

Written Statement of the Federal Republic of Somalia

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE No. 21)

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUBREGIONAL
FISHERIES COMMISSION (SRFC)

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

WRITTEN STATEMENT OF THE FEDERAL REPUBLIC OF SOMALIA

27.11.2013

In its order 2013/2 of 24 May 2013, the Tribunal invited the State Parties to the United Nations Convention on the Law of the Sea of 10 December 1982 (the "Convention") to present written statements on the questions submitted to the Tribunal for an advisory opinion in accordance with Art. 133 para. 3 of the Rules of the Tribunal. 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 Art. 33 of the 2012 Convention on the Determination of the Minimal Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the Member States of the Sub-Regional Fisheries Commission "to seize the International Tribunal for the Law of the Sea (...) in order to obtain its advisory opinion on the following matters:

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?"

We welcome the decision by the SRFC to address the problem of IUU fishing in the Exclusive Economic Zones of States and the resulting responsibility and liability of flag States and issue the following statement:

I. On the jurisdiction of the Tribunal:

1. In its first advisory opinion, Case No. 17, the Request had been submitted to the Seabed Disputes Chamber in accordance with Art. 191 of the Convention. This provision only applies to "advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities", meaning matters related to the Area. The request for an advisory opinion by the Sub-Regional Fisheries Commission (SRFC) is no such matter. Yet, while the jurisdiction for the present case cannot be based on Art. 191 of the Convention the Tribunal nevertheless has jurisdiction to render an advisory opinion.

2. The Convention itself only explicitly mentions the power of the Tribunal to give advisory opinions in Art. 191. However, the powers of the court are not determined by the Convention, but by the Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea, the "Statute"). According to Art. 21 of the Statute,

"[t]he 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."

3. This provision describes the jurisdiction of the Tribunal. It contains three scenarios: *disputes* submitted to the Tribunal in accordance with the Convention, *applications* submitted to the Tribunal in accordance with the Convention and *matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal. Since the Convention only provides for advisory opinions to be given by the Seabed Disputes Chamber, the present request for such an opinion cannot be "submitted to the Tribunal in accordance with the Convention". However, the last scenario provides for the jurisdiction of the Tribunal in this case. In relation to the terms *disputes* and *applications*, *matters* is significantly broader. This conclusion is supported by the fact that the use of the term *matters* can only be explained as going beyond the already enumerated *disputes* and *applications*. Since the procedures before international courts and tribunals are limited, *matters* can only mean to also incorporate advisory proceedings. *Matters* as such can be *disputes* or *applications*, but they are not limited to these terms.

4. Likewise, Art. 138 para. 1 of the ITLOS Rules of the Tribunal states:

“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.”

5. Since Art. 33 of the 2012 Convention on the Determination of the Minimal Access and Exploitation of Marine Resources within the Maritime Areas under the Jurisdiction of the Member States of the Sub-Regional Fisheries Commission regulates, that “[t]he 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”, an agreement which confers jurisdiction on the Tribunal exists. Consequently, the Tribunal has jurisdiction to render an advisory opinion as requested by the SRFC.

II. On the substance of the questions:

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?

1. "No State may validly purport to subject any part of the high seas to its sovereignty."¹ "The high seas are open to all States, whether coastal or land-locked."² The freedom of the high seas, described positive or negative, is a cornerstone of the international order and widely recognized as *ius cogens*. However, the "[f]reedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law"³. One of these conditions is the flag State principle to avoid lawlessness on the seas. According to Art. 94 para. 1 of the Convention, "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." The freedom of the high seas therefore can only be exercised under the condition of effective flag State oversight. By virtue of Art. 58 para. 2 of the Convention, this also applies to the Exclusive Economic Zone (EEZ). Moreover, pursuant to Art. 58 para. 3 of the Convention when exercising their freedoms associated with the high seas "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".

2. The law of the sea prescribes different degrees of flag State duties, depending on the subject matter. The Convention itself is primarily concerned with prescriptions for the register⁴ and measures to ensure safety at sea⁵. Art. 94 para. 6 of the Convention specifies the nature of the duty of the flag State: not a concrete result is owed under the Convention but rather the application of due diligence.⁶

¹ Art. 89 of the Convention.

