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## Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion

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### Introduction

On March 27, 2013, the Permanent Secretary of the Sub-Regional Fisheries Commission (SRFC), a Senegal-based intergovernmental organization, submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS), based in Hamburg, Germany.[1] Member States of the SRFC rely on the fishing industry to support their economies, and illegal, unreported and unregulated (IUU) fishing in the sub-region presents an on-going challenge. The request concerns the rights and obligations of flag States[2] and coastal States and poses the following questions:

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?[3]

This marks the first time that the ITLOS, as a full tribunal, has been asked to give an

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advisory opinion.[4]

## Jurisdiction

The ITLOS was created by the 1982 United Nations Convention on the Law of the Sea (UNCLOS, or the Convention).[5] The Tribunal's Statute refers to advisory opinions only with respect to the Tribunal's Seabed Disputes Chamber, a subset of judges within the Tribunal that hears cases on the exploitation of the seabed beyond the limits of national jurisdiction. The Convention provides that the Chamber shall give advisory opinions at the request of two specified UNCLOS bodies.[6] There is no other mention of advisory jurisdiction in the Convention, including in the Tribunal's Statute.

So on what basis does the full Tribunal have jurisdiction to entertain the SRFC request? Article 138, paragraph 1, of the Tribunal's Rules states that it "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." [7] The adoption of Article 138 was arguably consistent with the Tribunal's power under Article 16 of the Statute to "frame rules for carrying out its functions" and the broad jurisdiction conferred upon it by Article 21 of the Statute, which states that the Tribunal may hear "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." [8] Some have emphasized that no provision in the Convention or the Statute can be read "to exclude or reject such jurisdiction." [9] An ITLOS judge describes the Tribunal's advisory jurisdiction as a "recurrent issue" within the U.N. General Assembly and at meetings of States Parties to the Convention, and asserts that the past decade has demonstrated "a general movement in favour" of that function. [10]

Article 138 does not limit the types of entities that could request an advisory opinion from the Tribunal. Its language suggests that advisory opinions can be sought not only by international organizations, but also, for example, by States (including non-parties to UNCLOS), so long as the requesting entity is authorized by an international agreement related to the purposes of the Convention. The advisory function of the ITLOS under Article 138 has never been invoked, and the pending matter thus gives the Tribunal an opportunity to clarify the jurisdictional basis and breadth of its competence to provide advisory opinions. In this particular case, the Tribunal's exercise of its jurisdiction requires it to find (1) that the advisory opinion request is expressly authorized by an international agreement related to the purposes of the Convention, and (2) that the request sets forth legal questions within the meaning of Article 138. The SRFC request appears to meet this test. First, in 2012 the SRFC Member States entered into the 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), an agreement that regulates fishing activities within the 200-nautical-mile exclusive economic zones (EEZs) of SRFC Member States and includes provisions relating to IUU fishing. The 2012 MCA Convention, which repeals and replaces a 1993 treaty that also regulated fishing activities within the maritime areas of SRFC Member States, relates squarely to the purposes of the UNCLOS, which addresses the conservation and management of living resources within the EEZ (Articles 61-64) and on the high seas (Articles 116-119). In addition, the 2012 treaty, unlike the 1993 agreement, expressly empowers the SRFC Conference of Ministers to authorize the submission of a request for an advisory opinion to the Tribunal. [11] Second, the request addresses questions to the Tribunal that are clearly legal in nature.

## Procedure

On May 24, 2013, the Tribunal notified all UNCLOS States Parties of the pending request

and identified a list of forty-eight intergovernmental organizations that, in addition to the SRFC, it considers likely to be able to furnish information on the questions submitted.[12] Those States and organizations, as well as the SRFC, have been invited to file written statements by November 29, 2013. The Tribunal has also decided that oral proceedings will be held.[13]

Among States Parties to the Convention, the largest open registry flag States – which includes countries such as Panama, Liberia, the Marshall Islands, and the Bahamas – could be considered to have a particular interest in the matter.[14] States Parties that do not belong to the SRFC but which are plagued by IUU fishing – particularly those States that have undertaken significant efforts to prevent IUU fishing – may also consider it important to participate. The SRFC will also have the opportunity to clarify its request, including the specific types of situations that its questions are intended to address.

