

**Written Statement of New Zealand**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA  
(CASE NO. 21)

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

WRITTEN STATEMENT OF NEW ZEALAND

27 NOVEMBER 2013

**CONTENTS**

CHAPTER 1	INTRODUCTION .....	1
CHAPTER 2	JURISDICTION AND ADMISSIBILITY.....	3
I.	Jurisdiction.....	3
II.	Admissibility.....	7
CHAPTER 3	OBLIGATIONS OF THE FLAG STATE.....	9
I.	Introduction.....	9
II.	Applicable Law .....	10
A.	The primacy of coastal State responsibility for the conservation and management of living resources within the EEZ .....	10
B.	Flag State responsibility and the duty of effective control .....	11
C.	Duties of other States .....	15
III.	Conclusion.....	16
CHAPTER 4	FLAG STATE LIABILITY.....	17
I.	Introduction.....	17
II.	Applicable Law .....	17
A.	General principles of State responsibility .....	17
B.	International responsibility of the flag State for breach of its duty of effective.. control .....	18
C.	Legal consequences of State responsibility .....	20
III.	Conclusion.....	21
CHAPTER 5	LIABILITY OF INTERNATIONAL ORGANIZATIONS .....	22
I.	Introduction.....	22
II.	Applicable Law .....	22
III.	Conclusion.....	25
CHAPTER 6	RIGHTS AND OBLIGATIONS OF THE COASTAL STATE IN ENSURING THE SUSTAINABLE MANAGEMENT OF SHARED STOCK AND STOCKS OF COMMON INTEREST.....	26
I.	Introduction.....	26
II.	Applicable Law .....	26
A.	Obligations of cooperation in the conservation and management of straddling stocks and highly migratory species .....	26
B.	Cooperation is without prejudice to the sovereign rights of the coastal State .....	29
C.	Additional rights and obligations of the coastal State as a port State .....	30
III.	Conclusion.....	30
CHAPTER 7	CONCLUSION.....	32

## CHAPTER 1

### INTRODUCTION

1. During its fourteenth session (27 – 28 March 2013), the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) adopted a resolution by which it decided, in accordance with Article 33 of the 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (the MCA Convention), to authorize the Permanent Secretary of the SRFC “to seize the International Tribunal for the Law of the Sea [...] in order to obtain its advisory opinion on the following matters:

*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?*

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

*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?*

*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?<sup>1</sup>*

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<sup>1</sup> *Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC) on authorizing the Permanent Secretary to seek Advisory opinion pursuant to Article 33 of the Convention on the definition of minimum access conditions and exploitation of fishing resources within the maritime zones of SRFC Member States.*

2. By an Order dated 24 May 2013, the International Tribunal for the Law of the Sea (the Tribunal) invited the States Parties to the United Nations Convention on the Law of the Sea (the Convention) and relevant intergovernmental organizations to present written statements on the questions, and fixed 29 November 2013 as the time-limit within which written statements may be presented to the Tribunal.<sup>2</sup>

3. New Zealand notes the background to the request outlined in the Technical Note submitted to the Registry of the Tribunal by the Permanent Secretary of the SRFC.<sup>3</sup> In that note, the Permanent Secretary of the SRFC draws attention to the problem of illegal, unregulated and unreported fishing activities (IUU fishing) in the West African region.<sup>4</sup>

4. The growing incidence of IUU fishing, globally, is of significant concern to New Zealand and other members of the international community. IUU fishing can occur in all capture fisheries, both in national jurisdictions and on the high seas. IUU fishing results in widespread environmental, social and economic consequences. It adversely affects target species as well as associated and dependent species and the wider ecosystem. It can seriously impair efforts to achieve sustainable fisheries and can ultimately lead to the collapse of a fishery. By distorting competition, IUU fishing jeopardises the economic survival of those who fish legitimately. Because of their lower operating costs, IUU fishers gain an unjust economic advantage over legitimate fishers. The impacts of IUU fishing undermine international, regional, and national efforts to effectively conserve and manage fish stocks and the impacts of fishing. New Zealand remains committed to taking action, individually and collectively, to prevent, deter, and eliminate IUU fishing.

5. This statement by New Zealand addresses the jurisdiction of the Tribunal to give an advisory opinion in response to the request by the SRFC and the questions put by the SRFC in that request.

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<sup>2</sup> International Tribunal on the Law of the Sea, Order 2013/2.

<sup>3</sup> *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas Under Jurisdiction of the Member States of the SRFC (MCA Convention): Technical Note*, March 2013.

<sup>4</sup> *Ibid* p. 3.

## CHAPTER 2

### JURISDICTION AND ADMISSIBILITY

#### I. Jurisdiction

6. As this is the first occasion in which the Tribunal has been asked to render an advisory opinion under Article 138(1) of the Rules of the Tribunal (the Rules), New Zealand considers that it will be necessary for the Tribunal to examine the issues of jurisdiction and admissibility which arise in relation to this request.

7. Consistent with the principle of *compétence de la compétence*,<sup>5</sup> Article 288(4) of the Convention provides that it is for the Tribunal to settle any questions over whether it has jurisdiction to render an advisory opinion. In doing so, the Tribunal must act in accordance with the provisions of the Convention, its Statute and its Rules. The Tribunal's Order references Articles 21 and 27 of the Statute of the Tribunal, as well as Articles 130, 131, 133 and 138 of the Rules.

8. New Zealand notes at the outset that the Convention makes no provision for advisory opinions by the Tribunal. Provision is made for the Sea-Bed Disputes Chamber to render advisory opinions at the request of the Assembly or Council of the International Seabed Authority.<sup>6</sup> That has been interpreted as implying that no general advisory jurisdiction exists.<sup>7</sup> However, equally, New Zealand notes that the Convention contains no provision excluding such jurisdiction.<sup>8</sup>

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<sup>5</sup> See, for example, the comments of the International Court of Justice on this principle in *Nottebohm Case (Preliminary Objection), Judgment of 18<sup>th</sup> November 1953, I.C.J. Reports 1953 p. 111, at pp. 119-120.*

<sup>6</sup> Article 159(10) and Article 191 of the Convention.

<sup>7</sup> See, for example, Rao & Gautier (ed) *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, The Hague, 2006) at pp. 393-394.

<sup>8</sup> See *ibid* where the authors propose that Article 288(2) could be interpreted as providing a legal basis for the existence of an inherent advisory jurisdiction on the part of the Tribunal. For views to the contrary see Gao, Jianjun, "The Legal Basis of the Advisory Function of the International Tribunal for the Law of the Sea as A Full Court: An Unresolved Issue", 4 (1) *KMI International Journal of Maritime Affairs and Fisheries* (2012), pp. 83-106; and You, Ki-Jun, "Advisory opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited", 39 (4) *Ocean Development & International Law* (2008), pp. 360-371.

