



Sub-Regional Fisheries Commission - Permanent Secretariat

Advisory opinion of the International Tribunal for the Law of the Sea on the request submitted by the Sub-Regional Fisheries Commission (SRFC) regarding Illegal, Unreported and Unregulated fishing (IUU) and shared or common interest stocks management

On 2nd April 2015, the International Tribunal for the Law of the Sea delivered an Advisory Opinion on the **Request submitted by the Sub-Regional Fisheries Commission (SRFC)** in accordance with Article 138 of its Rules. **This is the first time in the history of the International Tribunal that an advisory opinion is being rendered by the full Tribunal.**

In its Advisory Opinion, **the Tribunal decided unanimously that it has jurisdiction to give the Advisory Opinion requested**, that its jurisdiction is limited to the exclusive economic zones of the SRFC Member States, and to respond to the Request submitted by the SRFC.

During its 14th extraordinary session (27-28 March 2013), **the SRFC Conference of Ministers** adopted a **Resolution authorizing the Permanent Secretary to request to the International Tribunal for the Law of the Sea an advisory opinion** in compliance with Article 33 of the Convention on Minimal Conditions for Access (hereinafter referred MAC Convention).

That request aimed at providing guidelines to SRFC member States on the most effective institutional and legal means to eliminate IUU fishing in the SRFC zone and ensuring sustainable management of shared stocks in their common maritime zone. As part of the effective implementation of the MCA Convention as amended in 2012, the request was to shed light on the international legal system governing IUU fishing and to sustain shared or common interest s stocks management.

In March, 27th, 2013, the SRFC's Permanent Secretary addressed a letter to the President of ITLOS relating to the Resolution of the Conference of Ministers authorizing him to request an advisory opinion on four legal issues. In March, 28th, 2013, the request was registered in the Tribunal as Case N0 21, "Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission".

Twenty-two States and eight intergovernmental organizations presented statements in two rounds of written pleadings. Hearings in the case were held on September 2014 and nine States as far as four intergovernmental organizations took part. In addition to the SRFC, the participants were as follows : Germany, Argentina, Australia, Chile, Spain, Micronesia (Federated States of), New Zealand, United Kingdom, Thailand, European Union, Caribbean Regional Fisheries Mechanism and the International Union for Conservation of Nature.

For each of the four issues composed of the request submitted by the SRFC, the Tribunal answered as follows:

N.B: In the responses, the term "Convention" refers to the 1982 UN Convention on the Law of the Sea, and the term "MCA Convention" to the SRFC Convention of the on Minimal Conditions for Access 2012.

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?

Response of the Tribunal:

The flag State has the following obligations:

Obligations of “due diligence”:

- to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources ;
- in light of the provisions of article 58, paragraph 3, article 62, paragraph 4, and article 192 of the Convention, to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention within the exclusive economic zones of the SRFC Member States;
- to adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State’s responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living resources which are an integral element of the marine environment (article 94 of the Convention).

Other obligations:

- The flag State and the SRFC Member States are under an obligation to cooperate in cases related to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned.
- The flag State, in cases where it receives a report from an SRFC Member State alleging that a vessel or vessels flying its flag have been involved in IUU fishing within the exclusive economic zone of that SRFC Member State, has the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation, and to inform the SRFC Member State of that action.

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

Responses of the Tribunal:

- The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not per se attributable to the flag State.
- The liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.
- The SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations, referred to in the reply to the first question.

- The flag State is not liable if it has taken all necessary and appropriate measures to meet its “due diligence” obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States.

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?

Response of the Tribunal:

- The question only relates to those international organizations, referred to in articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries. At present, the only such international organization is the European Union to which the member States, which are parties to the Convention, have transferred competence with regard to “the conservation and management of sea fishing resources”.
- In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of that State.
- Accordingly, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. Therefore, if the international organization does not meet its “due diligence” obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.
- The SRFC Member States may, pursuant to article 6, paragraph 2, of Annex IX to the Convention, request an international organization or its member States which are parties to the Convention for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned must provide this information. Failure to do so within a reasonable time or the provision of contradictory information results in joint and several liability of the international organization and the member States concerned.

