ITLOS issues its Advisory Opinion on IUU Fishing

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Decision commented on: International Tribunal for the Law of the Sea, Case No. 21
(Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC))

Introduction and context

On the 27 March 2013, the Permanent Secretary of the SRFC seized the International Tribunal for the Law of the Sea ('the Tribunal'), pursuant to Art. 138 of the Rules of the Tribunal, with a request for an Advisory Opinion ('AO') on the following four questions:

1. What are the obligations of the flag State in cases where IUU [Illegal, Unreported and Unregulated] fishing activities are conducted within the EEZ 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?

Some context is important to understand why the SRFC may have chosen to submit these questions. The SRFC established on 29 March 1985 is an intergovernmental fisheries organization for fisheries cooperation. Today, it is made up of 7 West African countries, namely Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. Illegal, Unreported and Unregulated fishing ('IUU fishing') is costing SRFC member states dearly. West Africa has a reputation of having one of the highest levels of IUU fishing in the world, amounting to an annual loss of around $1.3bn, according to the 2014 progress report of the Africa Progress Panel. According to the SRFC technical note to the Tribunal, Guinea, Guinea-Bissau and Sierra Leone especially suffer from IUU fishing in their Exclusive Economic Zone ('EEZ'), indeed almost the total allowable catch in these countries. IUU fishing in Guinean waters and by Guinean flagged vessels on the high seas is so serious, that at the time the request for the AO was filed the EU threatened to ban fisheries products coming from Guinea. This threat was subsequently realised. Moreover, some SFRC member states have a long history of exploitative fishing in their EEZs by fishing vessels of other states. Senegal is a good example. Senegal was the first West African country to sign an agreement with the then European Community, and paid the price for it when its local fish stocks collapsed as a result. This led Senegal not to renew its partnership with the EU in
2006, and only last year did the EU once again secure access to Senegalese waters. Currently there is tension between Mauritania and the EU. A similar access agreement was in place but the serious state of certain demersal stocks has led the EU to seek to reduce capacity. This caused tension both within the EU and with Mauritania. The existing protocol expired in 2014 and negotiations have failed thus far to conclude a new agreement.

These economic reasons for reducing IUU fishing in their EEZs led the SFRC member states to update their legal framework and implement the international law and policy instruments relevant to sustainable fisheries management. In 2012, the SRFC therefore amended the 1993 Minimal Access Conditions (‘MCA’) Convention. The MCA Convention implements the 1982 United Nations Convention on the Law of the Sea (‘LOSC’), regulates access to SRFC waters and harmonises the negotiating positions of member states on fisheries agreements with third countries. The 2012 amendments brought the MCA Convention in line with the significant developments that have occurred in international fisheries law and policy since the 1990s, including the 1995 United Nations Fish Stocks Agreement, the FAO’s International Plan of Action on IUU Fishing of 2001, and the Port State Measures Agreement of 2009 (not yet in force). Having incorporated these changes, the SRFC had a clear incentive to find out who bears international responsibility for vessels engaged in IUU fishing in their EEZs.

The AO was rendered by the full Tribunal, on 2 April 2015. Judge Ndiaye voted against the Tribunal’s answer to the fourth question and Judges Wolfrum and Cot wrote a separate declaration. Judges Ndiaye, Lucky and Paik each wrote separate opinions.

Before it could address the questions submitted by the SRFC, the Tribunal first confirmed that it had jurisdiction to provide an AO in a case that was not initiated by the Seabed Authority. This post does not deal with this issue other than to note that the Tribunal explicitly limited itself to answering the questions posed in the context of the EEZ of the SRFC member states. This post focuses on the issues related to the responsibility of flag states, and organizations like the EU, to ensure that their nationals and vessels flying their flag do not engage in IUU fishing in another state’s EEZ.

A primary obligation on the coastal state to prevent, deter and eliminate IUU Fishing

The applicable law in this case was the LOSC, the MCA Convention and other rules of international law compatible with the LOSC (Art. 293 LOSC). The LOSC contains no reference to the term IUU fishing, but the MCA Convention implements the IPOA-IUU’s definitions of IUU fishing verbatim. Whilst the Tribunal noted that the IPOA-IUU is a voluntary instrument, the Port States Measures Agreement which is binding also refers to the IPOA-IUU for its definition of IUU fishing. The Tribunal also highlighted the fact that this definition of IUU fishing has been included in the decisions of some Regional Fisheries Management Organizations (‘RFMOs’), in the national legislation of certain states, and in the law of the EU (para. 92 AO). The Tribunal did not however draw any conclusions as to the implications of these practices for the development of customary law. As for the SRFC member states in particular, IUU fishing was explicitly integrated into their own legal framework, since Art. 31(1) of the MCA Convention lists IUU fishing as one of the infringements which member states should incorporate in their national law. On the basis of this, the Tribunal agreed that IUU fishing, as defined in the MCA Convention, played an important role in considering the obligations of flag states whose vessels fish in the area of
application of the MCA Convention; in this case, the EEZs of the SRFC member states (para. 95 AO).