9. Article 21 of the Statute appears to confer a broad jurisdiction on the Tribunal. It provides:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

10. New Zealand considers that the phrase "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" could be interpreted as including a request for an advisory opinion where that request is submitted under an agreement that specifically confers such jurisdiction on the Tribunal.

11. That interpretation is reflected in Article 138 of the Rules, which refers specifically to the Tribunal's authority to render an advisory opinion in those circumstances:

(1) The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.

(2) A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

(3) The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

12. In the current proceedings, New Zealand notes that the request has been submitted to the Tribunal by the Permanent Secretary of the SFRC under the terms of Article 33 of the MCA Convention. Three questions therefore arise for the Tribunal's consideration:

- a. First, are the questions contained in the request "legal questions"?
- b. Second, is the MCA Convention "an international agreement related to the purposes of the Convention"?

- c. Third, has the request been transmitted to the Tribunal "by whatever body is authorized by or in accordance with the agreement" to make such a request?

In New Zealand's view, all three questions can be answered in the affirmative.

13. The questions posed in the request appear to be "legal questions". They address the "obligations" of the flag State; the "extent of liability" of the flag State, "liability" of a State or international organization; and "rights and obligations" of the coastal State. These are all of the nature of legal questions, framed in terms of law and raising problems of international law.<sup>9</sup> While the questions may have political aspects, or even political motives, this does not deprive them of their legal character.<sup>10</sup> In addition, while the questions may raise factual issues to some degree, that does not alter their essential legal character. They are legal questions capable of an answer in legal terms.

14. Further, it appears that the purposes of the MCA Convention are related to those of the Convention. The purposes of the MCA Convention are expressed in its Preamble. Paragraph 1 of that Preamble specifically recalls the Convention, "especially its provisions calling for the signing of regional and sub-regional cooperation agreements in the fisheries sector". The Preamble further records that the parties were:

[d]esirous of adapting the Convention of 14 July 1993 to the technical and legal changes that have taken place since its adoption, in particular with regards to the determination of conditions defining responsible fishing, the taking into account the ecosystem-based approach to fisheries for a sustainable management of resources, and

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<sup>9</sup> See the comments to this effect by the Sea-Bed Disputes Chamber of the International Tribunal of the Law of the Sea in its Advisory Opinion of 1 February 2011 on *Responsibilities and Obligations Of States Sponsoring Persons and Entities with respect to Activities in the Area*, ITLOS, Case No. 17, at paragraph 39.

<sup>10</sup> See, for example, the comments of the International Court of Justice on this point in its Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, *Advisory Opinion*, I.C.J. Reports, 2010, p. 403, at p. 415 (paragraph 27).

the fight against illegal, unreported and unregulated fishing, in accordance with international law.<sup>11</sup>

and

[d]esirous of ensuring that their policies and legislations are more effectively harmonized with a view to a better exploitation of fisheries resources in the maritime zones under their respective jurisdictions, for the benefit of current and future generations.<sup>12</sup>

15. The central purposes of the MCA Convention thus relate to the proper and effective conservation and management of marine living resources. As such, they follow closely the expressed purposes of the Convention, as set out in its Preamble, in particular the following paragraph:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the *equitable and efficient utilization of their resources, the conservation of their living resources*, and the study, protection and preservation of the marine environment.<sup>13</sup> (emphasis added)

16. Finally, it appears that the request has been transmitted to the Tribunal "by whatever body is authorized by or in accordance with the agreement" to make such a request. The MCA Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion, through its Article 33 which provides:

The Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion.

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<sup>11</sup> Paragraph 8 of the Preamble to the MCA Convention.

<sup>12</sup> Paragraph 10 of the Preamble to the MCA Convention.

<sup>13</sup> Paragraph 4 of the Preamble to the 1982 United Nations Convention on the Law of the Sea.



17. In the present case, the Conference of Ministers of the SRFC has authorized the Permanent Secretary of the SRFC through a resolution adopted during its fourteenth session and the Permanent Secretary has, pursuant to that resolution, transmitted the request for an advisory opinion by letter dated 27 March 2013, as referred to in the Tribunal's Order 2013/2. That procedure appears to be in accordance with the provisions of Article 33 of the MCA Convention.

## II. Admissibility

18. The ability of the Tribunal to render an advisory opinion under Article 138(1) of its Rules is discretionary: "[t]he Tribunal *may* give an advisory opinion..." (emphasis added). The International Court of Justice has taken this approach with respect to Article 36(1) of the Statute of the Court, which similarly uses the word "may".<sup>14</sup> Even where the Tribunal determines that it has jurisdiction to render an advisory opinion it may therefore decline to do so if it considers that to be appropriate in the circumstances.

19. In this regard, New Zealand notes that, as a general principle, an advisory opinion is not legally binding and has no formal precedential effect.<sup>15</sup> Nevertheless, such opinions often carry considerable weight beyond the specific context in which they may have arisen.<sup>16</sup> New Zealand would accordingly expect that the Tribunal will exercise its discretion as to whether to render an advisory opinion in a responsible manner with due consideration for the implications of doing so. That is particularly the case where a request for an advisory opinion has been made under an agreement other than the Convention but raises questions of general international law that go beyond the specific sphere of application of that agreement.

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<sup>14</sup> See, for example, Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, *Advisory Opinion*, *IC.J. Reports 2004*, p. 136, at p. 156 (paragraph 44); and Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010*, p. 403 at p. 416 (paragraph 29).

<sup>15</sup> See Article 59 of the Statute of the International Court of Justice.

<sup>16</sup> See, for example, M Shahabuddeen *Precedent in the World Court* (Grotius, Cambridge, 1996) at p. 171.

20. New Zealand notes in this context that the questions contained in the request in the present case are expressed at a high level of abstraction and generality. New Zealand does not suggest that this should in itself require the Tribunal to decline to exercise its jurisdiction.<sup>17</sup> But, should it choose to exercise jurisdiction, in giving its opinion the Tribunal will need to bear in mind the essential rules guiding its activities as a Court.<sup>18</sup> The purpose of advisory opinions is to provide legal advice to the requesting organization so as to assist the organization in the performance of its functions.<sup>19</sup> The questions posed may need to be interpreted so that the legal questions can be properly answered. In some cases, this may require the scope of the questions to be narrowed in the interests of greater precision and in light of the context within which the request has been submitted.

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<sup>17</sup> See, for example, Fitzmaurice *The Law and Practice of the International Court of Justice* (Grotius, Cambridge, 1986) Vol I at pp. 116-117.

<sup>18</sup> *Status of Eastern Carelia, Advisory Opinion*, 1923, P.C.I.J., Series B, No. 5, p. 29.

<sup>19</sup> Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, IC.J. Reports 2004, p. 136, at p. 162 (paragraph 60); Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403 at p. 417 (paragraph 34).