² Art. 87 para. 1 1st sentence of the Convention.

³ Art. 87 para. 1 2nd sentence of the Convention.

⁴ Art. 94 para. 2 (a) of the Convention.

⁵ Art. 94 para. 3 of the Convention.

⁶ *Yoshinobu Takei, Assessing Flag State Performance in Legal Terms: Clarification of the Margin of Discretion, International Journal of Marine and Coastal Law* 28 (2013), 97-133 (124-125).

3. The International Court of Justice (ICJ) pointed out in the *Pulp Mills* case that the obligation to act with due diligence

"is an obligation which entails 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 operators, to safeguard the rights of the other party."⁷

4. In its Advisory Opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea brought some light to the substance of such obligations when it stated that "[t]he standard of due diligence has to be more severe for the riskier activities."⁸ "It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable."⁹

5. Applied in the context of flags of ships it means that the flag State has the obligation not only to put appropriate legislation into place, but also to enforce that legislation. Applying due diligence control does not mean that every single act of IUU fishing can automatically be attributed to the flag State. However, it has been stated that "a consistent pattern of infractions by individual vessels gives rise to the presumption that the flag State has not exerted its best efforts"¹⁰. Judging from the devastating effects IUU fishing has on the marine environment of the oceans, fishing as such can easily be regarded as risky activity for which the standard of due diligence is more severe. Accordingly, there is a growing acceptance for duties of flag States regarding due diligence control vis-à-vis fishing vessels.¹¹ Furthermore, an increased level of due diligence is to be expected from flag States whose vessels fish in areas where the

⁷ ICJ, Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment, 20 April 2010), para. 197.

⁸ ITLOS Seabed Disputes Chamber, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion of 1 February 2011, para. 117.

⁹ ITLOS Seabed Disputes Chamber, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion of 1 February 2011, para. 239.

¹⁰ *Yoshinobu Takei, Assessing Flag State Performance in Legal Terms: Clarification of the Margin of Discretion*, International Journal of Marine and Coastal Law 28 (2013), 97-133 (131).

¹¹ See e.g. Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, Official Journal L 286 , 29/10/2008, para. 15 "It should be validated by the flag State of the fishing vessels which caught the fish concerned, in line with its duty under international law to ensure that fishing vessels flying its flag comply with international rules on conservation and management of fisheries resources".

coastal States exercise only limited control over their natural resources. Therefore, it is of particular importance for flag States with distant water fleets fishing off certain African and Asian coasts.

6. Since the Convention itself is relatively silent on flag State duties in regard to fisheries,¹² 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") was, according to its preamble, created to address in particular the problem "(...) that the management of high seas fisheries is inadequate in many areas and that some resources are overutilized". It is supplemented by the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("FAO Compliance Agreement"). As pertinent rules of international law, these treaties are not geographically limited to the high seas, but also applicable in the EEZ pursuant to Art. 58 para. 2 of the Convention.

7. The existence of the UNFSA and the FAO Compliance Agreement also led to a "hardening"¹³ of the general duties of the flag State as prescribed by Art. 94 para. 1 of the Convention. According to Art. 94 para. 5 of the Convention, "(...) each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance." By now, the part of the UNFSA and the FAO Compliance Agreement concerning flag State duties is so widely accepted, that they can be regarded as constituting generally accepted international regulations, procedures and practices. The same can be said about the FAO Code of Conduct for Responsible Fisheries.¹⁴ Consequently, all Member States of the Convention have to observe these standards when exercising control over their vessels. Such duties include, amongst others, the duties to:

- "take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the

¹² Art. 62 para. 4 of the Convention states, that "Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State", but does not explicitly address the flag State.

¹³ Term used by *Jürgen Friedrich*, *Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries*, 9 *German Law Journal*, p. 1539 (1555).

¹⁴ *Yashinobu Takei*, *Assessing Flag State Performance in Legal Terms: Clarification of the Margin of Discretion*, *International Journal of Marine and Coastal Law* 28 (2013), 97-133 (120 with further reference to i.e. *Jürgen Friedrich*, *Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries*, 9 *German Law Journal*, p. 1539 (1556)).

effectiveness of such measures" (Art. 18 para. 1 UNFSA; similar: Art. III 1. (a), 2. FAO Compliance Agreement);

- "authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement" (Art. 18 para. 2 UNFSA; similar: Art. III 3. FAO Compliance Agreement);
- "ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks" (Art. 19 para. 1 UNFSA);
- "take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation" (Art. III 8. FAO Compliance Agreement).

