International Tribunal for the Law of the Sea,  
Case 21

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)

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On 2 April 2015 the International Tribunal for the Law of the Sea delivered its first Advisory Opinion. It was in response to four questions submitted by the State parties to the West Africa Sub-Regional Fisheries Commission (SRFC). The Opinion clarifies a number of important issues regarding the obligations of flag States to control the activities of their vessels conducting fishing activities in the EEZs of other States and their potential liability for failure to do this effectively. It addresses the obligations of an international organization, such as the European Union (EU), where vessels flying the flags of the Member States of the organization are fishing under the terms of an access agreement between the organization and a coastal State or States. It also considers the obligations of cooperation under the 1982 Convention on the Law of the Sea (LOSC) between coastal States and others engaged in fishing for highly migratory species in the region. The Opinion represents an important further application of the requirements of “due diligence” which were developed by the ITLOS Seabed Disputes Chamber in its 2011 Advisory Opinion.¹

The West African Sub-Regional Fisheries Commission (SRFC) was established by a treaty of 29 March 1985 designed to strengthen cooperation.

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¹ Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, ITLOS Case No 17, 1 February 2011. For commentary see David Freestone, ‘Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,’ (2011) 105 American Journal of International Law 755–761.
among its members regarding the management of the living resources of their exclusive economic zones (EEZs).\textsuperscript{2} It has seven member States and is based in Dakar, Senegal.\textsuperscript{3} By a supplementary treaty in 1993 (the MAC Convention), the SRFC sought to regulate and harmonize minimum access conditions (MAC) for EEZ resources in the sub-region, as well as to implement regional FAO instruments relating to the exercise of hot pursuit and co-ordination of surveillance. The 1993 MAC Convention was further revised in June 2012; its amended version entered into force on 16 September 2012. The 2012 revised MAC Convention includes innovative provisions including the Food and Agricultural Organization (FAO) definition of “Illegal, Unreported and Unregulated” (IUU) Fishing,\textsuperscript{4} requirements of the 2009 FAO Port State Measures Agreement,\textsuperscript{5} acceptance of the precautionary and ecosystem approaches to fisheries and, in an especially interesting provision, its Article 33 specifically provides 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.” This apparently avails itself of the power included within the ITLOS Rules of Procedure to refer ‘a legal question’ to ITLOS.\textsuperscript{6}

It was utilizing this provision of the 2012 MAC Convention that the seven State Parties passed a resolution instructing their Secretariat to refer a number of legal questions to ITLOS for an Advisory Opinion. On 27 March 2013 the following questions were referred to the ITLOS Registrar:

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?

\textsuperscript{3} Members are Guinea, Cape Verde, The Gambia, Guinea Bissau, Mauritania, Senegal, and Sierra Leone.
\textsuperscript{5} Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted 22 November 2009.
\textsuperscript{6} Article 138(1) of the ITLOS Rules of Procedure permits referral for 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 opinion.”