### CHAPTER 3

#### OBLIGATIONS OF THE FLAG STATE

##### I. Introduction

21. The first question posed to the Tribunal is:

*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?*

22. New Zealand notes that the question is limited to flag State responsibilities in relation to IUU fishing activities within the Exclusive Economic Zone (EEZ) of third States. It does not address flag State responsibilities in relation to IUU fishing activities carried out on the high seas. New Zealand notes that "IUU fishing activities" are not defined in the request, although they are defined in Article 2 of the MCA Convention under which the request is submitted. That definition reflects the commonly relied upon definition in Paragraph 3 of the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (FAO IPOA-IUU).<sup>20</sup> New Zealand also notes in this context that fishing within the EEZ of a coastal State is subject to the laws of that State and is therefore not "unregulated" as that term has been defined. The question therefore must be limited to the illegal and unreported aspects of "IUU fishing".

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<sup>20</sup> *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, endorsed by the 120<sup>th</sup> Session of the FAO Council on 23 June 2001 (available at: <http://www.fao.org/docrep/003/y1224e/y1224e00.HTM> accessed 17 November 2013).

## II. Applicable Law

### A. The primacy of coastal State responsibility for the conservation and management of living resources within the EEZ

23. The coastal State has the primary responsibility for the conservation and management of the living resources within its EEZ. This reflects the preferential interests of the coastal State acknowledged in the *Fisheries Jurisdiction* cases.<sup>21</sup> The primacy of coastal State authority over the living resources of its EEZ is supported by the *travaux préparatoires* of the Convention. A joint Australian/New Zealand proposal in the early stages of the Sea-Bed Committee advocated a strong regulatory role for the coastal State on the basis of its preferential interests. Key elements of this proposal are now found in the text of the Convention.<sup>22</sup>

24. Article 56(1)(a) of the Convention provides that the coastal State has "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" of the EEZ. In exercising those rights, Articles 61 and 62 of the Convention require that the coastal State also has an obligation to set the allowable catch of the living resources within its EEZ to avoid over-exploitation<sup>23</sup> and to promote "optimum utilization" by allowing third States access to any excess allowable catch.<sup>24</sup>

25. Such access is a relative right,<sup>25</sup> and is expressly subject to the agreement of the coastal State and any conditions of access that it might choose to impose.<sup>26</sup> As set out in Article 62(4) of the Convention, nationals of other States fishing in the EEZ

<sup>21</sup> *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits, Judgment*, *ICJ Reports 1974* p. 3 at pp. 24-27 (paragraphs 55-60); and *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* *Merits, Judgment*, *I.C.J. Reports 1974*, p. 175 at pp. 193-196 (paragraphs 47-52).

<sup>22</sup> See Nordquist *UNCLOS 1982: A Commentary* (Vol II) (Kluwer, The Hague, 1993) at [62.2] p. 616.

<sup>23</sup> Article 61 of the Convention.

<sup>24</sup> Article 62 of the Convention.

<sup>25</sup> See, for example, Nordquist *UNCLOS 1982: A Commentary* (Vol II) (Kluwer, The Hague, 1993) at [62.16(g)] pp. 636-637.

<sup>26</sup> Article 62(4) of the Convention.

are therefore obliged to comply with the conservation measures and laws and regulations of the coastal State. This provision establishes and illustrates the competence of the coastal State to regulate foreign fishing in its EEZ.<sup>27</sup> It contains a non-exhaustive list of the types of laws and regulations which may be established and with which foreign fishing vessels must comply. Article 73 of the Convention supplements Article 62(4) and provides that the coastal State may take necessary measures to enforce its sovereign rights in its EEZ, including boarding, inspecting, arresting and instituting judicial proceedings against vessels engaged in fishing activities in breach of its laws and regulations.<sup>28</sup>

#### B. Flag State responsibility and the duty of effective control

26. The primary responsibility of the coastal State does not absolve a flag State from its responsibilities under international law with respect to the activities of its vessels within the EEZ of a third State. The flag State and the coastal State thus have concurrent jurisdiction over fishing vessels in the EEZ.<sup>29</sup>

27. Central to the responsibilities of the flag State is the long-established principle of customary law that a State must exercise effective control over the vessels that fly its flag.<sup>30</sup> The duty of effective control forms the corollary of the right of a nation to sail ships on the high seas. As the International Law Commission expressed in its 1956 *Draft Articles Concerning the Law of the Sea*, flag State jurisdiction entails a corresponding responsibility to exert control over ships which fly the flag of that State.<sup>31</sup> That duty is reflected in both the 1958 High Seas Convention<sup>32</sup> and in

<sup>27</sup> Nordquist, *UNCLOS 1982: A Commentary* (Vol II) (Kluwer, The Hague, 1993) at [62.16(i)] p. 637.

<sup>28</sup> Article 73(1) of the Convention.

<sup>29</sup> Nordquist, *UNCLOS 1982: A Commentary* (Vol III) (Kluwer, The Hague, 1995) at [92.6(c)] p. 126. See also the obligations for cooperation in enforcement set out in Article 20 of the 1995 UN Fish Stocks Agreement.

<sup>30</sup> "Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, *thereby accepting responsibility for it and acquiring authority over it.*" (emphasis added) *Lauritzen v Larsen* [1953] 345 US 571. See also the discussion in Colombos, *International Law of the Sea* (4<sup>th</sup> ed, Longman, London, 1961) at pp. 250-251.

<sup>31</sup> International Law Commission, *Commentary to the articles concerning the law of the sea*, Article 29, paragraph 3; Article 30, paragraph 1, 1956, *Yearbook of the International Law Commission* 1956,

Article 94 of the Convention itself.<sup>33</sup> Its application to fishing vessels has been confirmed by the 1995 UN Fish Stocks Agreement adopted under the Convention<sup>34</sup> and the 1993 Compliance Agreement adopted under the auspices of the FAO.<sup>35</sup> Both agreements have been accepted by a wide range of both flag and coastal States.<sup>36</sup>

28. The duty of effective control takes on a special character in relation to the activities of fishing vessels in the EEZ of a third State. Article 58(3) of the Convention requires that all States “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 in accordance with the provisions of this Convention”. Flag States therefore have a special obligation to ensure that activities carried out by vessels under their authority comply with the rules and regulations adopted by the coastal State for the conservation and management of the living resources of its EEZ.

29. A number of international instruments have elaborated in more detail the elements contained within the duty of effective control. Although several of these

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Vol II, p. 254 at p. 279.. See also Churchill & Lowe *The Law of the Sea* (3<sup>rd</sup> ed, Manchester University Press, 1999) at p. 209: “Flag State jurisdiction also entails responsibilities”.

<sup>32</sup> *Convention on the High Seas*, Geneva, 29 April 1958, 450 UNTS 82, (entered into force 30 September 1962). See Article 5(1).

<sup>33</sup> Article 58(2) of the Convention provides that Article 94 applies *mutatis mutandis* to vessels operating in the exclusive economic zone.

<sup>34</sup> *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, 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001). See Article 18.