8. Besides, the Convention itself obliges member States to cooperate regarding the conservation and management of living resources.¹⁵ This duty as such may be too broad to apply directly. However, the different flag State duties spelled out by the UNFSA and the FAO Compliance Agreement can be considered to implement the general duty to cooperate.¹⁶

9. Furthermore, the requirement of a "genuine link", Art. 91 para. 1 of the Convention, proves that the Convention itself envisions a close relationship between the vessel and the flag State. Their relationship is not a one-way street: giving a vessel a flag (and in doing so creating revenue) comes with an international duty to oversee its activities. In the words of the Tribunal, "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State (...)"¹⁷. Even though the requirements of what constitutes a genuine link are interpreted rather broadly in international practice, it does not discharge the flag State of its duties.

¹⁵ Art. 63, 118 of the Convention.

¹⁶ *Camille Goodman*, *The Regime for Flag State Responsibility in International Fisheries Law – Effective Fact, Creative Fiction, or Further Work Required?*, 23 *Australia and New Zealand Maritime Law Journal* (2009), 157 (162).

¹⁷ ITLOS, *The M/V Saiga* (No. 2) Case, (*Saint Vincent and the Grenadines v. Guinea*), Judgment of 1 July 1999, para. 83.

10. Finally, a stringent enforcement of flag State duties in cases of IUU fishing is also in line with the precautionary principle, which is widely accepted.¹⁸ The precautionary principle contains the idea that activities harming the environment must be avoided.¹⁹ Since the devastating effects of IUU fishing already endanger entire species, let alone local populations, fishing in general has become an activity that States must oversee accurately. Therefore, the precautionary principle supports or even entails the duty to control the lawfulness of the fishing activities of vessels flying their flag on flag States.

11. The very concept of having flag States with exclusive jurisdiction over vessels flying their flag is to avoid lawlessness on the seas. Therefore, it is only a logical consequence of this institution to also oblige flag States to apply the necessary oversight. Any other interpretation of the Convention would imply that one of the pillars of the law of the sea has become brittle. Consequently, the UN General Assembly has stressed the importance of "effective control"²⁰. Also, the Tribunal itself has stated that it "understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States (...) to deal with the problem."²¹ It seems that only procedural restraints kept the Tribunal from articulating a clearer message in earlier cases.²²

¹⁸ Cautiously acknowledging: ITLOS, *The MOX Plant Case* (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Wolfrum.

¹⁹ Meinhard Schröder, *Precautionary Approach/Principle*, in: MPEPIL, Wolfrum (ed.), online edition, 2009, para. 2.

²⁰ Resolution A/RES/62/177 (2008) of 28 February 2008.

²¹ ITLOS, *The Volga Case* (Russian Federation v. Australia), Judgment of 23 December 2003, para. 68.

²² Tullio Treves, *Flags of Convenience before the Law of the Sea Tribunal*, 6 *San Diego International Law Journal* (2004), p. 179 (184).

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

12. According to the customary law of State responsibility as codified by the International Law Commission in their non-binding Draft Articles on State Responsibility, "[e]very internationally wrongful act entails the international responsibility of that State".²³ The aspects of the Draft Articles relevant to this case are widely held to reflect customary international law.²⁴ For an internationally wrongful act to trigger the responsibility of a State under international law, it has to be attributable to that State and constitute a breach of its international obligations.²⁵

13. According to Art. 56 para. 1 lit. a) of the Convention, the exploitation of natural resources, which includes fishing, is a sovereign right of the coastal State. Consequently, all cases of fishing in an EEZ without the express permission of the coastal State violate the rights of that State and constitute a breach of international obligations. However, for this breach to constitute an internationally wrongful act, it must be attributable to the flag State.