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?

Response of the Tribunal:

- In the case of stocks referred to in article 63, paragraph 1, of the Convention, the SRFC Member States have the right to seek to agree, either directly or through appropriate subregional or regional organizations, with other SRFC Member States in whose exclusive economic zones these stocks occur upon the measures necessary to coordinate and ensure the conservation and development of such stocks.

- Under the Convention, the SRFC Member States have the obligation to ensure the sustainable management of shared stocks while these stocks occur in their exclusive economic zones; this includes the following:

(i) the obligation to cooperate, as appropriate, with the competent international organizations, whether subregional, regional or global, to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation (see article 61, paragraph 2, of the Convention);

(ii) in relation to the same stock or stocks of associated species which occur within the exclusive economic zones of two or more SRFC Member States, the obligation to “seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks” (article 63, paragraph 1, of the Convention);

(iii) in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones (see article 64, paragraph 1, of the Convention). The measures taken pursuant to such obligation should be consistent and compatible with those taken by the appropriate regional organization, namely the International Commission for the Conservation of Atlantic Tunas, throughout the region, both within and beyond the exclusive economic zones of the SRFC Member States.

To comply with these obligations, the SRFC Member States, pursuant to the Convention, specifically articles 61 and 62, must ensure that:

(i) the maintenance of shared stocks, through conservation and management measures, is not endangered by over-exploitation;

(ii) conservation and management measures are based on the best scientific evidence available to the SRFC Member States and, when such evidence is insufficient, they must apply the precautionary approach, pursuant to article 2, paragraph 2, of the MCA Convention;

(iii) conservation and management measures are designed to maintain or restore stocks at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special needs of the SRFC Member States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

Such measures shall:

(i) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened;

(ii) provide for exchange on a regular basis through competent international organizations, of available scientific information, catch and fishing efforts statistics, and other data relevant to the conservation of shared stocks.

The obligation to “seek to agree ...” under articles 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the Convention are “due diligence” obligations which require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

- The conservation and development of shared stocks in the exclusive economic zone of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

- In light of the foregoing, the SRFC Member States fishing in their exclusive economic zones for shared stocks which also occur in the exclusive economic zones of other Member States must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks. Such management measures are also required in respect of fishing for those stocks by vessels flying the flag of non-Member States.
- Cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources, is a well-established principle in the Convention. This principle is reflected in several articles of the Convention, namely articles 61, 63 and 64.
- Fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes. Fish stocks, in particular the stocks of small pelagic species and tuna, shared by the SRFC Member States in their exclusive economic zones are also shared by several other States bordering the Atlantic Ocean. The Tribunal, however, has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case.
- In exercising their rights and performing their duties under the Convention in their respective exclusive economic zones, the SRFC Member States and other States Parties to the Convention must have due regard to the rights and duties of one another. This flows from articles 56, paragraph 2, and 58, paragraph 3, of the Convention and from the States Parties' obligation to protect and preserve the marine environment, a fundamental principle underlined in articles 192 and 193 of the Convention and referred to in the fourth paragraph of its preamble. Living resources and marine life are part of the marine environment and, as stated in the Southern Bluefin Tuna Cases, "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".
- Although, in the present case, the jurisdiction of the Tribunal is limited to the area of application of the MCA Convention, in the case of fish stocks that occur both within the exclusive economic zones of the SRFC Member States and in an area beyond and adjacent to these zones, these States and the States fishing for such stocks in the adjacent area are required, under article 63, paragraph 2, of the Convention, to seek to agree upon the measures necessary for the conservation of those stocks in the adjacent area.
- With respect to tuna species, the SRFC Member States have the right, under article 64, paragraph 1, of the Convention, to require cooperation from non-member States whose nationals fish for tuna in the region, "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species".