<sup>35</sup> *Agreement to Promote Compliance with International Conservation and Management Measures on the High Seas*, Rome, 24 November 1993, (entered into force 24 April 2003), <http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.HTM> accessed 17 November 2013. See Articles III, IV, V and VI. For a discussion of the duty of effective flag State control and the development of these agreements see: Vukas & Vidas “Flags of Convenience and High Seas Fishing” in Stoke ed *Governing High Seas Fisheries* (2001, Oxford University Press) pp. 53-90; Balton “The Compliance Agreement” and Hayashi “The Straddling and Highly Migratory Fish Stocks Agreement” in Hey ed. *Developments In International Fisheries Law* (Kluwer, The Hague, 1999). Note that the application to fisheries activities is a logical extension of the principle expressed in Article 94 of the Convention: see, for example, Nordquist, *UNCLOS 1982: A Commentary* (Vol III) (Kluwer, The Hague, 1995) at [94.8(a)] p. 144.

<sup>36</sup> The 1995 UN Fish Stocks Agreement has 81 parties as at 18 September 2013 ([http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf) accessed 17 November 2013). The 1993 FAO Compliance Agreement has 39 parties as at 1 August 2013 ([http://www.fao.org/fileadmin/user\\_upload/legal/docs/1\\_012s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/1_012s-e.pdf) accessed 17 November 2013).

instruments are expressly stated to be voluntary in nature, they recognise also that elements within them are based on relevant rules of international law, including those of the Convention.<sup>37</sup> The 1995 UN Fish Stocks Agreement, the 1993 FAO Compliance Agreement, the FAO Code of Conduct for Responsible Fisheries,<sup>38</sup> the FAO IPOA-IUU, and the FAO Voluntary Guidelines on Flag State Performance<sup>39</sup>, each build on the general duty by setting out specific measures that flag States can be expected to take in fulfilling their duty of effective control. Several regional fisheries management agreements, including Article 30 of the MCA Convention itself, also set out specific measures to be taken by flag States fishing in their area of application.<sup>40</sup>

30. In considering its response to this question, New Zealand considers that the Tribunal should take account of the following provisions in particular:

- Articles 18 and 19 of the 1995 UN Fish Stocks Agreement;
- Articles III and IV of the 1993 FAO Compliance Agreement;
- Article 8.2 of the FAO Code of Conduct for Responsible Fisheries;
- Paragraphs 34-50 of the FAO IPOA-IUU; and
- The FAO Voluntary Guidelines for Flag State Performance.

31. The precise measures that a flag State will be obliged to take in exercising effective control over its vessels will necessarily depend on the specific instruments

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<sup>37</sup> See: Article 1.1 of the FAO Code of Conduct for Responsible Fisheries; Paragraph 1 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>38</sup> *Code of Conduct for Responsible Fisheries*, adopted by the 28<sup>th</sup> Session of the FAO Conference on 31 October 1995 (<http://www.fao.org/docrep/005/v9878e/v9878e00.HTM> accessed 17 November 2013).

<sup>39</sup> *Voluntary Guidelines on Flag State Performance*, adopted by the Second Resumed Session of the Technical Consultation on Flag State Performance, 4-8 February 2013 (<http://www.fao.org/fishery/nems/40262/en> accessed 17 November 2013).

<sup>40</sup> See, for example: Article 24 of the *Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean*, Honolulu, 5 September 2000, 2275 UNTS 43, (entered into force 19 June 2004); Article 11 of the *Southern Indian Ocean Fisheries Agreement*, Rome, 6 July 2006, (entered into force 21 June 2012) (<http://www.siodfa.org/the-sio/the-southern-indian-ocean-fisheries-agreement-text/> accessed 17 November 2013); Article 25 of the *Convention for the Conservation and Management of High Seas Fisheries Resources of the South Pacific Ocean*, Auckland, 14 November 2009, (entered into force 24 August 2012) (<http://www.southpacificrfmo.org/basic-documents/> accessed 17 November 2013).

to which it is a party. However, a number of common elements can be identified within these instruments which have been widely adopted in the practice of regional fisheries management organizations. Drawing on those elements, New Zealand considers that the most significant and accepted flag state responsibilities are to:

- Authorise fishing activities;<sup>41</sup>
- Ensure that flag vessels are authorised to fish in coastal State waters;<sup>42</sup>
- Maintain records of fishing vessels;<sup>43</sup>
- Ensure that flag vessels are properly marked;<sup>44</sup>
- Monitor the activities of flag vessels;<sup>45</sup>
- Monitor catches, and the collection and provision of data;<sup>46</sup>
- Ensure effective jurisdiction and control;<sup>47</sup>
- Ensure vessels flying its flag comply with coastal State laws;<sup>48</sup>
- Investigate and prosecute violations;<sup>49</sup> and

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<sup>41</sup> See: Article III(2) and (3) of the 1993 FAO Compliance Agreement; Article 18(3)(a) of the 1995 UN Fish Stocks Agreement; Article 8.2.2 of the FAO Code of Conduct for Responsible Fisheries; Paragraphs 41, 44 & 45 of the FAO IPOA-IUU; Paragraph 19 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>42</sup> See: Article 18(3)(b)(iv) of the 1995 UN Fish Stocks Agreement; Article 8.2.2 of the FAO Code of Conduct for Responsible Fisheries; Paragraph 45 of the FAO IPOA-IUU; Paragraph 19 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>43</sup> See: Article IV of the 1993 FAO Compliance Agreement; Article 18(3)(c) of the 1995 UN Fish Stocks Agreement; Article 8.2.1 of the FAO Code of Conduct for Responsible Fisheries; Paragraph 42 of the FAO IPOA-IUU; Paragraphs 15 & 16 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>44</sup> See: Article III(6) of the 1993 FAO Compliance Agreement; Article 18(3)(d) of the 1995 UN Fish Stocks Agreement; Article 8.2.3 of the FAO Code of Conduct for Responsible Fisheries; Paragraph 47.8 of the FAO IPOA-IUU; Paragraph 10 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>45</sup> See: Article III(7) of the 1993 FAO Compliance Agreement; Article 18(3)(g) of the 1995 UN Fish Stocks Agreement; Paragraph 47 of the FAO IPOA-IUU; Paragraph 22 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>46</sup> See: Article III(7) of the 1993 FAO Compliance Agreement; Article 18(3)(e)-(g) of the 1995 UN Fish Stocks Agreement; Paragraph 47 of the FAO IPOA-IUU; Paragraph 22 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>47</sup> See: Article III(3) of the 1993 FAO Compliance Agreement; Article 18(2) of the 1995 UN Fish Stocks Agreement; Paragraph 35 of the FAO IPOA-IUU; Paragraphs 2(f), 7 & 20 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>48</sup> See: Paragraphs 34 & 47.9 of the FAO IPOA-IUU; Paragraph 8 of the FAO Voluntary Guidelines for Flag State Performance.

