



The ITLOS Advisory Opinion in Case No. 21

Introductory briefing on the due diligence obligation of flag States regarding their fishing vessels, the liability for breach of this obligation and the possibilities for litigation

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1. Introduction

1. In April 2015, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion in Case No. 21. The Advisory Opinion answered questions posed to ITLOS by the West African Sub-Regional Fisheries Commission. Those questions addressed flag State obligations and liability (Questions 1 and 2), the obligations and liability of international organisations in certain circumstances (Question 3) and coastal State obligations (Question 4). The Advisory Opinion answered all of the questions. However, this briefing is concerned just with the content of the Advisory Opinion regarding Questions 1 and 2. It summarises that content and considers the possibilities for litigation in an international court or tribunal by a coastal State against a flag State.

2. Abbreviations used below are as follows: '**AO**' means the Advisory Opinion of ITLOS in Case No. 21; '**EEZ**' means exclusive economic zone; '**IUU fishing**' means illegal, unreported and unregulated fishing (on which, see paras.90–92 of the AO); '**MCA Convention**' means the regional treaty referred to at para.62 of the AO, concluded by seven member States of the West African Sub-Regional Fisheries Commission; '**SRFC**' means the West African Sub-Regional Fisheries Commission; '**Tribunal**' means the International Tribunal for the Law of the Sea (ITLOS); '**Q1**' and '**Q2**' mean Questions 1 and 2 in the AO; and '**UNCLOS**' means the 1982 United Nations Convention on the Law of the Sea. Paragraph numbers used below (i.e. those prefixed by 'para.')

refer to the AO, unless otherwise stated. In quotations from UNCLOS and from the AO, ellipses and text in square brackets have been introduced in the interests of abbreviation (including consistency with the abbreviations referred to above).

2. Content of the Advisory Opinion

2.1 Introduction

3. The Tribunal, in answering the questions posed to it by the SRFC, limits its jurisdiction to the EEZs of SRFC member States (see, amongst others, paras.69, 87 and 89). This limitation may be seen as a measured response to the fact that the Tribunal's jurisdiction to deliver any advisory opinion at all in answer to the SRFC's questions was contested by several States. The Tribunal states that its AO 'has no binding force and is given only to the SRFC' (para.76). It adds that it is 'mindful of the fact that [...] it will [...] contribute to the implementation of [UNCLOS]' (para.77).

2.2 Question 1

4. Q1 reads as follows: 'What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States?'

5. In answering Q1, the Tribunal takes the following steps: it defines the geographical scope of Q1; it explains that the flag State is not absolved of responsibility in the EEZ; it sets out the relevant provisions of UNCLOS; it identifies the flag State obligation arising from these provisions; it identifies two categories of actions by which the flag State must meet its

obligation; it states that the flag State obligation is one of conduct and, in turn, one of due diligence; and it identifies elements of the due diligence obligation.

6. In this briefing, there is not sufficient space to address each of the above steps. Instead, in this sub-section, the briefing looks first at the provisions of UNCLOS considered by the Tribunal in setting out the obligation of the flag State. (The relevance of that is considered further below.) The briefing then explains the nature and elements of the flag State obligation.

7. The provisions of UNCLOS considered by the Tribunal are as follows: the preamble (para.102); Articles 91, 92 and 94 (all in Part VII of UNCLOS) (para.111), but with special focus on Article 92 (para.115) and Article 94 (paras.116–119); Articles 192 and 193 (both in Part XII of UNCLOS) (paras.111 and 120), with the Tribunal citing the link that it made previously, in the Southern Bluefin Tuna Cases, between protection and preservation of the marine environment, on the one hand, and conservation of living marine resources, on the other (para.120); and Articles 58(3) and 62(4) (both in Part V of UNCLOS) (paras.111, 121–124 and 127). (See also paras.134–140.)

8. The Tribunal reaches various conclusions from its analysis of the above provisions. These are expressed by the Tribunal in various forms of words (see, for example, paras.102, 119, 120, 124 and 127). This briefing focuses on the form of words used by the Tribunal in para.127 of the AO, namely the following:

[...] as has been explained earlier, the flag State has the “responsibility to ensure”, pursuant to [Articles 58(3) and 62(4) of UNCLOS], compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. [...]

9. The Tribunal goes on to explain how this obligation is to be met, as follows (para.127):

[...] The flag State must meet this responsibility by taking measures defined in paragraphs 134 to 140 [of the AO] as well as by effectively exercising its jurisdiction and control in “administrative, technical and social matters” over ships flying its flag in accordance with [Article 94(1) of UNCLOS].