In answering the first question, the Tribunal emphasised the obligation of the coastal state to adopt conservation and management measures for all living resources within its EEZ. This results directly from the LOSC, although the MCA Convention also contains specific provisions to ensure that the SRFC member states have in place national conservation and management measures. Moreover, Art. 73(1) of LOSC gives the coastal state the right to take the necessary measures to ensure compliance with its laws and regulations concerning the conservation and management measures. These ‘special rights and responsibilities’ led the Tribunal to conclude that it is the coastal state which has the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing in its EEZ (para. 106 AO).

**The responsibility of a flag state ‘to ensure’ compliance with the laws and obligations of the coastal state**

The Tribunal made it clear that the coastal state’s primary obligation, explained above, does not release the flag state from its own responsibilities (para. 109 AO). As mentioned above, the LOSC does not contain specific references to IUU fishing. The Tribunal therefore looked at flag state obligations for the conservation and management of marine living resources pursuant to Arts. 91, 92, 94, 192 and 193 LOSC, in so far that they set out general obligations on the flag state in all maritime areas; and Arts. 58(3) and 63(4) LOSC, in so far that they set out specific obligations on the flag state in the EEZ. Furthermore, in this case, the Tribunal pointed out that a flag state could be subject to more specific obligations flowing from a bilateral fisheries access agreement in place, and from the MCA Convention (set out in detail in para. 113 and 114 AO).

Ships are almost exclusively subject to the exclusive jurisdiction of their flag state in the high seas as well as the EEZ (Arts. 92 and 58 LOSC). Having confirmed this, the Tribunal reasoned, on the basis of Art. 94 LOSC, that a flag state must effectively exercise its jurisdiction and control over ships flying its flag including, as far as fisheries are concerned, by adopting the necessary administrative measures ‘to ensure’ that such vessels are not involved in activities which will undermine the flag state’s responsibilities in respect of the conservation and management of marine living resources. The Tribunal then identified a flag state’s responsibilities in respect of the conservation and management of marine living resources. The Tribunal had previously concluded, in the *Southern Bluefin Tuna Cases*, that the conservation and management of living marine resources forms part of the duty to protect and preserve the marine environment which binds all parties to the LOSC (Art. 192 LOSC). A state must observe this duty when exercising its right to exploit its natural resources (Art. 193 LOSC). Furthermore, the Tribunal concludes that a coastal state’s conservation measures for its EEZ are an integral element in this protection (para. 120 AO). This implies that, on the basis of Art. 192 LOSC, a flag state must ensure compliance by vessels flying its flag with the conservation measures concerning living resources adopted by the coastal state (para. 120 AO). A similar obligation to comply with the conservation measures established by the laws and regulations of a coastal state arises from the EEZ-specific provisions of the LOSC, namely Arts. 58(3) and 62(4) LOSC. The Tribunal therefore concluded that a flag state is under the obligation to take the necessary measures ‘to ensure’ that vessels flying its flag and its nationals are not engaged in IUU fishing activities (para. 124 AO).
A responsibility 'to ensure' is a 'due diligence' obligation

Having concluded that the LOSC imposes on a flag state the responsibility ‘to ensure’ that no IUU fishing occurs, the Tribunal interpreted this as being an obligation of ‘conduct’ which (and referring here to the Seabed Disputes Chamber AO of 2011 (Sponsoring in the Area), is an obligation of ‘due diligence’. This means that a particular standard of care is expected of a flag state, as opposed to an obligation to achieve a certain result (e.g. ‘no IUU fishing’). This is consistent with the International Court of Justice’s decision in Pulp Mills, (also referred to by the Seabed Disputes Chamber), to the effect that the obligation of a source state not to cause transboundary harm is one of ‘due diligence’. It is therefore only when a flag state fails its obligations of ‘due diligence’ that this is (a) an act attributable to a state and, (b) a breach of that state’s international obligations under the LOSC. The criteria for state responsibility, as set out in Art. 2 of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, would thus be fulfilled only if a flag state had not fulfilled its obligations of ‘due diligence’, where it was obliged to do so, e.g. as a result of being a party to the LOSC. For the purpose of state responsibility, the Tribunal furthermore highlighted that it is therefore irrelevant whether the IUU fishing occurred only once or repeatedly, since the obligation on states is one of ‘due diligence’ and not of a particular result (para. 150 AO). The Tribunal took this view notwithstanding the fact that a repeated chain of events could be evidence that the flag state has not fulfilled its ‘due diligence’ obligations.