<sup>49</sup> See: Article III(8) of the 1993 FAO Compliance Agreement; Article 19 of the 1995 UN Fish Stocks Agreement; Article 8.2.7 of the FAO Code of Conduct for Responsible Fisheries; Paragraphs 2(g) & 21 of the FAO Voluntary Guidelines for Flag State Performance.



- Impose effective sanctions for violations, including denial of authorisation to vessels with a history of non-compliance.<sup>50</sup>

### C. Duties of other States

32. New Zealand notes that international law also recognises that similar obligations may also fall on States other than the flag State in certain circumstances. Such duties are imposed in order to address the evasion of legal responsibility by operators that deliberately choose to flag their vessels in States that fail to properly discharge their duty of effective control. In such circumstances, there is concurrent responsibility on the part of the State of nationality of those operating the vessel.

33. The Tribunal has noted that the obligations of the flag State can be discharged only through the exercise of appropriate jurisdiction and control over natural and juridical persons such as the Master and other members of the crew, the owners or operators and other persons involved in the activities of the ship.<sup>51</sup> While New Zealand agrees with the Tribunal in that case that the nationality of persons on the vessel are irrelevant for the purposes of the institution of proceedings against the flag State,<sup>52</sup> New Zealand considers that States also have a responsibility to exercise effective control over their nationals, including the beneficial owners or operators of vessels, in order to prevent and deter them from engaging in IUU fishing.<sup>53</sup>

34. This principle has been recognised in several international instruments. The 1995 UN Fish Stocks Agreement provides for cooperation between relevant coastal States and “States whose nationals fish for straddling or highly migratory fish stocks

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<sup>50</sup> See: Article III(8) of the 1993 FAO Compliance Agreement; Article 19(2) of the 1995 UN Fish Stocks Agreement; Article 8.2.7 of the FAO Code of Conduct for Responsible Fisheries; Paragraph 36 of the FAO IPOA-IUU; and Paragraphs 2(g) & 21 of the FAO Voluntary Guidelines for Flag State Performance. Note that this may also require the flag State to take measures to prevent “flag-hopping” on the part of non-complying vessels: see, for example, Paragraphs 38 & 39 of the FAO IPOA-IUU.

<sup>51</sup> *M/V “Saiga” (No. 2) Case (St Vincent and the Grenadines v Guinea)*, ITLOS Case No. 2, 1999, paragraph 105.

<sup>52</sup> *Ibid*, at paragraph 106.

<sup>53</sup> See OP50 of the 2012 United Nations General Assembly Resolution on Sustainable Fisheries (A/Res/67/79); and the earlier OP 47 of A/Res/66/68 (2011) and OP 41 of A/Res/66/38 (2010).

in the adjacent high seas areas”.<sup>54</sup> Article X of the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) provides for the Commission to draw the attention of non-parties to any activity undertaken by its nationals or vessels which affects the implementation of the objective of that Convention.<sup>55</sup> In 2009 the Commission decided on a Conservation Measure which called on parties to verify whether any of their nationals were engaged in IUU fishing activities and to take appropriate action in response to any verified activities.<sup>56</sup>

35. The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean provides a specific obligation on Members to exercise control over the fishing activities of their nationals.<sup>57</sup> Similarly, the FAO IPOA-IUU is explicit in its recognition of the responsibility for States to take action “to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing”.<sup>58</sup>

### III. Conclusion

36. New Zealand considers that the first question posed in the request must be answered with reference to the duty of effective control, which requires that a flag State whose vessels fish within the EEZ of another State is required to take steps to ensure that its vessels comply with coastal State laws and regulations adopted in accordance with the Convention and with other relevant rules of international law. A similar duty falls on the State of nationality of those operating the vessel. Particular guidance as to the precise content of that duty can be found in the instruments outlined above.

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<sup>54</sup> Article 7(1) of the 1995 UN Fish Stocks Agreement.

<sup>55</sup> Convention on the Conservation of Antarctic Marine Living Resources, (<http://www.ccamlr.org/en/organisation/camlr-convention> accessed 17 November 2013).

<sup>56</sup> CCAMLR Conservation Measure 10-08 (2009): Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures (in force), (<http://www.ccamlr.org/en/measure-10-08-2009> accessed 17 November 2013).

<sup>57</sup> Article 23 of the Convention on Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

<sup>58</sup> Paragraph 18 of the FAO IPOA-IUU.

## CHAPTER 4

### FLAG STATE LIABILITY

#### I. Introduction

37. The second question submitted to the Tribunal is:

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

38. Liability at international law flows from State responsibility for a wrongful act. New Zealand therefore considers that this question addresses the issue of State responsibility and the legal consequences that flow from a breach of an international obligation. New Zealand makes no comment on the nature of the liability which flows from a breach of international law relating to IUU fishing activities.

#### II. Applicable Law

##### A. General principles of State responsibility

39. Considerable guidance on the principles of State responsibility can be found from the International Law Commission's *Draft Articles on Responsibility of States*<sup>59</sup> together with jurisprudence of international Courts and tribunals. It is generally recognised that the *Draft Articles on Responsibility of States* represent customary international law.<sup>60</sup>

40. A breach of international law by a State entails its international responsibility.<sup>61</sup> This principle has been consistently upheld by international courts

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<sup>59</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, *Yearbook of the International Law Commission, 2001*, Vol II, Part 2, p. 26.

<sup>60</sup> Pronto & Wood, *International Law Commission 1999-2009 Vol IV: Treaties, Final Draft Articles, and Other Materials* (Oxford University Press, London, 2010) at p. 133.

<sup>61</sup> Draft Article 1 of the ILC *Draft Articles on Responsibility of States*.

and tribunals.<sup>62</sup> It was succinctly put by the arbitral tribunal in the *Rainbow Warrior* case as: "any violation by a State of any obligation of whatever origin, gives rise to State responsibility".<sup>63</sup>

41. The violation of an international obligation may arise from an act or an omission, or a series of acts or omissions. Furthermore, failure to take action, when action is clearly called for, can incur international responsibility.<sup>64</sup> This is particularly relevant in circumstances where the failure of a flag State to exercise its duty of effective jurisdiction and control over its vessels is at issue.

B. International responsibility of the flag State for breach of its duty of effective control

42. As outlined in relation to the first question, a flag State has a duty to exercise effective control over vessels flying its flag. In the case of a flag State whose vessels fish within the EEZ of another State, that duty requires the flag State to take steps to ensure that its vessels comply with coastal State laws and regulations adopted in accordance with the Convention and with other relevant rules of international law.

43. Failure by a flag State to exercise its duty of effective control over the activities of its vessels in the EEZ of a coastal State, in particular by failing to ensure that its vessels comply with the laws and regulations of the coastal State imposed for the purpose of conserving and managing the fisheries resources within the EEZ, is an internationally wrongful act. It therefore entails the responsibility of the flag State in accordance with the general rules of international law. The international responsibility of the State of nationality of the persons operating the vessel may also

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<sup>62</sup> See for example, *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28, *Corfu Channel, Merits, Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 4, at p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142 (paragraph 283), and p. 149, (paragraph 292); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 38 (paragraph 47).

