligation of the agency, then the agency incurs responsibility for which it must provide restitution, compensation, or satisfaction (in descending order of preference).<sup>75</sup>
60. Thus, it is the position of the FSM that if an international agency fails to meet its due diligence obligation to address, eliminate, and penalize the IUU fishing activities of its vessels, the agency will have to make restitution (or, failing that, tender compensation or satisfaction) to the coastal State which is party to an FPA with the agency, and whose fisheries legislation is violated by the IUU fishing activities of the agency's vessels.
61. The most common example of an international agency entering into FPAs with coastal States is the European Community (EC), which is a Party to UNCLOS, and which has exclusive competence to regulate fisheries conservation and management measures in the EEZs of the EC's Member States, deal with foreign States and international organizations with regard to those EEZs, and enter into FPAs with foreign States and international organizations on behalf of the EC's fishing vessels. The FSM and the EC entered into an

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<sup>74</sup> International Law Commission, *Draft articles on the responsibility of international organizations*, 2011, reprinted in [2011] *Report of the International Law Commission to the General Assembly*, 66 U.N. GAOR Supp. (No. 10) at 56, U.N. Doc. A/66/10 (2011).

<sup>75</sup> See *id.*, arts. 35-37.

FPA in 2006. The FSM-EC FPA<sup>76</sup> authorizes EC fishing vessels to engage in fishing activities in the FSM's EEZ, pursuant to the securing by those vessels of fishing licenses from the FSM (as outlined in the Annex to the Protocol to the FSM-EC FPA). Significantly, the FPA obligates the EC to "take all the appropriate steps required to ensure that its vessels comply with . . . the laws and regulations governing fisheries in the FSM EEZ."<sup>77</sup> The FPA also obligates the EC to "keep an up-to-date list of the vessels to which a fishing license has been issued" under the FPA.<sup>78</sup> Finally, the FPA allows either the FSM or the EC to terminate the FPA if there is a "failure to comply with undertakings made by the Parties with regard to combating illegal, unreported and unregulated fishing."<sup>79</sup>

62. Unfortunately, the FSM-EC FPA does not explicitly state whether the EC incurs any liability for the IUU fishing activities of its vessels in the FSM's EEZ. However, the FPA does impose, at a minimum, a due diligence obligation on the EC to take measures that will monitor, deter, and enforce sanctions for IUU fishing activities by its vessels in the FSM's EEZ. The EC is obligated to ensure that its vessels do not violate the fisheries legislation of the FSM. Thus, in the absence of clear provisions on liability in the FSM-EC FPA or any other agreement between the FSM and the EC, if the EC fails to meet that due diligence obligation, the EC may incur the responsibility to make full reparations to the FSM, preferably through restitution.

#### 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?**

63. As a preliminary matter, ITLOS should define what "shared stocks and stocks of common interest" are. For the purposes of its response to Question 4, the FSM defines "shared stocks and stocks of common interest" to mean straddling stocks as defined in Article 63 of UNCLOS (i.e., same stocks of associated species living either within the EEZs of two or more coastal States or within one coastal State's EEZ and in an adjacent high seas area beyond the coastal State's EEZ),<sup>80</sup> highly migratory species (i.e., species that travel in and out of EEZs and the high seas on a regular basis) as regulated in Article 64 of UNCLOS and listed in Annex I of UNCLOS;<sup>81</sup> anadromous stocks (i.e., fish that originate in the rivers of a single State, migrate to and live in salt water for most of their life, and return to the fresh waters of the origin State for spawning) as regulated in Article 66 of UNCLOS;<sup>82</sup> and catadromous species (i.e., fish that originate in the rivers of a

<sup>76</sup> Partnership Agreement between the European Community and the Federated States of Micronesia on fishing in the Federated States of Micronesia, 2006 O.J. (L151) 1 [hereinafter FSM-EC FPA].

<sup>77</sup> *Id.*, art. 5(4).

<sup>78</sup> Protocol to FSM-EC FPA, *supra* note 76, Annex, Ch. IX(1).

<sup>79</sup> FSM-EC FPA, *supra* note 76, art. 12(1).

<sup>80</sup> UNCLOS, *supra* note 4, art. 63.

<sup>81</sup> *Id.*, art. 64 and Annex I.