In explaining the meaning of ‘due diligence’ in this case, the Tribunal borrowed the Seabed Disputes Chamber’s wording in saying that a flag state must do “the utmost” to prevent IUU fishing (para. 129 AO). The Tribunal then noted that the LOSC was the appropriate instrument to provide guidance in establishing what measures a flag state should take. In order to comply with its ‘due diligence’ obligations to prevent IUU fishing in the EEZ of an SRFC member state, a flag state should take the following measures:

- adopt enforcement measures to ensure compliance by their vessels with the laws and regulations of SRFC member states (i.e. the coastal states) (Art. 58(3) and 62(4) LOSC);
- adopt the necessary measures prohibiting vessels flying their flag from fishing, unless authorised to do so, in the EEZs of SRFC member states (Art. 58(3) and 62(4) LOSC);
- adopt measures to ensure that their vessels comply with the protection and preservation measures adopted by the SRFC member states (Art. 192 and 193 LOSC)
- properly mark their vessels (Art. 94(1) and (2) LOSC)
- adopt enforcement mechanisms to monitor and ensure compliance by their vessels with the laws and regulations of the flag state, adopted in order to effectively exercise jurisdiction over their vessels in administrative, social and technical matters (Art. 94 LOSC)
- have in place sanctions of sufficient gravity so as to deter violations and deprive offenders of the benefits from IUU fishing (Art. 94 LOSC)
- investigate alleged IUU fishing, where this is reported to the flag state by the coastal state, and, if appropriate, take necessary action to remedy the situation (Art. 94(6) LOSC)
- cooperate in the event of alleged IUU fishing activities (by analogy to the MOX Plant Case, where the duty to cooperate was said to be a fundamental principle to prevent pollution)
The EU’s obligations of 'due diligence' in the context of fisheries access agreements

Having answered the first two questions, the Tribunal then considered the scenario of IUU fishing where the flag state, or an international agency, have agreed a fisheries access agreement with the coastal state. As explained further below, the latter refers only to access agreements with the EU. Some background information is useful to better understand the often highly criticised fisheries access agreements between SRFC member states and the EU. The EU has signed fisheries access agreements with Senegal (after an 8 year ‘break’), Mauritania (the protocol expired in December 2014), Cape Verde and Guinea-Bissau. The European Parliament rejected a draft fisheries access agreement with Guinea in 2009 as a result of the Guinean government’s use of force during the elections, which led to hundreds of deaths in its capital, Conakry. Since the EU overhauled its Common Fisheries Policy ('CFP'), which took effect on 1 January 2014, these fisheries access agreements are now called Sustainable Fisheries Partnership Agreements ('SFPAs'). The EU has been much criticised in the past for overexploiting foreign EEZs and taking no responsibility for blindly relying on the coastal state’s assessment of their stock surplus (see Emma Witbooi’s book, below). Whilst the latter is in line with the LOSC, it imposes a heavy burden on developing countries that often cannot make a clear assessment of their surplus. In response to this, the newest generation of EU SFPAs reinforces the EU’s aim for sustainable fisheries exploitation abroad.

Under the new CFP, the EU aims to keep stocks levels above Maximum Sustainable Yield. Under an SFPA, the EU will do so by identifying surplus based on best scientific advice, including that of RFMOs if the stock is straddling or highly migratory, and on the basis of information about the total fishing effort on the affected stock by all fleets (Art. 31(4) CFP). Furthermore, SFPAs decouple financial compensation for access to fisheries resources from financial assistance for sectoral support. This is important, since it ensures that the sectoral support remains independent from the EU’s fishing rights, and subject to the achievement of specific results. Financial sectoral assistance is intended, among other things, to help build capacity for the development of a sustainable fisheries policy driven by the third country. This includes establishing and maintaining scientific and research institutions; promoting consultation processes with interest groups; and establishing monitoring, control and surveillance capability (Art. 32 CFP). This move towards providing an active contribution to the coastal state’s fisheries management regime may become very relevant when assessing obligations of ‘due diligence’. The sectoral support may provide proof that the EU has (or has not) done all it could to subject its vessels to better control and thus ensure compliance with whatever conservation measures are in place. The SFPA with Senegal, for example, even dedicates part of the sectoral support specifically to the surveillance, monitoring and combatting of IUU fishing. Moreover, it creates specific obligations on both the EU and Senegal to report any IUU fishing in Senegalese waters to one another and to the flag state of the vessel doing the Fishing.