10. As can be seen, two categories of actions are referred to by the Tribunal in para.127: (a) the flag State is to take the measures defined in paras.134 to 140 of the AO; and (b) the flag State is to effectively exercise its jurisdiction and control in ‘administrative, technical and social matters’ over ships flying its flag in accordance with Article 94(1) of UNCLOS.

11. The Tribunal adds that the obligation of the flag State, such as that set out in para.127, is an obligation of conduct and, in turn, an obligation of ‘due diligence’ (para.129):

In the case of IUU fishing in the [EEZs] of the SRFC Member States, the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is [...] an obligation “of conduct”. In other words, as stated in the [ITLOS advisory opinion in Case No. 17], this is an obligation “to deploy adequate

means, to exercise best possible efforts, to do the utmost” to prevent IUU fishing by ships flying its flag. However, as an obligation “of conduct” this is a “due diligence obligation”, not an obligation “of result”. This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the [EEZs] of the SRFC Member States. The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.

12. Thus, as can be seen, the Tribunal concludes that: ‘The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.’ It is beyond the scope of this briefing to explain how the Tribunal reaches its conclusion that the flag State’s obligation is one of ‘due diligence’ (rather than being one of result). However, put very briefly, that conclusion is not derived from UNCLOS directly, but it is derived from broad principles and from the findings of international courts and tribunals.

13. As already noted above, two categories of actions are referred to by the Tribunal when stating how the flag State must meet its obligation. One of these is put in quite general terms: the flag State is to effectively exercise its jurisdiction and control in ‘administrative, technical and social matters’ over ships flying its flag in accordance with Article 94(1) of UNCLOS. The other category is more particularised: the flag State is to take the measures defined in paras.134 to 140 of the AO. The Tribunal prefixes that list of measures with the following statement (para.133):

The Tribunal holds that, in the present case, [UNCLOS] is the key instrument which provides guidance regarding the content of the measures that need to be taken by the flag State in order to ensure compliance with the “due diligence” obligation to prevent IUU fishing by vessels flying its flag in the [EEZs] of the SRFC Member States.

14. The full text of paras.134 to 140 of the AO is provided in the Annex to this briefing. In summary, as can be seen from the Annex, the measures defined in paras.134 to 140 relate to the following: ‘necessary measures, including those of enforcement, to ensure compliance’ (para.134); authorisation to fish (para.135); ‘necessary measures’ to ensure compliance with ‘protection and preservation measures’ (para.136); vessel marking (in particular) (para.137); ‘enforcement mechanisms’, including sanctions (para.138); investigation of reports (para.139); and cooperation (para.140).

2.3 Question 2

15. Q2 reads as follows: ‘To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?’

16. The Tribunal notes that ‘neither [UNCLOS] nor the MCA Convention provides guidance on the issue of liability of the flag State for IUU fishing activities conducted by vessels under its flag’ (para.142). It adds that in answering Q2 it ‘will therefore be guided by relevant rules of international law on responsibility of States for internationally wrongful acts’ (para. 143). It identifies three rules of ‘general international law’ relevant to Q2,

namely Articles 1, 2 and 31(1) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (para.144).

17. As to when the flag State *is* liable, the Tribunal, citing paras.109–140 of the AO and paragraph 170 of its own judgment in the M/V 'Saiga' (No.2) Case, concludes that (para.147):

The Tribunal is of the view that the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their [EEZs] for a breach, attributable to the flag State, of its international obligations referred to in the reply to [Q1] [...]

18. As to when the flag State is *not* liable, the Tribunal concludes that (para.148):

[...] 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 [EEZs] of the SRFC Member States.

19. The Tribunal is clear about the relevance of the behaviour of vessels and about the frequency of IUU fishing activities. Thus, at paras.146 and 150 respectively, it states that:

In the present case, 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 [EEZs], as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State. [...]

The Tribunal also wishes to address the issue as to whether isolated IUU fishing activities or only a repeated pattern of such activities would entail a breach of "due diligence" obligations of the flag State. [...] the frequency of IUU fishing activities by vessels in the [EEZs] of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State.