## **Merits**

The first question focuses on flag State duties. Under the law of the sea, coastal States bear primary responsibility for the conservation and management of living resources within the EEZ. On the high seas, regional fisheries management organizations (RFMOs) play that role. Under UNCLOS, the coastal State has sovereign rights for the purposes of conserving and managing the living resources within its EEZ (Article 56(1)(a)) and is authorized to board, inspect, and arrest vessels engaged in IUU fishing in violation of its laws (Article 73(1)). The coastal State also must determine catch limits for its EEZ to avoid over-exploitation (Article 61) and promote "optimum utilization" by giving third States access to the excess "allowable catch" (Article 62). Article 62 further provides that nationals of third States who fish within the EEZ shall comply with the applicable laws and regulations of the coastal State and authorizes the coastal State to undertake "judicial proceedings" to ensure such compliance. The Convention does not address expressly whether the responsibility of the flag State is engaged, or whether the flag State may incur liability, if its ships do not comply with the laws and regulations of coastal States.[15]

UNCLOS Article 94 is addressed to flag States, but principally concerns the duty to ensure the seaworthiness of vessels, safe navigation, and acceptable labor conditions. The advisory opinion could, however, clarify the content and scope of other provisions which suggest that flag States have an affirmative duty to prevent and punish IUU fishing. Within an EEZ, States Parties are required to have "due regard" to the rights of the coastal State and to comply with the laws and regulations adopted by the coastal State in accordance with the Convention (Article 58(3)). On the high seas, States Parties have "the right for their nationals to engage in fishing" subject to other treaty obligations and the rights, duties, and interests of coastal States (Article 116). States Parties also have a duty to co-operate with other States regarding high seas fisheries (Articles 117-118). Where a flag State has failed to prevent IUU fishing by not taking reasonable measures to prevent such conduct, these provisions may provide a basis for the coastal State to invoke the international responsibility or liability of the flag State.

States and organizations that participate in the proceedings could draw the Tribunal's attention to other international agreements, such as the 1995 U.N. Agreement on Straddling Fish Stocks, under which the flag State must ensure that vessels flying its flag do not undermine the effectiveness of conservation and management measures on the high seas.[16] The so-called 1993 FAO Compliance Agreement could also be relevant, but many flag States with open registries are not parties.[17]

The Tribunal could also assess the extent to which "soft law" instruments have been incorporated into State practice. UN General Assembly Resolution 62/177 (2008) urges States to exercise "effective control" over vessels flying their flag "to prevent and deter" IUU

fishing.[18] In February 2013, an FAO-led consultative process resulted in the publication of the Voluntary Guidelines for Flag State Performance, which lists flag State responsibilities relating to IUU fishing.[19] The SRFC itself referred to the FAO 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing in explaining its request.[20] State practice under RFMO agreements could also be relevant.

The first question posed by the SRFC thus raises issues of treaty interpretation, the development of customary norms, and State responsibility. The ITLOS could consider whether the instruments described above impose a "due diligence" requirement to prevent IUU fishing on flag States, such that State responsibility could be invoked when a flag State has failed to take appropriate measures with respect to the oversight and management of its vessel registry. If so, what is the nature and scope of that due diligence obligation?[21] Alternatively, could the flag State be subject to an "obligation of result" or strict liability when vessels flying its flag engage in IUU fishing and cause injury? Legislative practice and enforcement activity at the national level may shed light on these issues.[22]

Notably, the Deep Seabed Mining Advisory Opinion in 2011 considered, albeit in a different context, the distinction between due diligence obligations with respect to third parties and "direct obligations" with which States Parties must comply independently.[23] The Tribunal may find itself returning to that distinction.

The second question, which might benefit from clarification in the course of proceedings, asks to what extent flag States can be held liable for IUU fishing by their vessels. The SRFC might ask the Tribunal to address the consequences for the flag State of a breach of the obligations identified in response to the first question, including potential remedies. The question could also lead the Tribunal to consider the distinction between the responsibility of the flag State for internationally wrongful conduct relating to IUU fishing and the notion of international liability arising from the harm caused by the failure of a vessel to comply with the laws and regulations of the coastal State (which do not themselves necessarily impose obligations on the flag State).