Part of the third question put to the Tribunal concerned flag state liability where IUU fishing occurs as a result of a fishing licence issued under a fisheries access agreement. Here, the Tribunal simply pointed to its earlier conclusions on flag state responsibility, discussed above (para. 155 AO). It then considered the case where an access agreement has been agreed with an international ‘agency’, to use the wording of the request. Without elaborating on this, the Tribunal explained that the use of the word ‘agency’ should be understood as being synonymous with ‘international organization’ (para. 152 AO). Furthermore, the Tribunal explained that this only related to an organization that had been granted the necessary competences by its member states over fishery matters (as set out in Arts. 305 1(f) and 306 the LOSC). The EU acceded to the LOSC in 2009 (replacing the European Community), and
in doing so accepted the rights and obligations of its member states under the LOSC, in matters for which competence had been transferred to it. As explained above, SFPAs are part of the CFP, an area of exclusive competence of the EU (Art. 3(d) TFEU). The EU also confirmed this on its accession to the LOSC, by specifying that it had exclusive competence in matters related to the conservation and management of sea fishing resources (para. 163 AO). The Tribunal highlighted that the responsibility of an organization like the EU for an internationally wrongful act is directly linked to its competence. It therefore concluded that, if an SFPA is in place, it is the EU, rather than the EU member state which is the flag state of the fishing vessel, which bears responsibility for the 'due diligence' obligations (para. 168 AO). It is therefore the EU that must be able to demonstrate that it has discharged that responsibility, either directly, or indirectly through the fisheries laws and practices of it member states.

Implications of the Advisory Opinion

The Tribunal, in the words of the WWF, "throws a lifeline" to the SRFC member states, in acknowledging that flag states and even the EU could be held responsible for IUU fishing by their vessels in the EEZ of a coastal state. However, it remains to be seen whether the effects of the AO will be felt outside the particular case of the SRFC.

First of all, the question arises what will happen in a situation in which the coastal state has not adopted specific laws on IUU fishing. As noted above, the Tribunal's jurisdiction, and therefore the AO itself, was limited to the EEZs of the SRFC member states. IUU fishing was explicitly addressed in the MCA Convention, which had been amended so as to be in line with the most recent international legal and policy developments. This played a role in the Tribunal's determination that IUU fishing would be in breach of the laws and regulations of the coastal state. Of course, one hopes that a similar conclusion could be reached for any coastal state, regardless of whether or not it has adopted specific provisions on IUU fishing. This may depend on what one means by IUU fishing. Any fishing in the EEZ would by definition be 'regulated', in so far as a coastal state is obliged, under the LOSC, to adopt conservation and management measures for the living resources in its EEZ. And fishing in breach of those measures would most certainly be 'illegal', and a violation of the LOSC. Whether a flag state must 'report' would depend on whether a coastal state had adopted reporting requirements to ensure compliance with its measures (Art. 73(1) LOSC).

Second, to what extent do flag states have obligations of 'due diligence' on the high seas, and to what extent they could be held responsible for breach of those obligations? Many RFMOs face the problem of fishing by non-members contrary to their conservation measures. In answering the first question, the Tribunal relied both on provisions concerning general obligations on the flag state in all maritime areas, namely Arts. 91, 92, 94 and 192 LOSC, and those provisions specific to the EEZ, namely Arts. 58(3) 62(4) LOSC (para. 111 AO). The Tribunal first concluded that, as far as fisheries are concerned, Art. 94 LOSC should be interpreted to mean that a flag state must adopt the "necessary administrative measures 'to ensure' that fishing vessels flying its flag are not involved in activities which will undermine the flag state’s responsibilities under the [LOSC] in respect of the conservation and management of marine living resources" (para. 119 AO). The Tribunal then reaffirmed that the conservation of living resources is an integral element of the general obligation to protect and preserve the marine environment, set out in Art. 192 LOSC. Therefore, the Tribunal concluded that a flag state must 'ensure' that vessels flying its flag comply with the coastal state's conservation measures concerning marine living resources for its EEZ, on the basis of...
Art. 192 LOSC (para. 120 AO). Given that these provisions (Art. 192 and 94 LOSC) apply to all maritime areas, this hints at the possibility that a flag state might be under a more general obligation 'to ensure' compliance with conservation and management measures of marine living resources, including those adopted by RFMOs, on the high seas. If this is so, then there is still a question as to the content of such an obligation of 'due diligence' outside the EEZ. In the case of the SFRC, the Tribunal offered a broad interpretation of 'due diligence' and developed an extensive list of measures that a flag state ought to adopt. For example, the Tribunal suggested that a flag state should adopt sanctions of sufficient gravity so as to deter violations and deprive offenders of the benefits from IUU fishing, on the basis of Art. 94 LOSC. This suggests a more general obligation on the flag state to have in place a suitable enforcement mechanism for IUU fishing, wherever its vessels fish. On the other hand, Art. 94 LOSC only obliges a flag to ensure that its vessels do not engage in activities that undermine the flag state's responsibilities in respect of the conservation and management of marine living resources. These responsibilities are less clear-cut on the high seas than they are in the EEZ of a coastal state. It is tempting to read more into the Tribunal's wording than perhaps one should.