<sup>63</sup> *Rainbow Warrior (New Zealand v France) UNRIIAA, Vol XX*, p. 215 (1990) at p. 217.

<sup>64</sup> *United States Diplomatic and Consular Staff in Tehran, ICJ Reports, 1980*, p. 3 at pp. 31-32 (paragraphs 63 and 67).

similarly be entailed in circumstances where that State has failed to discharge its duty of effective control.

44. New Zealand considers that the international responsibility of the flag State for failure to discharge its duty of effective control over its vessels arises entirely separately from any question of whether the actions of the vessels themselves can be legally attributed to the flag State. While in general the conduct of private persons, and entities (which would include flag vessels), is not attributable to a State, there are circumstances when the responsibility of a State is engaged by such conduct. Article 8 of the *Draft Articles on Responsibility of States* refers to the situation where there is attribution of the conduct to a State of a person under the direction or *control* of that State. Even if the person concerned has acted contrary to an authorisation, if the action is under the control of the State, that State will bear responsibility for it.<sup>65</sup> Whether such control can be established in relation to the actions of a particular vessel sufficient to attribute those actions to the flag State will be a matter of fact to be determined in each case.

45. New Zealand notes that the situation will be different, for example, where the vessel operates under a charter agreement with a person or entity of the coastal State and is authorised to fish in the water of the coastal State under that charter arrangement. In such circumstances the effective control over the vessel's fishing activities will rest with the chartering, or coastal, State. It therefore may not be appropriate in those circumstances to hold the flag State responsible at international law for the failure of the vessel to comply with the fisheries laws of the coastal State.

46. The control of the chartering State is recognised in several international fisheries instruments. The FAO IPOA-IUU calls upon all States with vessels involved in chartering arrangements, including flag States and other States that accept such an arrangement, to, within the limits of their respective jurisdictions, take measures

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<sup>65</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001*, vol II, Part 2, p. 26, Commentary on Article 8, paragraph 8, pp. 48-49.

to ensure that chartered vessels do not engage in IUU fishing.<sup>66</sup> Similarly, the FAO Agreement on Port State Measures<sup>67</sup> provides in Article 3.2 that a port State may decide not to apply the Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority. Where this is the case, those vessels are subject to measures that are as effective as measures applied in relation to the Party's flag vessels. The recent FAO Voluntary Guidelines on Flag State Responsibility adopts a similar approach.<sup>68</sup>

### C. Legal consequences of State responsibility

47. New Zealand refers the Tribunal to the International Law Commission's *Draft Articles on Responsibility of States* for a thorough analysis of the legal consequences of State responsibility for an international wrongful act. Those consequences include cession and non-repetition of the act,<sup>69</sup> reparation<sup>70</sup> and the possibility of taking countermeasures.<sup>71</sup> While Article 35 of the 1995 UN Fish Stocks Agreement also deals with the issue of damage or loss attributable to a State, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.<sup>72</sup> The legal consequences for breach of an international legal obligation may be invoked directly by the coastal State in whose EEZ the IUU fishing activities have occurred, or also by other affected States depending on the circumstances in question.<sup>73</sup> The appropriate modalities for doing so are further elaborated in the Draft Articles.<sup>74</sup>

48. New Zealand makes no comment on the appropriate forms of redress for IUU fishing in the waters of a coastal State. That would depend on the particular facts

<sup>66</sup> Paragraph 37 of the FAO IPOA-IUU.

<sup>67</sup> *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Rome, 22 November 2009, (not yet in force) (<http://www.fao.org/fishery/topic/166283/en> accessed 17 November 2013).

<sup>68</sup> Paragraph 5.

<sup>69</sup> Draft Article 30.

<sup>70</sup> Draft Articles 31, 34-39.

<sup>71</sup> Draft Articles 49-54.

<sup>72</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, ITLOS Case No. 17, 1 February 2011, paragraph 178.

<sup>73</sup> Draft Articles 33 and 42-48.

<sup>74</sup> Draft Articles 43 and 49-54.

and circumstances of the case at hand. It is neither appropriate nor feasible to comment in the abstract on such matters.

### **III. Conclusion**

49. New Zealand considers that the failure of a flag State to discharge its duty to exercise effective control over its vessels is an internationally wrongful act and thus incurs State responsibility. Where a flag vessel has undertaken IUU fishing activities in the waters of a coastal State, and the flag State has failed to take measures to prevent or address that activity, the flag State bears international responsibility for its wrongful act. Legal consequences flow from such an international wrongful act. Other States may also bear a degree of responsibility for failing to take action to control the activities of their nationals seeking to evade effective control by another State.

## CHAPTER 5

### LIABILITY OF INTERNATIONAL ORGANIZATIONS

#### I. Introduction

51. The third question submitted to the Tribunal is:

*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?*

52. This question refers to an international agreement which provides the framework for licensed fishing vessel activities in the waters of a coastal State. As an 'international agreement' is between subjects of international law, New Zealand interprets this question as referring to the scenario where a coastal State has concluded an agreement with an international organization to permit licensed vessels flagged to member States of that organization to fish in its EEZ, or bilaterally with a particular flag State. The question asks whether, in those circumstances, the flag State or the international organization is responsible for any violation by a licensed vessel of the fisheries legislation of the coastal State.

53. New Zealand has addressed the responsibility of the flag State in its submissions on the previous question. This response therefore addresses only the responsibility of the international organization.

#### II. Applicable Law

54. International organizations are bound by any international legal obligations incumbent on them, including under international agreements to which they are



party.<sup>75</sup> It is generally accepted that an international organization possesses international legal personality distinct from that of its members.<sup>76</sup> However the question arises as to the extent to which the acts or omissions of the member States of the international organization are attributable to the international organization.

55. New Zealand considers that assistance in resolving these questions can be found in the International Law Commission's *Draft Articles on the Responsibility of International Organizations*.<sup>77</sup> It accepts the view of the International Law Commission that the Draft Articles are more in the nature of a progressive development, rather than a codification of the law.<sup>78</sup> However, they are nevertheless a useful guide to the Tribunal in determining its response.

56. An international organization may be responsible for the acts or omissions of member States of the organization. It has been suggested that this may arise in two ways which are relevant to the question posed: through the implementation of the obligation being dependent on the member State; or through attribution of the conduct of the member State to the organization. New Zealand makes no comment on which of these approaches are to be preferred. Both provide for responsibility on the part of the international organization.

57. In his Second report on responsibility of international organizations, the ILC Special Rapporteur, Professor Giorgio Gaja, suggested that where an international organization undertakes an obligation in circumstances in which compliance depends on conduct of its member States, should a member State fail to conduct itself in the expected manner, the obligation is infringed and the organization is

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<sup>75</sup> *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, I.C.J. Reports 1980, p. 73, at pp. 89-90 (paragraph 37).