<sup>82</sup> UNCLOS, *supra* note 4, art. 66.

single State, live in those waters for most of their lives, and migrate to salt water for spawning) as regulated in Article 67 of UNCLOS.<sup>83</sup>

64. The primary international law sources for a coastal State's rights and obligations in ensuring the sustainable management of shared stocks and stocks of common interest are UNCLOS and UNFSA. Article 56 of UNCLOS recognizes the "sovereign rights" of the coastal State to, *inter alia*, conserve and manage the living resources within its EEZ, but the coastal State must have "due regard" for the rights and obligations of other States in connection with those same living resources.<sup>84</sup> This balance of rights and obligations between coastal State and other interested States is particularly pronounced for shared stocks and stocks of common interest.
65. Before considering the rights and obligations of coastal States under this Question, ITLOS should define "sustainable management." It is the position of the FSM that the sustainable management of shared stocks and stocks of common interests is the approach that comports with Article 61 and Article 62 of UNCLOS<sup>85</sup> (which establish the systems of maximum sustainable yield, total allowable catch, and optimal utilization in EEZs, as discussed in para. 27 of this statement), and with Article 119 of UNCLOS<sup>86</sup> (which applies similar systems to the conservation and management of fish stocks in the high seas), as modified by the specific provisions in UNCLOS and UNFSA regulating those stocks.
66. With regard to straddling stocks within the EEZs of two or more coastal States, Article 63(1) of UNCLOS obligates those States to coordinate directly and/or through RFMOs and SFMOs to conserve and develop those stocks.<sup>87</sup> With regard to straddling stocks within the EEZ of a coastal State and in an adjacent area of the high seas that is fished by other States, Article 63(2) of UNCLOS obligates the coastal State and the other States to agree directly and/or through RFMOs and SFMOs to enact measures to conserve those stocks.<sup>88</sup>
67. With regard to highly migratory species, Article 64 of UNCLOS obligates the coastal State in whose EEZ the species travels to work with other States that harvest the same species in its migration pattern in order to conserve the species and promote the optimum utilization of the species throughout its entire migration pattern.<sup>89</sup> Ideally, such regulations would be imposed through RFMOs or other appropriate international organizations.<sup>90</sup>

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<sup>83</sup> *Id.*, art. 67.

<sup>84</sup> *Id.*, art. 56.

<sup>85</sup> *Id.*, arts. 61-62.

<sup>86</sup> *Id.*, art. 119.

<sup>87</sup> *Id.*, art. 63(1).

<sup>88</sup> *Id.*, art. 63(2).

<sup>89</sup> *Id.*, art. 64(1).

<sup>90</sup> *Id.*

68. With regard to anadromous stocks, Article 66 of UNCLOS imposes the primary responsibility for those stocks on the State in whose rivers the stocks originate.<sup>91</sup> This origin State is presumably a coastal State, though it may not always be. The origin State is obligated to establish conservation measures regulating the fishing of those stocks in “all waters landward of the outer limits of its exclusive economic zone.”<sup>92</sup> For fishing of those stocks beyond the origin State’s EEZ, the interested States (including the origin State) must consult with each another to establish a fishing arrangement that satisfies the conservation measures and needs of the origin State.<sup>93</sup> When the stocks migrate through the EEZ of a coastal State other than the origin State, the two States must cooperate in order to conserve and manage the stocks.<sup>94</sup>
69. With regard to catadromous species, Article 67 of UNCLOS imposes the responsibility for managing such species and ensuring their free movement on the State in whose waters the species resides for most of its life.<sup>95</sup> When the species migrates through the EEZ of a coastal State other than that of the residence State, both States must agree on a rational management scheme for the species that preserves the responsibility of the residence State.<sup>96</sup>
70. As a general matter, all States (coastal and otherwise) are obligated under Article 117 and Article 118 of UNCLOS to cooperate with each other to ensure that their nationals conserve the living resources of the high seas (including the shared stocks and stocks of common interest that migrate to the high seas at some point in their life cycles) when exploiting those resources.<sup>97</sup> States whose nationals engage in such exploitation are obligated, where appropriate, to create RFMOs and SFMOs to ensure that conservation measures are crafted and implemented.<sup>98</sup>
71. As another general matter, Article 73 of UNCLOS grants a coastal State the right to take a number of measures—including “boarding, inspection, arrest, and judicial proceedings”—to ensure that fishing vessels comply with the State’s conservation and management measures, including those measures regulating shared stocks and stocks of common interest.<sup>99</sup> If the coastal State arrests or detains a foreign fishing vessel for violating such measures, the coastal State must “promptly notify the flag State [of the seized vessel], through appropriate channels, of the action taken and of any penalties subsequently imposed.”<sup>100</sup>
72. UNFSA establishes extensive rights and obligations for coastal States with regard to the conservation and management of straddling fish stocks and highly migratory fish stocks.

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<sup>91</sup> *Id.*, art. 66(1).

<sup>92</sup> *Id.*, art. 66(2).

<sup>93</sup> *Id.*, art. 66(3)(a).