The third question suggests the practice by which coastal States enter into international agreements with flag States to issue fishing licenses. This includes Fisheries Partnerships Agreements (FPAs) between regional organizations, such as the European Union, and coastal States. In the case of the European Union, FPAs allow vessels flagged by EU Member States to fish within a coastal State's EEZ. In such situations, it may be unclear whether the flag State or the regional organization that entered into the FPA bears international responsibility or liability when obligations relating to IUU fishing have not been met.

The fourth question, relating to the rights and obligations of coastal States, will give additional focus to the UNCLOS provisions referred to above, as well as to the 1995 Fish Stocks Agreement.[24] Attention could also be given to port measures, such as rules to deny the vessels of a particular flag State access to port for a history of IUU fishing violations. The 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, which the SRFC noted in explaining its request, is not yet in force, so national legislation and RFMO practice may be especially important with respect to the role of coastal States in the management of shared stocks and stocks of common interest.[25]

## **Conclusion**

The request from the SRFC for an advisory opinion by the ITLOS raises questions about the scope of the Tribunal's advisory jurisdiction, as well as questions of State responsibility and international liability in the context of largely private conduct – fishing activity – within the EEZs of coastal States and on the high seas. It offers an opportunity for the ITLOS to

elaborate upon a number of UNCLOS provisions, as well as other international instruments, that may have been considered as setting forth aspirational norms rather than enforceable duties. It may also indicate whether and in what form international dispute resolution has a role to play in the enforcement of fisheries conservation measures as set forth in national and international law, including whether compensation might be required from one State to another if such duties are not discharged.

#### About the Author:

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#### Endnotes:

[1] The SRFC is a Regional Fishery Body based in Dakar, Senegal. Seven West African states are members: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, and Sierra Leone.

[2] The term "flag State" refers to the State in which a vessel is registered. By virtue of registration, vessels enjoy the navigational rights that all States possess and may fly the flag of the registering State. See United Nations Convention on the Law of the Sea art. 91, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Under UNCLOS, the flag State has exclusive jurisdiction over its vessels on the high seas (Article 92), subject to certain exceptions (Articles 105, 110).

[3] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21, ITLOS (Request of Mar. 27, 2013), *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Request\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Request_eng.pdf) [hereinafter SRFC Request]. 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 (SRFC) art. 33, June 8, 2012, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Convention\\_CMA\\_ENG.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf) [hereinafter MCA Convention], empowers the SRFC to request an advisory opinion from the Tribunal. A Technical Note attached to the treaty, which replaces a 1993 agreement (see MCA Convention, art. 41), provides additional background on the request's objectives. See 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, Technical Note, March 2013, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Technical\\_Note\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Technical_Note_eng.pdf) [hereinafter Technical Note].

[4] The Tribunal's Seabed Disputes Chamber has issued one advisory opinion. See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, ITLOS, Advisory Opinion of Feb. 1, 2011, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Adv\\_Op\\_010211\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Adv_Op_010211_eng.pdf) [hereinafter Deep Seabed Mining Advisory Opinion].

[5] See UNCLOS, *supra* note 2, Annex VI (setting forth the Tribunal's Statute).

[6] See UNCLOS, *supra* note 2, art. 191.

[7] International Tribunal for the Law of the Sea, Rules of the Tribunal (as amended 17 March 2009) art. 138 ¶ 2, ITLOS/8, *available at* [http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf) [hereinafter Rules of the Tribunal].

[8] UNCLOS, *supra* note 2, Annex VI, arts. 16, 21 (emphasis added).

[9] See The Rules of the International Tribunal for the Law of the Sea: A Commentary 393-94 (P. Rao & P. Gautier, eds., 2006); see also Tafsir Malick Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, 9 Chinese J. Int'l L. 565, 581 (2010); Doo-young Kim, *Advisory Proceedings Before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea*, in 7 Issues in Legal Scholarship: Frontier Issues in Ocean Law

(Daniel A. Farber ed., 2010).