14. Illegal acts by fishing vessels are not *per se* attributable to the flag State since these are often private vessels and belong to entities that are not directly bound by international law. However, in certain circumstances the acts of such entities may be directly attributable to the flag State.²⁶ Moreover, the international responsibility of flag States may also arise from its own conduct *sensu stricto* e.g. the failure to effectively control its vessels.²⁷

15. Art. 2 of the Draft Article on State Responsibility states that the attributable conduct can consist of an action or an omission. Since in cases concerning IUU fishing such conduct is regularly the lack of control exercised by the flag State, the conduct in question would be one of omission. Such conduct can only be regarded as an internationally wrongful act, if the flag State had a duty to act. This duty can arise, as has been shown above, from specific obligations States have concerning vessels flying their flag and the general duty to apply due diligence.

²³ Art. 1 of the Draft Article on State Responsibility.

²⁴ See e.g. ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 1999, p. 87, para. 62.

²⁵ Art. 2 of the Draft Article on State Responsibility.

²⁶ See below paras 22-24.

²⁷ E.g. *Yoshinobu Takei, Assessing Flag State Performance in Legal Terms: Clarification of the Margin of Discretion*, *International Journal of Marine and Coastal Law* 28 (2013), 97-133 (131).

16. In cases involving the violation of specific duties, the performance of the flag State can simply be assessed towards the law. Depending on the obligation, the conduct needs not to involve a specific vessel, e.g. if it concerns the adoption of national legislation,²⁸ when a causal link between the (non-) adoption of said law and a specific act of illegal fishing can be established. The exact content of a due diligence obligations depends on the circumstances of the concrete case.²⁹

17. Circumstances precluding the wrongfulness of the omission, such as necessity or force majeure, will regularly not be given to justify IUU fishing conduct or the lack of flag State control.

18. The reparation for such injury will regularly come in the form of compensation, since restitution, the re-establishment of the situation which existed before the wrongful act was committed, is materially impossible or would be out of proportion³⁰ in cases of IUU fishing. Therefore, monetary compensation will regularly be the form of reparation. Furthermore, "the State responsible for the internationally wrongful act is under an obligation to offer appropriate assurances and guarantees of non-repetition, if the circumstances require so"³¹, which is the case for flag States known for exercising insufficient control over vessels flying their flags, i.e. flags of convenience.

²⁸ *Yoshinobu Takei, Assessing Flag State Performance in Legal Terms: Clarification of the Margin of Discretion, International Journal of Marine and Coastal Law 28 (2013), 97-133 (131).*

²⁹ See answer to question 1, para. 5.

³⁰ See Art. 35 of the Draft Article on State Responsibility.

³¹ Art. 30 (b) of the Draft Article on State Responsibility.

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 the fisheries legislation of the coastal State by the vessel in question?"

19. The liability of the flag State or an international agency for violations of the fisheries legislation of the coastal State, when a fishing licence is issued to a vessel within the framework of an international agreement with the flag State or international agency, is again regulated by the general principles of State responsibility and those of the responsibility of international organizations respectively. As stated, these rules presuppose for an internationally wrongful act first a breach of an international obligation and second the attribution of this breach to the organization or State. It is important to note that the international liability of the international organization is engaged parallel to that of the flag State, in cases in which the license is issued on the basis of an international agreement between the coastal State and the international organization.

20. Violations of a coastal State's fisheries legislation *per se* are not breaches of international obligations. They are in itself merely acts in contravention of national legislation.

21. Violations of coastal State legislation may, however, qualify as breaches of international law, if an underlying agreement or another rule of international law valid between either the flag State or the international agency and the coastal State obliges the flag State or the international agency to comply with the coastal State legislation.³² A breach of the coastal State legislation then becomes a breach of the international obligation to respect said legislation, if the violation can be attributed to the flag State as a bearer of international rights and obligations.

22. The attribution of such violation to the flag State or the international agency first depends on the legal categorization of its merchant and fishery fleet and the respective personnel. If the fleet and/or the personnel on the vessels would be "organs" of the flag State or international agency, then pursuant to customary international law as codified in Art. 4 of the Draft Articles on the Responsibility of International Organizations and of the Draft Article on State Responsibility and acknowledged by the ICJ in the case on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the*

³² See e.g. Arts 58 para. 3 and 62 para. 4 of the Convention.

*Commission on Human Rights*³³, the conduct of the fleet or personnel would be directly attributable to the State.