3. Applying the Advisory Opinion to litigation

20. The Tribunal, in answering Q1 and thereby setting out the due diligence obligation of flag States, uses a rationale that is based on provisions of UNCLOS – as well as on broad principles and the findings of international courts and tribunals (see above). In turn, in answering Q2 on liability of flag States, the Tribunal uses a rationale that is based on the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (again, see above). In other words, the Tribunal does not rely on any regional treaties, such as the MCA Convention, to derive its conclusion about the due diligence obligation of flag States or its conclusion about the liability of flag States. In principle, as a result, these conclusions have applications beyond the narrow jurisdictional confines of the AO.

21. One potential application is litigation. Let us suppose that a coastal State Party to UNCLOS wishes to bring a flag State Party to UNCLOS before an international court or tribunal, alleging breach by the flag State of the latter's due diligence obligation. In

principle, the Tribunal's conclusions from the AO about the due diligence obligation of flag States and about the liability of flag States could be invoked by the coastal State, irrespective of whether that coastal State is a member State of the SRFC. That is because of the rationale of the Tribunal's conclusions, as noted above. (It is beyond the scope of this briefing to consider litigation between one or more non-parties to UNCLOS.)

22. A coastal State, in litigation against a flag State, would need to demonstrate a breach by the flag State of the latter's due diligence obligation (see further the 'Summary and conclusions' below). However, as a crucial prerequisite, it would also need to be able to bring the flag State concerned before an international court or tribunal. UNCLOS, in Part XV, contains important provisions on dispute settlement in that respect, although these provisions only apply as between the States Parties to UNCLOS.

23. As various provisions of Part XV of UNCLOS make clear, Part XV relates (only) to disputes 'concerning the interpretation or application' of UNCLOS (see, for example, Article 286). On the assumption that any dispute between a coastal State Party to UNCLOS and a flag State Party to UNCLOS concerning adherence by the flag State to the latter's due diligence obligation would be a dispute 'concerning the interpretation or application' of UNCLOS, Part XV would apply to that dispute.

24. Part XV of UNCLOS has three sections. Section 2, entitled 'compulsory procedures entailing binding decisions', is the core of Part XV. It is sandwiched between sections 1 and 3. Section 3 sets out various limitations and exceptions to section 2. (One of the limitations set out in section 3 is in Article 297(3)(a). This relates to disputes concerning certain fisheries matters in the EEZ. However, it only comes into play when a coastal State is the respondent in a dispute: it does not prevent a coastal State from initiating a dispute.) Section 1, amongst other things, sets out procedures that either must be or may be followed by States when they first become engaged in a dispute.

25. Section 1 also includes a provision, Article 282, which precludes resort to Part XV if the parties to a dispute concerning the interpretation or application of UNCLOS 'have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision'. (The parties can, by consensus, agree to disregard Article 282.) Further consideration of Article 282 is beyond the scope of this briefing, but its potential relevance should not be overlooked. For example, a flag State might seek to rely on it where a fisheries access agreement exists between the two States in dispute. Its relevance in any given case would depend on the terms of the agreement in question.

26. As noted above, section 2 is the core of Part XV and is entitled 'compulsory procedures entailing binding decisions'. It starts with Article 286, which reads as follows:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Thus if State Party 'A' to UNCLOS (e.g. a coastal State Party) wants to take State Party 'B' to UNCLOS (e.g. a flag State Party) to an international court or tribunal, State 'A' can do so without needing the dispute-specific consent of State 'B': State 'B' has already given its consent by virtue of its being a party to UNCLOS. In turn, Article 296(1), at the end of section 2, states that any decision of a court or tribunal having jurisdiction under section 2 'shall be final and shall be complied with by all parties to the dispute'. In other words, the decision is binding on the parties concerned.

27. Within section 2 of Part XV, there are rules, set out in Article 287, for the choice of dispute settlement forum. Because of the way these rules work and because of the choices made, or indeed not yet made, under Article 287 by States Parties, it is currently the case that the most likely forum in a dispute between any two States Parties to UNCLOS would be an Annex VII arbitral tribunal. However, an Annex VII arbitral tribunal is not the only possible outcome. What is more, the parties could, by consensus, potentially choose one of the other forums listed in Article 287(1) (for example, ITLOS) as an alternative (see Article 287(4) and (5)). Questions arise as to what weight a court or tribunal other than ITLOS would give to the AO, but that is beyond the scope of this briefing.

4. *Summary and conclusions*

28. In its Advisory Opinion in Case No. 21, in response to Q1, the Tribunal sets out an obligation for flag States. It concludes that a flag State 'is under the "due diligence obligation" to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag' (para.129). In turn, under Q2, the Tribunal concludes that 'the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their [EEZs] for a breach, attributable to the flag State, of its international obligations referred to in the reply to [Q1]' (para.147).