<sup>76</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174 at p. 179.

<sup>77</sup> *Draft Articles on Responsibility of International Organizations with Commentaries*, Report of the International Law Commission, Sixty-third session, 26 April – 3 June and 4 July – 12 August 2011, AJ/66/10, p.67.

<sup>78</sup> ILC, *Draft Articles on Responsibility of International Organizations*, General Commentary, para 5, *ibid*, p 68.

responsible.<sup>79</sup> It follows that where member States are responsible for the implementation of an international agreement entered into by the international organization of which they are a member, failure on the part of the member State to ensure that the obligation is complied with, entails responsibility on the part of the international organization, as well as the member State. This applies even though the member State may not itself be party to the agreement.

58. Support from this can be found from the manner in which international tribunals have considered these issues. The WTO Panel in *EC – Geographical Indications* accepted the explanation of the European Community that Community laws were executed through recourse to the authorities of the Member States, which act *de facto* as organs of the Community, for which the Community would be responsible at international law.<sup>80</sup> WTO practice to date has been consistent with this view.<sup>81</sup>

59. Some assistance can also be found from the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*<sup>82</sup> brought before this Tribunal in respect of activities of vessels of Member States of the European Union in relation to the conservation of swordfish. While this case was settled, neither the claims that were raised by the parties, nor the comments of the Tribunal, gave any impression that the dispute was not properly between Chile and the EU, rather than Chile and one of the EU Member States.

60. It follows, therefore, that if an international organization enters into a fisheries agreement which provides for licensed access by vessels flagged to a member State of the organization, and the member State is expected to ensure compliance by its flag vessel with the terms of the agreement, if it fails to exercise effective jurisdiction

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<sup>79</sup> Doc A/CN.4/541.6, 2 April 2004, paragraph 11.

<sup>80</sup> *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R adopted 20 April 2005, paragraph 7.725.

<sup>81</sup> See in particular *EC – Asbestos*; WT/DS135/R; *EC – Approval and Marketing of Biotech Products*, WT/DS291/R; WT/DS292/R; WT/DS293/R.

<sup>82</sup> *ITLOS Case No. 7*.

and control over that vessel, both the member State and the international organization are responsible at international law.

61. An alternative approach is to base responsibility of the international organization on attribution of conduct to the organization. Article 6 of the *Draft Articles on the Responsibility of International Organizations* provides that the conduct of an organ or agent of an international organization may be attributed to that organization. The concept of 'agents' has been interpreted broadly by the International Court of Justice and includes, for example, "any person through whom [the organization] acts".<sup>83</sup> The rules of the organization, while not the only criterion, may be indicative of the functions that are entrusted to an agent of the organization.<sup>84</sup> This is consistent with the view that the same conduct can be attributed to both the international organization and its member States.<sup>85</sup>

62. It follows that the conduct of a member State of an international organization may be attributable to the international organization where, as envisaged by Article 6, that State is acting as the organization's agent. In such circumstances, the international organization will bear international responsibility for its member State's conduct. Whether a member State is acting as the agent of an international organization will be question of fact to be determined in each case.

### III. Conclusion

63. New Zealand considers that if an international organization enters into a fisheries agreement which provides for licensed access by vessels flagged to a member State of that organization, the failure of the flag State to exercise effective jurisdiction and control over the vessel engaged in IUU fishing activities, may result in international legal responsibility, both on behalf of the flag State, and the international organization.

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<sup>83</sup> *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949, p. 174 at p. 177.*

<sup>84</sup> ILC, *Draft Articles on the Responsibility of International Organizations with Commentaries, Commentary on Article 6, paragraph 9, Report of the International Law Commission, Sixty-third session, 26 April – 3 June and 4 July – 12 August 2011, A/66/10, p.67, at p. 84.*

<sup>85</sup> *Ibid*, Commentary Chapter II, paragraph 4, at p. 81.

## CHAPTER 6

### RIGHTS AND OBLIGATIONS OF THE COASTAL STATE IN ENSURING THE SUSTAINABLE MANAGEMENT OF SHARED STOCK AND STOCKS OF COMMON INTEREST

#### I. Introduction

64. The fourth question submitted to the Tribunal is:

*What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stock and stocks of common interest, especially the small pelagic species and tuna?*

#### II. Applicable Law

A. Obligations of cooperation in the conservation and management of straddling stocks and highly migratory species

65. As has been indicated in response to the first question, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural living resources of its EEZ.<sup>86</sup> The rights and obligations of the coastal State with respect to the conservation and utilisation of the marine living resources in the EEZ are set out in Articles 61 and 62 of the Convention. Additional specific rights and obligations apply in the case of shared or "straddling" stocks and to highly migratory species such as tunas.<sup>87</sup>

66. Article 63 of the Convention deals specifically with shared stocks. It provides that where the same stock or stocks of associated species occur within the EEZs of two or more coastal States, those States must agree on measures necessary to coordinate and ensure the conservation and development of those stocks. This may

<sup>86</sup> Article 56(1)(a) of the Convention.

<sup>87</sup> "Highly migratory species" are defined in Annex I of the Convention.

be done directly or through an appropriate organization.<sup>88</sup> The same obligation applies in respect of the coastal State and any State fishing for those stocks in an area adjacent to the exclusive economic zone.<sup>89</sup>

67. With respect to highly migratory species, Article 64 of the Convention provides that the coastal State and other States whose nationals fish in the region for highly migratory species must cooperate either directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of those species throughout the region, both within and beyond the exclusive economic zone. Where no appropriate international organization exists, the coastal State and other States whose nationals harvest those species in the region are obliged to cooperate to establish such an organization and participate in its work.<sup>90</sup>

68. The obligations of cooperation in Articles 63 and 64 have been given more detailed expression through the 1995 UN Fish Stocks Agreement. Under the provisions of that agreement, coastal States and States whose nationals fish for straddling stocks in adjacent high seas must seek to agree on measures necessary for the conservation of those stocks.<sup>91</sup> With respect to highly migratory fish stocks, relevant States Parties must cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond areas under national jurisdiction.<sup>92</sup> Further provisions set out in detail the nature of the measures to be adopted.<sup>93</sup>

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<sup>88</sup> Article 63(1) of the Convention.

<sup>89</sup> Article 63(2) of the Convention.

<sup>90</sup> Article 64(1) of the Convention.

<sup>91</sup> Article 7(1)(a) of the 1995 UN Fish Stocks Agreement.

<sup>92</sup> Article 7(1)(b) of the 1995 UN Fish Stocks Agreement.

