

**Written Statement of the European Union**

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE  
SUB-REGIONAL FISHERIES COMMISSION (SRFC)  
(CASE NO.21)**

**SECOND WRITTEN STATEMENT BY THE EUROPEAN COMMISSION  
ON BEHALF OF THE EUROPEAN UNION**

**13 MARCH 2014**

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## CHAPTER I

### INTRODUCTION

1. On 28 March 2013, the International Tribunal for the Law of the Sea (ITLOS or "the Tribunal") received a request for an advisory opinion from the Sub-Regional Fisheries Commission (SRFC). The request was based on a resolution adopted during the fourteenth extraordinary session (25-29 March 2013) of the Conference of Ministers of the SFRC, which authorized the Permanent Secretary of the SRFC to seize the Tribunal of the following questions:
  1. *"What are the obligations of the flag State in cases where IUU fishing activities are conducted within the Exclusive Economic Zones 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?"*
2. Following the order of 24 May 2013 of the President of the Tribunal fixing 29 November 2013 as the time-limit within which written statements may be presented to the Tribunal (subsequently extended), the European Union (the EU or the Union) and 21 other parties to the United Nation Convention on the Law of the Sea (LOSC) (including 7 EU Member States) submitted written statements. In addition 9 non-parties to the LOSC (one State non-party, 7 international organisations and one non-governmental organisation) submitted written statements.
3. By order of 20 December 2013 the Tribunal decided that, by 14 March 2014 at the latest, the parties having presented written statements may submit written statements on the statements made by others.
4. By its present second written statement the Union only addresses those questions which raise major issues and no comments are made in any detail on each point submitted.
5. Therefore it is to be stressed that the Union does not necessarily agree (or disagree) with all the statements it has not reacted to, and its silence on any point can in no case be construed as an acceptance.

## CHAPTER II

### JURISDICTION AND ADMISSIBILITY

#### I. Jurisdiction

6. As the first written statement, this second written statement is without prejudice to the question of the jurisdiction of the Tribunal to examine the request for an advisory opinion in respect of the questions raised before it.

#### II. Admissibility

7. In the first written submission the EU had already expressed serious doubts as to the admissibility of the questions as raised, notably because of the lack of precise facts and legal questions related to those facts, and it has been concluded that "the request for an advisory opinion should be more closely related to the interpretation or application of specific legal obligations, in particular the MCA Convention<sup>1</sup> or the LOSC" and that "considering the general nature of the questions, especially the fact that they do not concern the interpretation or application of any particular instrument or a part of it, and given the lack of sufficient factual context, the Tribunal should examine carefully whether the questions, especially in the form in which they have been submitted by the SRFC, are admissible." (see first Written Statement by the EU, points 5 to 17).
8. Similar and other doubts have been expressed in several other written submissions.
9. In this context it is to be noted that the SRFC statement (pages 8-12, 13, 15, 35-38) mentioned certain IUU problems in general and some IUU incidents.
10. In this respect it has to be stressed that some of these matters go well beyond the inherent natural limits of an advisory procedure, and would instead fall under the dispute settlement method for individual cases as they may be agreed under bilateral or multilateral agreements.
11. Notably the "*Virginia G*" case (whose pertinence for the present advisory opinion is already doubtful as it does not concern fishing activities) is still pending before the Tribunal in the disputed case N° 19 between Guinea-Bissau and Panama, and it can thus not be addressed again in the context of the present advisory opinion case
12. Such questions related to individual disputes would therefore be inadmissible in the framework of an advisory opinion procedure.
13. In addition, the EU notes that some statements would seek to extend even more the scope of the questions.
14. In this vein, the SRFC refers in its statement to additional topics, not mentioned in its questions, in particular the responsibilities of port states (pages 71-72),

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<sup>1</sup> Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (2012).

and wider questions regarding new technical and economic uses of the sea (page 72).

15. Also other submissions, such as New Zealand's with regard to the issue of responsibility over nationals, beneficial owners or operators of vessels (pages 15-16), raise questions going clearly beyond the scope of the questions of the SRFC.
16. As all these additional issues and questions go beyond the scope of the four questions referred to the Tribunal, they should not be considered admissible.

### CHAPTER III

#### RESPONSES TO THE QUESTIONS

##### A. On the concept of IUU fishing

17. As pointed out in several written statements, the concept of IUU fishing, which is not defined by the LOSC or the UNFSA, has been addressed in several international instruments (e.g. United Nations General Assembly Resolutions on sustainable fisheries, as well as in the FAO's IPOA-IUU).
18. Most written statements refer to the definition of the concept of IUU fishing as contained in the FAO's voluntary IPOA-IUU.
19. The SRFC wonders whether this IUU definition should not be revised in the short term, without making any suggestions (page 3).
20. In view of the solid consensus on the definition contained in the FAO IPOA on IUU (mentioned by most interventions), there is no room for the Tribunal to enter into the definition of the notion of IUU in another way than by the FAO IPOA on IUU.

##### B. On question 1 on the obligations of the flag State

21. The SRFC states (page 10) that the flag State has the function to impose sanctions "regardless of sanctions imposed by the coastal States".
22. In this respect it can be observed that obliging the flag State to impose sanctions for facts already sanctioned by the Coastal State, regardless of any consideration of the sanctions imposed by the coastal State, might result in imposing twice a penalty for the same facts. This in turn will raise issues of proportionality of sanctions.
23. In addition, it should be noted that once a coastal State has imposed a sanction of adequate severity, there is no need for the flag State to impose an additional sanction (or vice-versa).