29. In delivering its AO, the Tribunal is careful to limit its jurisdiction to the EEZs of SRFC member States. However, in reaching its conclusion about the due diligence obligation of flag States, the Tribunal uses a rationale that is based on provisions of UNCLOS – as well as on broad principles and the findings of international courts and tribunals. In turn, in reaching its conclusion about the liability of flag States, the Tribunal uses a rationale that is based on the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. In principle, as a result, these conclusions by the Tribunal have applications beyond the narrow jurisdictional confines of the AO.

30. One potential application is litigation. Let us suppose that a coastal State Party to UNCLOS wishes to bring a flag State Party to UNCLOS before an international court or tribunal, alleging breach by the flag State of the latter's due diligence obligation. In principle, the Tribunal's conclusions from the AO about the due diligence obligation of flag States and about the liability of flag States could be invoked by the coastal State, irrespective of whether that coastal State is a member State of the SRFC.

31. In cases where the coastal State and the flag State concerned are both States Parties to UNCLOS (such as in the example above), and assuming that their dispute could be characterised as one 'concerning the interpretation or application' of UNCLOS, Part XV of

UNCLOS would apply to that dispute. That would mean that, subject to the rules set out in Part XV (on which, see above), the coastal State could take the flag State to an international court or tribunal, for a binding decision, without needing the dispute-specific consent of the flag State.

32. The coastal State would then need to demonstrate to the court or tribunal concerned that the flag State was in breach of the latter's due diligence obligation. Two categories of actions are referred to by the Tribunal when stating how the flag State must meet its obligation. One of these is put in quite general terms (a reference to Article 94(1) of UNCLOS) and one is more particularised (a list of measures set out in paras.134 to 140 of the AO). In principle, a failure by a flag State to adhere to one or more of the measures set out in paras.134 to 140 of the AO (or to adhere to Article 94(1) of UNCLOS) should be sufficient to constitute a breach. In practice, the measures referred to in paras.134 to 140 are quite broadly worded (as is Article 94(1) of UNCLOS) and so there is clearly some room for interpretation.

33. If the coastal State were to be successful in demonstrating a breach by the flag State of the latter's due diligence obligation, the Tribunal's conclusion in the AO about flag State liability flowing from such a breach could, in principle, be invoked by the coastal State.

34. It must be emphasised that before any coastal State were to commence proceedings against a flag State, it would be very important for that coastal State to take legal advice on, amongst other things, the following: (a) jurisdiction of relevant courts and tribunals; (b) the merits of the case; (c) the potential remedies that might be awarded by the court or tribunal concerned; and (d) the potential costs of litigation. The term 'the merits of the case' as used in '(b)' above means the chances of the coastal State being successful, including, in particular, the chances of it being able to demonstrate successfully a breach by the flag State concerned of the latter's due diligence obligation. Outside the purely legal sphere, the political risks of litigation should also be taken into account.

<ENDS>

[Annex overleaf]

Annex: Text of paras.134 to 140 of the Advisory Opinion

134. The Tribunal observes that, under [Articles 58(3) and 62(4) of UNCLOS], the flag State has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States in accordance with the provisions of [UNCLOS].

135. The aforementioned provisions of [UNCLOS] also impose the obligation on the flag State to adopt the necessary measures prohibiting its vessels from fishing in the [EEZs] of the SRFC Member States, unless so authorized by the SRFC Member States.

136. Pursuant to [Articles 192 and 193 of UNCLOS], the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States.

137. [Article 94(1) and (2) of UNCLOS] provides that the flag State is under an obligation to exercise effectively its jurisdiction and control in administrative matters over fishing vessels flying its flag, by ensuring, in particular, that such vessels are properly marked.

138. While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.

139. In accordance with [Article 94(6) of UNCLOS], “[a] State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State” and “upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.” In the view of the Tribunal, this obligation equally applies to a flag State whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal State concerned. The flag State is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action. The action to be taken by the flag State is without prejudice to the rights of the coastal State to take measures pursuant to [Article 73 of UNCLOS].

140. The Tribunal wishes to recall that, as stated in the *MOX Plant Case*,

the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of [UNCLOS] and general international law ...

(MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 110, para. 82)

The Tribunal holds that this obligation extends also to cases of alleged IUU fishing activities.