Thirdly, it is interesting to note that the AO sheds little light on the importance of legal and policy developments in international fisheries management since the adoption of the LOSC. The Tribunal distilled rather precise obligations of 'due diligence' entirely from the LOSC itself. In a separate opinion, Judge Paik pointed out that the Tribunal should have taken into account the fact that flag state responsibility has significantly evolved over the last two decades. Part XII of the LOSC in general and Art. 94(5) in particular include references to “generally accepted international regulations, procedures and practices”, and Paik concluded that this rule of reference should be applied to IUU fishing by analogy. Thus, in his view, guidance could have been found in the body of post-LOSC developments, whether legally binding or not, to find out which measures constitute 'generally accepted regulations, procedures and practices' (Separate Opinion Paik, para. 27). This approach would give more weight to the measures adopted by the FAO, such as the IPOA-IUU, and would not require such an extensive interpretation of the provisions of the LOSC. In fact, the Tribunal only briefly considered the IPOA-IUU, and only in so far as the MCA Convention copies its definition of IUU fishing verbatim. The request dealt with IUU fishing, which is not a term used in the LOSC. The Tribunal acknowledged that the IPOA-IUU's definition is reaffirmed in the 2009 Port State Measures Agreement. Moreover, the Tribunal pointed out that it has "been included in decisions of some RFMOs, the national legislation of a number of states and the EU" (para. 92 LOSC). Whilst the Tribunal did not address the issue of the formation of customary law, it has shown that the definition of IUU fishing has evolved outside its voluntary setting and has now been incorporated in a legally binding agreement. It is also clear that a significant amount of state practice exists in this regard.

A fourth question that arises from the AO is whether there is scope for shared responsibility, in case a coastal state does not adopt the necessary conservation and management measures. Take the example of Guinea, which was listed as a non-cooperation third country in March 2014, pursuant to the EU IUU Regulation. The EU Commission had previously concluded that Guinea had failed to fulfil its obligations not only as a flag state, in terms of its own vessels, but also as a coastal state. The Commission concluded that Guinea had failed to take action against foreign vessels engaging in IUU fishing in its waters, and had neglected to enforce the provisions of a fisheries access agreement.
To conclude, one wonders what the immediate implications of the AO are for SRFC member states. Will SRFC member states now investigate whether the flag states of illegally fishing vessels have fulfilled their obligations of ‘due diligence’? Will this prompt EU member states (and the EU itself) to examine their due diligence practices in relation to the enforcement of the prohibition of IUU fishing by their vessels? The CFP aims to ensure that an effective system of control, inspection and enforcement is in place, and, explicitly referring to IUU fishing, it encourages cooperation between EU member states to establish comparable and dissuasive sanctions (Part IX CFP). So far, however, the CFP’s effectiveness in this respect is debatable. It will be interesting to see what happens next, and whether the Tribunal’s AO will serve as a deterrent to illegal fishing in coastal waters.

Further Reading

- Emma Witbooi, *Fisheries and Sustainability: A Legal Analysis of EU and West African Agreements* (2012, Brill Nijhof)
- EJF Foundation (2012) *PIRATE FISHING EXPOSED: The Fight Against Illegal Fishing in West Africa and the EU* Available online [here](#)
- Frédéric Le Manach, Christian Chaboud, Duncan Copeland, Philippe Cury, Didier Gascuel, Kristin M Kleisner, André Standing, U Rashid Sumaila, Dirk Zeller, and Daniel Pauly, ‘European Union’s public fishing access agreements in developing countries.’ (2013) 8 PloS one e79899
- Gunther Handl, ‘Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs’ (2014) 44 Environmental Policy and Law 158–167

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