[10] See Ndiaye, *supra* note 9, at 582-83. In the event that a participating State or organization were to challenge the Tribunal's jurisdiction, the Convention provides that a dispute over the Tribunal's jurisdiction shall be settled by the Tribunal itself. See UNCLOS, *supra* note 2, at art. 288 (4).

[11] MCA Convention, *supra* note 3, at art. 33.

[12] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, ITLOS, Order of May 24, 2013, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/C21\\_Ord\\_2013-2\\_24.05\\_E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/C21_Ord_2013-2_24.05_E.pdf). In a previous advisory opinion proceeding, twelve States and three intergovernmental organizations submitted written statements within the time limits. See Deep Seabed Mining Advisory Opinion, *supra* note 4, ¶ 13. Two non-governmental organizations made a written submission, which was distributed to States Parties and participating intergovernmental organizations. *Id.* It is posted on the Tribunal's website, but labelled "not part of the case file."

[13] If the advisory opinion request "relates to a legal question pending between two or more parties," the Rules permit the appointment of judges *ad hoc*. Rules of the Tribunal, *supra* note 7, at art. 130(2). Nothing in the pending request suggests a specific dispute between two States, however.

[14] See UNCTAD, Review of Maritime Transport 44, 48 (2012), [http://unctad.org/en/PublicationsLibrary/rmt2012\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2012_en.pdf) (as ranked by deadweight tonnage).

[15] By contrast, the Convention addresses expressly the responsibility of States Parties to ensure compliance with certain provisions concerning exploitation of the Area (i.e., the seabed beyond national jurisdiction) and the potential liability for damage resulting from a failure to discharge those obligations. See UNCLOS, *supra* note 2, at art. 139.

[16] 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 arts. 18-19, Aug. 4, 1995, 2167 U.N.T.S. 88 [hereinafter Fish Stocks Agreement].

[17] Agreement To Promote Compliance With International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 2221 U.N.T.S. 91.

[18] G.A. Res. 62/177, ¶ 38, UN Doc. A/RES/62/177 (Feb. 28, 2008).

[19] See Press Release, Food and Agriculture Organization, International Guidelines Take Aim at Illegal Fishing (IUU) (Feb. 28, 2013), <http://www.fao.org/news/story/pt/item/170570/icode/>. The voluntary guidelines are available at [ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines\\_adopted.pdf](ftp://ftp.fao.org/FI/DOCUMENT/tc-fsp/2013/VolGuidelines_adopted.pdf).

[20] Food and Agriculture Organization, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (June 23, 2001), *available at* <http://www.fao.org/docrep/003/y1224e/y1224e00.HTM>. The Technical Note to the MCA Convention specifically refers to this instrument with regard to the objectives of the advisory opinion request. See Technical Note, *supra* note 3.

[21] For example, the International Court of Justice has also considered treaty provisions relating to due diligence obligations. See, e.g., Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 80-81 (Apr. 20).

[22] See, e.g., Council Regulation 10005/2008, 2008 O.J. (L. 286) 1(EC) (establishing a system to prevent, deter and eliminate IUU fishing for the European Union). A variety of U.S. legislation, including the 2006 Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884, concerns IUU fishing.

[23] See Deep Seabed Mining Advisory Opinion, *supra* note 4, ¶¶ 110, 115, 121-122, 242.

[24] See, e.g., Fish Stocks Agreement, *supra* note 16, at arts. 7-8.

[25] Food and Agriculture Organization of the United Nations, Agreement on Port Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, Nov. 22, 2009, *available at* [http://www.fao.org/fileadmin/user\\_upload/legal/docs/1\\_037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/1_037t-e.pdf). According to the SRFC Technical Note, see Technical Note, *supra* note 3, the MCA Convention incorporates the "main principles" laid down by the Port Measures Agreement (see MCA Convention, *supra* note 3, at arts. 25-30), and the SRFC Member States consider themselves bound by that treaty, which is also mentioned in the preamble to the MCA Convention.