C. On questions 2 and 3 on the liability of respectively the flag States for IUU fishing activities conducted by vessels flying their flag and of international agencies in cases where a fishing licence is issued to a vessel within the framework of an international agreement with that international agency, for the violation of the fisheries legislation of the coastal State by the vessel in question

24. Most written statements underline that the liability of the flag State can only be engaged by its own failure to comply with its obligations of "due diligence", and would thus not be engaged by the IUU fishing activities by vessels flying its flag<sup>2</sup>. In the same vein, most statements consider that the liability of the international agency would only be engaged in case of its own failure to comply with its own international obligations<sup>3</sup> and would not be engaged by the IUU fishing activities by vessels flying the flag of one of its Member States<sup>4</sup>.
25. The IUCN observations examine in some detail the EU's role as an international agency party to access agreements, and analyse the nature of competences involved (points 78-80). However, the third question concerns the liability of an international agency in case a vessel licensed in accordance with an agreement between the agency and the coastal State violates the fisheries legislation of that coastal State. In this context the discussion by IUCN on the internal division of competences between the European Union and its Member States must be based on a misunderstanding, as the Fisheries and Partnership Agreements are pure EU agreements and not mixed agreements between the EU and its Member States at one hand and the coastal State at the other (see points 84 to 91 of the first EU Written Statement and **Annex 5**). In any case such a discussion is of no relevance for the reply to be provided to the question

<sup>2</sup> See (*mutatis mutandis*) in this context the Tribunal's Advisory Opinion in Case No 17, point 112: "*The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).*"

<sup>3</sup> It was explained in the EU first written statement that this depends on the contents of the agreement and it was noted that most of these contain a provision that the EU shall take all the appropriate steps required to ensure that its vessels comply with the agreement and the legislation governing the fisheries. The EU observations noted moreover the IUU Regulation in this context, including the fact that also vessels of the EU Member States can be listed (see point 91 of the first EU Written Statement). See other examples such as Article 5(4) of the 2006 Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (Official Journal, L 141, 29.5.2006, p. 4), Article 6(1) of the 1980 Agreement on fisheries between the European Economic Community and the Kingdom of Norway (Official Journal L 226, 29.8.1980, p. 48) and Article 15(1) of the Convention on future multilateral cooperation in North- East Atlantic fisheries (NEAFC) (Official Journal J L 227, 12.8.1981, p. 2).

<sup>4</sup> In light of this, the replies to questions 2 and 3 Switzerland, stating in absolute terms and without making any distinction between the high seas and the EEZ of third States, that the flag State should be fully liable for IUU fishing, without limiting such liability to cases where the flag State failed to observe its own "due diligence" obligation and that the international agency would be liable on the basis of mere knowledge of the domestic coastal State's legislation, cannot be followed, because flag States as well as international agencies which are party to international fisheries agreements (bilateral access agreements or multilateral agreements establishing Regional Fisheries management Organisations) can only be held liable for their own failure to comply with their international obligations.

concerned and is thus not to be addressed by the Tribunal in the framework of the present advisory opinion procedure<sup>5</sup>.

26. The Union has already submitted in its first written statement that in the situation described in the third question the obligations and rights of the coastal State and of the other contracting party depend on the contents of the agreement, and that in the absence of specific provisions related to liabilities, the general rules of international law governing in particular the responsibility of a flag State for its vessel apply in the EEZ of a third country (point 92). The Union has also submitted that States' liability, as reflected in the practice of identification or listing of non-cooperating third countries, cannot be engaged by isolated occurrences of IUU fishing (points 79 and 80) and that the conduct of privately owned vessels cannot be directly and automatically attributed to the flag State (point 56). Only systemic failures as flag, port, coastal or market State, or, within the limits of its competence, as an international agency organisation party to a fisheries agreement, would be relevant (see, for the Union practice under its IUU Regulation, point 79).
27. Finally, it may also be added in this context, that it is the EU practice to have so-called "exclusivity clauses" in its Fisheries Partnership Agreements, providing that Union vessels may only fish in the coastal State's fishing zones if they are in possession of a fishing licence requested by the Union authorities under the agreement (see examples in **Annex 5**). This is an additional safeguard to ensure responsible governance of fisheries activities by the EU as an international agency (see in this context IUCN written statement page 16, point 37 first bullet stating that double authorisation is needed by flag and coastal state).

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<sup>5</sup> In any case it would be for the European Court of Justice to delineate the respective competences of the EU and its Member States.

**CHAPTER IV**

**SUMMARY AND CONCLUSION**

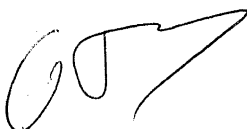
28. In sum, the European Union respectfully persists in its proposed answers to the questions asked by the SRFC along the lines set out in the first written statement and above.

The European Commission, on behalf of the European Union



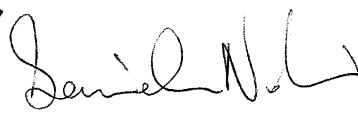
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