23. It is without prejudice to the legal categorization as a state organ that the fishery fleet is typically involved in commercial activities, due to the fact that state organs may also undertake actions *iure gestionis*, which does not hinder the attribution of these actions, just as the illegality of actions, such as the contravention of the duty to respect national legislation, does not prevent its attribution to the state.

24. The categorization of the fishery fleet or specific personnel on board vessels of the fishery fleet of a State as state organs has to take into account the circumstances of every specific case, including the status of these in the national legislation of the State pursuant to the customary rule codified in Art. 4 para. 2 of the Draft Article on State Responsibility and Art. 6 para. 2 of the Draft Article on the Responsibility of International Organizations. A fishery fleet will regularly not qualify as a state organ, but may be deemed to be such, when the internal law of the State or international agency elevates it into such status. More likely, the master of a vessel may be deemed a state organ, when authorized to this effect or may be the source of attributable conduct when exercising elements of governmental authority (cf. Art. 5 Draft Article on State Responsibility), for which there is widespread international practice.

25. Given the above circumstances, the breach of coastal State legislation by a fishing vessel will *first* be a breach of international law, if the act is either carried out under an agreement spelling out the duty to respect such national legislation or such duty derives from another norm of international law such as Art. 58 para. 3 or more specifically Art. 62 para. 4 of the Convention and it will *secondly* be attributable to the flag State or International agency, when the national legislation of the State or agency deems the fleet to be an organ of beforesaid entity or deems the master of a vessel violating coastal State legislation to be a public official or exercising elements of governmental authority, be it by status or by function.

26. Apart from this constellation, the responsibility of the flag State or international agency may also be invoked by the coastal State if the State or agency violates further duties stemming from international agreements or customary international law.³⁴

27. First, such duties may derive from the specific agreements on the basis of which fishing licenses are given out. The European Union (EU) includes clauses in its Fisheries

³³ I.C.J. Reports 1999, p. 87, para. 62.

³⁴ For violations of due diligence duties see above paras 15-16.

Partnership Agreements (FPA) obliging it to “take all the appropriate steps required to ensure that its vessels comply with [the agreements] and the legislation governing fisheries”³⁵ in the respective waters. By this it explicitly accepts duties of oversight and control, as it does in its Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.³⁶ A clause similar to the one in the FPAs can be found in fisheries agreements which the USA is a party to. The Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America may serve as an example with its Article 4 laying out flag State duties obliges the USA to take “necessary steps to ensure that nationals and fishing vessels of the United States refrain from fishing in the Licensing Area and in waters closed to fishing [...] except as authorized...”. These treaties bind the respective parties as treaty law.

28. Secondly, these obligations are also reflections of obligations stemming from multilateral treaty law, such as the duty to act with due diligence addressed earlier, as well as customary obligations of flag States under international law, obliging them to take necessary steps to ensure compliance with coastal State legislation and to guarantee that the actions undertaken by themselves and their fishery fleet do not contradict the interests of or damage the coastal State. As customary law, these duties bind all flag States in similar situations. This duty derives from the duty of all States to exercise their rights in good faith, especially with regard to the interests of their contractual partners and other States in general in the sense of the principle *sic utere tuo ut alienum non laedas*. It furthermore derives from state practice and the *opinio juris* that are the basis of the contractual obligations assumed by e.g. the USA and the EU as well as many other States in their fisheries agreements. Such a duty is also deeply rooted in the universal interest of the international community to conduct the utilization of natural resources in a sustainable manner, which has found its expression in similar duties for fishing on the high seas.³⁷

29. These duties thus exist on a contractual and customary basis and bind all States with fishery fleets and international agencies involved in the management of fishery fleets. These obligations are enhanced by factual circumstances in specific cases. There is an elevated level of a duty to control, investigate and in general execute oversight over the fishery fleet when a flag State or international agency first has grounds to believe that

³⁵ See e.g. Art. 5 para. 4 of the Fisheries Partnership Agreement between the European Community and the Republic of the Seychelles; the clause is a regular feature in such agreements.

³⁶ Para. 15, see for the quotation above fn. 11.