<sup>94</sup> *Id.*, art. 66(4).

<sup>95</sup> *Id.*, art. 67(1).

<sup>96</sup> *Id.*, art. 67(3).

<sup>97</sup> *Id.*, arts. 117-118.

<sup>98</sup> *Id.*, art. 118.

<sup>99</sup> *Id.*, art. 73(1).

<sup>100</sup> *Id.*, art. 73(4).

UNFSA extensively fleshes out the relevant provisions of UNCLOS on straddling fish stocks and highly migratory fish stocks. Rather than engage in an exhaustive discussion of UNFSA, the FSM commends UNFSA as a whole to the attention of ITLOS and highlights the following provisions of UNFSA: Article 5 on measures which coastal States and States fishing in the high seas must carry out in order to conserve and manage straddling fish stocks and highly migratory fish stocks;<sup>101</sup> Article 7 on ensuring the compatibility of coastal State conservation and management measures and similar measures established for States fishing the same stocks on the high seas;<sup>102</sup> Article 8 on requiring coastal States and States fishing on the high seas to cooperate in order to effectively conserve and manage straddling and highly migratory stocks, particularly through RFMOs and other relevant regional agreements (whether existing or created by those States);<sup>103</sup> Article 16 on a coastal State's rights, duties, and interests being reflected under conservation and management measures for straddling and highly migratory fish stocks in a high seas area surrounded entirely by that coastal State's national waters;<sup>104</sup> Article 21 on a coastal State's right to board and inspect a fishing vessel flying the flag of another State that is suspected of engaging in fishing activities that violate the conservation and management measures for straddling and highly migratory stocks as implemented by an RFMO or SFMO in which the coastal State is a Member;<sup>105</sup> Article 24 on obligating developed coastal States to recognize the special needs of developing States when cooperating to establish conservation and management measures for the straddling and highly migratory stocks they exploit;<sup>106</sup> and Article 25 obligating all States (including coastal States) to provide, *inter alia*, financial assistance, technical assistance, and technology transfers in order to enhance the ability of developing States (especially least-developed States and small island developing States) to conserve and manage straddling and highly migratory stocks, develop their own fisheries for those stocks, and participate in high seas fisheries for those stocks.<sup>107</sup>

73. In addition to multilateral instruments, the practice of RFMOs and SFMOs can be instructive in determining the rights and obligations of coastal States regarding their sustainable management of shared stocks and stocks of common interest. In the FSM's region, the Western and Central Pacific Fisheries Commission (WCPFC) regulates straddling stocks and highly migratory species that are present, at some points in their life cycles, in the EEZs of the FSM and other Members of the WCPFC (as well as in the high seas of the WCPO), particularly tuna.<sup>108</sup>

74. The FSM is also one of eight Pacific Island States Parties to a subregional agreement called the Nauru Agreement Concerning Cooperation in the Management of Fisheries of

<sup>101</sup> UNFSA, *supra* note 38, art. 5.

<sup>102</sup> *Id.*, art. 7.

<sup>103</sup> *Id.*, art. 8.

<sup>104</sup> *Id.*, art. 16.

<sup>105</sup> *Id.*, art. 21.

<sup>106</sup> *Id.*, art. 24.

<sup>107</sup> *Id.*, art. 25.

<sup>108</sup> For examples of the WCPFC's Conservation and Management Measures, see <http://www.wcpfc.int/conservation-and-management-measures> (last visited Nov. 23, 2013).

Common Interest (Nauru Agreement).<sup>109</sup> The Parties to the Nauru Agreement (PNA) are obligated to implement several fisheries management instruments that “co-ordinate and harmonise the management of fisheries with regard to common stocks within the Fisheries Zones [of the PNA], for the benefit of their peoples.”<sup>110</sup> The primary objective of this management is the regulation of the granting of fishing licenses to foreign tuna purse-seining vessels wishing to fish in the EEZs of the PNA. The individual fisheries management instruments adopted pursuant to the Nauru Agreement—e.g., the Federated States of Micronesia Arrangement, the Palau Arrangement—set, *inter alia*, a common licensing arrangement system for fishing vessels in the PNA EEZs, the number of fishing days available to those vessels, and restrictions on the use of fish aggregating devices by those vessels.