<sup>93</sup> Among other things, the 1995 UN Fish Stocks Agreement requires relevant States Parties (including coastal States) to apply the precautionary approach (Article 5(c)) and establishes how they are to do this (Article 6). States must also take an ecosystem approach by assessing the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks (Article 5(d)); and by adopting, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened (Article 5(e)). They must also protect biodiversity (Article 5(g)); take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort

69. The Convention and the 1995 UN Fish Stocks Agreement therefore impose an express duty on the part of coastal States and other relevant States to cooperate in the conservation and management of shared stocks and highly migratory species. This is consistent with international law, which recognises a duty of cooperation, particularly in relation to the environment, as a rule of customary international law.<sup>94</sup> The International Court of Justice in the *Pulp Mills on the River Uruguay* case has embraced obligations relating to cooperation as “all the more vital where a shared resource is at issue”.<sup>95</sup> Such cooperation is necessary in order to fulfil the obligation to prevent harm, including environmental harm, to another State.<sup>96</sup>

70. The obligation to cooperate has several different elements which New Zealand considers are relevant to the consideration of this question. First, it is an obligation of substance not of form: “consultations and negotiations [...] must be genuine, must comply with the rules of good faith and must not be mere formalities”.<sup>97</sup> Second, the duty of cooperation requires that there is a mutual willingness to discuss the matter and to take account of the views of others.<sup>98</sup> Insisting on one’s position without contemplating any modification, is not meaningful cooperation.<sup>99</sup> Third, cooperation is particularly necessary where the conduct will

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do not exceed those commensurate with the sustainable use of fishery resources (Article 5(h)); and take into account the interests of artisanal and subsistence fishers (Article 5(i)). Further guidance as to the objectives and substance of the measures that may be adopted can be found in instruments such as the FAO Code of Conduct for Responsible Fisheries as well as applicable regional fisheries management agreements.

<sup>94</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, ITLOS Case No. 17, 1 February 2011, paragraph 148. This has been applied in the case of fisheries: see *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3, at p. 31 (paragraph 72); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 175, at p. 202 (paragraph 70). See also the statement by Judge Wolfrum in his Separate Opinion in the *Mox Plant Case*: “the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake”. *Mox Plant Case (Ireland v UK) Provisional Measures Order*, 3 September 2001 (2001) 41 ILM 405, Separate Opinion of Judge Wolfrum at p. 4.

<sup>95</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 51 (paragraph 81).

<sup>96</sup> *Ibid.*, at p. 56 (paragraph 102).

<sup>97</sup> *Lac Lanoux Arbitration (France/Spain)* (1957) 24 ILR, p. 101, at p. 119.

<sup>98</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment*, ICJ Reports, 1997, p. 7 at p. 68 (paragraph 112).

<sup>99</sup> *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)*, Judgment, I.C.J. Report, 1969, p. 3, at p. 47 (paragraph 85).

have an impact on the interests of other States. As noted, this is especially important where the interests are in a shared resource.<sup>100</sup>

B. Cooperation is without prejudice to the sovereign rights of the coastal State

71. The obligation to cooperate is, however, stated to be “without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction” as provided for in the Convention.<sup>101</sup> New Zealand notes that three consequences flow from this. First, the obligation to cooperate cannot prevent the coastal State from exercising its sovereign rights within its EEZ to adopt conservation and management measures where attempts to develop such measures cooperatively have not reached agreement. Second, cooperative measures must be compatible with any conservation and management measures adopted by the coastal State. And third, they must not undermine the effectiveness of measures adopted by the coastal State.

72. Article 7(2) of the 1995 UN Fish Stocks Agreement provides that conservation and management measures established for the high seas and for areas under national jurisdiction must be compatible in order to ensure conservation and management of straddling fish stocks and highly migratory fish stocks in their entirety.<sup>102</sup> There is a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks<sup>103</sup> and every effort is to be made to agree on such measures within a reasonable period of time.<sup>104</sup>

73. While the 1995 UN Fish Stocks Agreement places emphasis on the need for compatibility of conservation and management measures, it also recognises the

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<sup>100</sup> *Responsibility and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 1 February 2011; ITLOS Case No. 17, at paragraphs 147, 148 and 150.*

<sup>101</sup> Article 7(1) of the UN Fish stocks Agreement.

<sup>102</sup> Article 7(2) of the UN Fish Stocks Agreement

<sup>103</sup> Article 7(2) of the UN Fish Stocks Agreement.

<sup>104</sup> Article 7(3) of the UN Fish Stocks Agreement.

importance of the rights of coastal States over the marine living resources of its EEZ. States Parties must ensure that measures don't undermine the effectiveness of measures taken under Article 61 of the Convention by coastal States in respect of the same fish stocks.<sup>105</sup> This recognises the importance of the primacy of the coastal State sovereign rights over the marine living resources of its exclusive economic zone.

### C. Additional rights and obligations of the coastal State as a port State

74. New Zealand notes in addition that, consistent with its sovereignty at international law over its internal waters and its ports, a coastal State also has the right to exercise port State measures against vessels engaged in IUU fishing activities. Such rights of port State control were included in paragraphs 52 to 64 of the FAO IPOA-IUU, Article 8.3 of the FAO Code of Conduct, and given further expression in the FAO Agreement on Port State Measures. They are reflected also in the MCA Convention.<sup>106</sup> These rights enable a coastal State into whose ports a fishing vessel seeks access, to deny such access where the vessel has been involved in IUU fishing activities.<sup>107</sup> The rights of a coastal state acting as a port State may be particularly relevant in the case of straddling and highly migratory fish stocks, which may be taken in an area of high seas adjacent to the EEZ but landed in the ports of the neighbouring coastal State.

## III. Conclusion

75. New Zealand considers that the coastal State has a responsibility to effectively conserve and manage the marine living resources of its EEZ, including when the same stocks are found within the waters of other States and the high seas. This applies to both straddling stocks and highly migratory species, such as tuna. To that end, the coastal State is obliged to cooperate with other States in effective

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<sup>105</sup> Article 7(2)(a) of the UN Fish Stocks Agreement

<sup>106</sup> Articles 25-29 of the MCA Convention.

<sup>107</sup> This applies except in situations of *force majeure*: Article 10 of the FAO Port State Measures Agreement.



conservation and management. Cooperative measures must be compatible with, and not undermine, the conservation and management measures adopted by the coastal State. Where such cooperation does not prove possible, this does not absolve the coastal State from the right to take measures on its own initiative with respect to the resources under its jurisdiction. Indeed the failure to reach agreement with other States on conservation and management measures should not be used as an excuse to avoid the application of such measures. Neither should the conservation and management measures of coastal States in respect of the marine living resources of its EEZ be undermined by unwillingness to cooperate on the part of others.

**CHAPTER 7****CONCLUSION**

76. In conclusion, for the reasons set out in this Written Statement, should the Tribunal consider that it is in a position to respond to the request, New Zealand suggests that the Tribunal respond to the questions it contains on the lines set out in paragraphs 36, 49, 63 and 75 above.



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