³⁷ Cf. Art. 18 para. 1 UNFSA.

its vessels are conducting illegal fishing in the areas in question and/or secondly, has reason to suspect that the coastal State in question lacks the capacity to manage fishing off its coasts, especially with a view to countering and investigating illegal activities. The existence of duties of the flag State associated with the lack of oversight from other States is again evidenced by Art. 18 UNFSA, which spells out wide-ranging duties of the flag State for fishing on the High Seas.³⁸

30. Should a State or international agency be responsible for a breach of international law in accordance with the foresaid conditions, then customary rules may preclude the wrongfulness of their actions in specific cases, chief among them being a consent of the coastal State. Other such circumstances, e.g. necessity will regularly not be present.

31. In case where the wrongfulness of the flag State's or international agency's actions or omissions is not precluded, the coastal State may invoke the flag State's responsibility. The state or agency has incurred responsibility and is liable, among others, to cease that act or omission and make full reparations for the injury caused, whether material or moral, by means of restitution, compensation and satisfaction.³⁹ The responsibility of the flag State pursuant to these rules will regularly not be overshadowed by the responsibility of an international organization due to the close connection between a flag State and the vessels flying its flag. Consequently, if a fishing license is issued to a vessel within the framework of an international agreement between the coastal State and an international agency, the responsibility of said agency will be engaged parallel to that of the flag State, if both the agency and the flag State violated international obligations.

³⁸ See above para. 5.

³⁹ See above para. 18.

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?"

32. For the purpose of this question the Somali government adopts the definition of "shared stocks" contained in Art. 2 para. 12 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, that is to say:

"stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it".

Furthermore, the Somali government understands the term "stocks of common interest" as including

fish stocks whose geographical distribution makes it available to the fleets of CRFC Member States and third countries and whose management requires the cooperation between these third countries and the Sub-Regional Fisheries Commission.

33. The rights and obligations of the coastal State in ensuring the sustainable management of "shared stocks" and "stocks of common interest" are primarily set forth in the Convention and the UNFSA.

34. The aforementioned rights and obligations differ according to the location of the fish stocks in relation to the coastal States' maritime zones and the High Seas respectively.

35. The Convention is silent with regard to the coastal States' management obligations within the coastal States' internal waters, archipelagic waters and its territorial sea. The coastal States enjoy absolute sovereignty relating to fish stocks within these maritime zones.

36. The coastal States' management rights and obligations concerning fish stocks within their EEZ are defined by Part V of the Convention. These include in particular the coastal States' obligation to

"ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation" (Art. 61 para. 2 of the Convention)

and equally to

"promote the objective of optimum utilization of the living resources in the exclusive economic zone" (Art. 62 para. 1 of the Convention).

37. Special rules apply to fish stocks that are not exclusive to the waters of a single coastal State. These notably include the coastal States' duty to cooperate in respect of the conservation (and development) of straddling fish stocks (Art. 63 of the Convention) and highly migratory species (Art. 64 of the Convention) as well as rules regarding the management of anadromous stocks (Art. 66 of the Convention) and catadromous species (Art. 67 of the Convention). The Convention rules on the conservation and management of straddling fish stocks and highly migratory fish stocks have been implemented by the UNFSA. The latter extends its member States obligations to include, *inter alia*, the duty to "apply the precautionary approach" and the duty to "take measures to prevent or eliminate overfishing and excess fishing capacity" (Art. 5 UNFSA). Additionally, coastal States may abide to non-binding instruments, such as the FAO Code of Conduct for Responsible Fisheries.

38. The matrix of EEZ rights and obligations of the coastal States affects other States' rights and obligations on the High Seas. Whilst all States enjoy the right for their nationals to engage in fishing on the High Seas, this right is *inter alia* subject to the coastal States' rights mentioned under para. 5 above.

Respectfully submitted,



Andreas Schulz
Attorney-at-Law
Hubertusallee 42-44
14193 Berlin
Phone: +49 (0) 30 893 575 5
Fax: +49 (0) 30 893 575 8
E-mail: schulz@rasberlin.de

COUNSEL FOR THE FEDERAL
REPUBLIC OF SOMALIA



Khubaib Ali Mohammed
Attorney-at-Law
Leitzstr. 45
70469 Stuttgart
Phone: +49 (0) 711 722 33 488
Fax: +49 (0) 711 722 33 644
E-mail: mohammed@kanzlei-bfs.de

COUNSEL FOR THE FEDERAL
REPUBLIC OF SOMALIA