75. The FSM is also a Member of the Pacific Islands Forum Fisheries Agency (FFA), an advisory body that provides technical assistance and other forms of support to its Members when they set domestic policies about their tuna resources as well as when they engage in regional bodies and arrangements (such as the WCPFC and the PNA) that regulate tuna fisheries.<sup>111</sup> The FFA Members (including the FSM) have endorsed and implemented an FFA document entitled *The Harmonised Minimum Terms and Conditions for Foreign Fishing Vessel Access* (HMTC).<sup>112</sup> The HMTC establishes a common regional license form for all FFA Members and prohibits foreign fishing vessels from fishing in the national waters of any FFA Member unless, *inter alia*, they are licensed to do so in accordance with the common license scheme,<sup>113</sup> participate fully in a Vessel Monitoring System,<sup>114</sup> and are in good standing in the HMTC’s Vessel Register. The HMTC obligates FFA Members to apply the terms of the HMTC to all foreign fishing vessels interested in fishing in the Members’ national waters, particularly for tuna and other highly migratory stocks.
76. Finally, along with multilateral instruments and regional/subregional organizations and arrangements, domestic coastal State fisheries management and conservation legislation plays a key role in outlining the rights and obligations of coastal States when regulating shared stocks and stocks of common interest that live in and/or pass through their national waters at some point in their life cycles. UNCLOS and UNFSA, as well as RFMO regulations and SFMO arrangements, obligate coastal States to adopt and implement such national fisheries legislation.
77. The FSM’s primary domestic fisheries legislation is the Marine Resources Act of 2002.<sup>115</sup> The paramount purpose of the Act is “to ensure the sustainable development,

<sup>109</sup> Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, Feb. 11, 1982 [hereinafter Nauru Agreement]. The Parties to the Nauru Agreement are Kiribati, the Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, Tuvalu, and the FSM.

<sup>110</sup> *Id.*, art. 1.

<sup>111</sup> For more about the work of the FFA, see <http://www.ffa.int/about> (last visited Nov. 23, 2013).

<sup>112</sup> Pacific Islands Forum Fisheries Agency, *The Harmonised Minimum Terms and Conditions for Foreign Fishing Vessel Access*, Honiara, Solomon Islands, May 27, 2011.

<sup>113</sup> *Id.*, para. 2.

<sup>114</sup> *Id.*, para 14.

<sup>115</sup> Marine Resources Act, 24 F.S.M.C. §§ 101-920 (2002).

conservation and use of the marine resources in the exclusive economic zone [of the FSM] by promoting development of, and investment in, fishing and related activities in the context of effective stewardship.”<sup>116</sup> Toward that end, the Act establishes the National Oceanic Resource Management Authority (NORMA), the lead fisheries management agency for the FSM.<sup>117</sup>

78. The FSM commends the Act as a whole to the attention of ITLOS and highlights the following provisions: Section 106, which authorizes NORMA to enter the FSM into regional agreements—e.g., the HMTC—for the conservation and management of tuna stocks and other shared stocks and stocks of common interest, as well as multilateral access agreements between foreign fishing vessels and regional groups—e.g., the PNA—for the exploitation of the same stocks;<sup>118</sup> Section 205(7), which obligates NORMA to “cooperate as appropriate with other nations or territories in the region and with foreign states fishing in the region and adjacent high seas areas for the conservation and management of highly migratory stocks”;<sup>119</sup> and Section 502(7), which authorizes NORMA to “cooperate with foreign states fishing on the high seas in respect of [highly migratory stocks which occur both in the exclusive economic zone [of the FSM] and in the high seas] for the purpose of achieving compatible conservation and management measures in according with the [UNFSA], any access agreement or fisheries management agreement.”<sup>120</sup>
79. Pursuant to Sections 204(f) and 703(1) of the Marine Resources Act of 2002, and in conformity with international law, NORMA has promulgated a number of fisheries regulations. The FSM commends to ITLOS the Vessel Monitoring System Regulations (which authorize NORMA to, *inter alia*, install and collect information from monitoring devices on fishing vessels licensed to fish in the FSM’s EEZ),<sup>121</sup> and the Administrative Penalties Regulations (which authorize NORMA to “assist in the conservation of marine resources by establishing a system whereby some fisheries violations [by vessels fishing in the FSM’s EEZ] may be cited and fined”).<sup>122</sup> The Regulations are necessary components of the FSM’s ability to discharge its obligation to sustainably manage shared stocks and stocks of common interest that may be fished in the FSM’s EEZ pursuant to, *inter alia*, the Marine Resources Act of 2002.

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<sup>116</sup> *Id.*, § 101(1).

<sup>117</sup> *Id.*, § 201(1).

<sup>118</sup> *Id.*, § 106.

<sup>119</sup> *Id.*, § 205(7).

<sup>120</sup> *Id.*, § 502(7).

<sup>121</sup> See <http://www.norma.fm/Downloads/VMS%20Regulations.pdf> (last visited Nov. 23, 2013).

<sup>122</sup> See <http://www.norma.fm/Downloads/AP%20Regulations.pdf> (last visited Nov. 23, 2013).