

# CAPE

Coalition pour  
des Accords de Pêche Équitables

# CFFA

Coalition for  
Fair Fisheries Arrangements

*ITLOS Advisory Opinion in the case 21, submitted by West Africa Sub Regional Fisheries Commission (SRFC)*

## CFFA Summary and Comments

*Rights and responsibilities of States in the fight against IUU fishing, fisheries agreements and small pelagic management*

9 June 2015

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### 1. Introduction

*On April the 2<sup>nd</sup> 2015, the International Tribunal for the Law of the Sea (ITLOS) issued an advisory opinion, following a request submitted by West Africa Sub-Regional Fisheries Commission (SRFC), on March 28, 2013.*

*The request for an advisory opinion is intended to support West Africa Sub Regional Fisheries Commission Member States (MS) in order for them to benefit from the effective implementation of relevant legal instruments, and to guide them in their efforts to better tackle the challenges they face regarding the fight against IUU fishing. The answers to the questions raised are expected to allow the SRFC to obtain the necessary legal elements for the success of its activities, in particular the effective implementation of the SRFC Convention on Minimal Access Conditions (MCA)<sup>1</sup>.*

*Overall, the ITLOS advisory opinion mostly takes up and clarifies the existing rules of international law.*

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<sup>1</sup> CONVENTION ON THE DETERMINATION OF THE MINIMAL CONDITIONS FOR ACCESS AND EXPLOITATION OF MARINE RESOURCES WITHIN THE MARITIME AREAS UNDER JURISDICTION OF THE MEMBER STATES OF THE SRFC (MCA CONVENTION)  
[https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/Technical\\_Note\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Technical_Note_eng.pdf)

## 2. SRFC Questions and main elements of ITLOS Advisory opinion

**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 Zones of third party States?**

Main elements of ITLOS Advisory opinion:

Flag States have:

- An **obligation “of conduct”**: to ensure that vessels flying its flag do not engage in IUU fishing
- **Obligations of “due diligence”**:
  - Take the necessary measures, including enforcement measures, to ensure that vessels flying its flag **comply with the laws and regulations** of SRFC MS regarding the conservation and management of resources in their EEZs
  - To take the necessary measures to ensure that vessels flying its flag **do not engage in IUU fishing activities**, in the EEZ of SRFC MS, and must always be **authorized** by the coastal States to operate in their ZEE
  - To take the necessary **administrative measures** to ensure that fishing vessels flying its flag do not engage in activities in the EEZ of SRFC MS, hindering the exercise of its responsibility re the management and conservation of resources in its EEZ.
- **Obligation to cooperate** between States (coastal/flag) in cases relating to IUU fishing activities

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

Main elements of ITLOS Advisory opinion:

- The liability of the flag state is the **result of a breach of his duty of “due diligence”** regarding IUU fishing activities by vessels flying its flag in the EEZs of SRFC MS, and not due to the fact that its vessels **have not complied with the laws and regulations** of SRFC MS re IUU fishing.
- The **flag State is not held liable** if it has **taken all necessary and appropriate measures** to fulfill its obligation of **“due diligence”** to ensure that vessels flying its flag do not engage in IUU fishing activities in the EEZ of SRFC MS.
- The **frequency** of IUU fishing activities **is not relevant** to determining whether there has been a breach by the flag State of its obligation of “due diligence”.

**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 the international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?**

Main elements of ITLOS Advisory opinion:

- Within the framework of a **fishing agreement** between a coastal State and an **international organization** that exercises its **exclusive jurisdiction in respect of fisheries** (management and conservation of resources), the flag State obligations become the **obligations of the international organization**, as the contracting party to the agreement.
- Only the **liability of the international organization** in case of breach of its duty of “due diligence” and not that of its Member States can be **engaged** for the violation of this obligation ensue from agreement.

**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?**

Main elements of ITLOS Advisory opinion:

- Makes reference to UNCLOS articles 61, 62, 63 and 64 in particular.
- Underlines the interdependence of these stocks
- Coastal States are **obliged to ensure the sustainable management of shared stocks**, their conservation and avoid overexploitation when these stocks are in their respective EEZs
- There is also an obligation for coastal states to **agree, to consult, to cooperate** with other States sharing the stocks, in **good faith**, directly or through relevant sub-regional or regional organizations = “due diligence” obligation. Coastal states have to agree on **coordinated management measures** for the **same stock** or **stocks of associated species** found in the EEZs of several States
- For **tuna**: management has to be consistent and compatible measures with those of **ICCAT**
- Reiterates guiding principles for taking conservation and management measures:
  - Avoid **overexploitation**
  - Rely on the **best scientific advice** and apply the **precautionary approach**

- Ensure **maximum sustainable yield** exploitation, taking into account relevant environmental and economic factors, including the **economic needs of coastal fishing communities**
- Consider the **entire stock** of the species throughout its distribution area and on all migration routes.
- Take into account the effects on species associated / dependent, untargeted
- Ensure regular exchange of scientific information, of statistics on catches and fishing effort and other data on the conservation of shared stocks.

### 3. CFFA Comments

- Generally, ITLOS puts the emphasis on the responsibilities of the Flag States, and rather eludes the question of the primary responsibility of Coastal States for the management and conservation of resources within their EEZs, which results in rights and obligations, particularly in terms of control, monitoring and surveillance (MCS). Shortcomings in that area have been highlighted recently in the Greenpeace report, denouncing various IUU operations entered in by vessels of foreign origin (China in this case), some of them flagged in SRFC member countries –fraud about the real tonnage of vessels, trawlers fishing in artisanal fishing zone, etc
- In ITLOS advisory opinion, SRFC members are considered only as Coastal States, not as flag states. In recent years however, several cases of vessels engaged in IUU fishing, flagged in one of SRFC members, have been recorded (including the case of a Senegalese tuna vessel, of Spanish origin, arrested for illegal fishing in the Indian Ocean/Madagascar EEZ in 2008<sup>2</sup>). ITLOS recommendations to flag states should therefore also apply to SRFC members.
- ITLOS advisory opinion regarding fishing agreements focusses on the case of ‘international organization that exercises its exclusive jurisdiction in respect of fisheries’. In West Africa, that restricts the analysis to the case of EU bilateral fishing agreements with countries of the region. However, ITLOS advisory opinion should also serve as a basis to engage the liability of other foreign fishing entities that negotiate fishing agreements with SRFC coastal States, including Russia, China and Korea, whose fishing activities are generally opaque and have been denounced in recent years as IUU (Russian trawlers in Senegal, etc).
- Similarly, there is a need to broaden the debate on the basis of that advisory opinion, to non-State entities, private companies, - from EU or other foreign countries origin-, which operate through private agreements, joint ventures or chartering arrangements in West African waters. There is a need to strengthen coastal States’ legislations regarding such ventures, as well as the control of the initial flag State, - which often remains the state of beneficial ownership-, on these activities to ensure more transparency and to avoid that these vessels contribute to overfishing and compete with the local small scale sector.

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<sup>2</sup> <http://agritrade.cta.int/en/Fisheries/Topics/ACP-EU-relations-FPAs/A-Senegalese-fishing-vessel-is-arrested-for-illegal-fishing-in-Malagasy-waters>

- Pelagic fisheries, especially small pelagics (sardinella, sardines, horse mackerel, etc) are key resources for food security and job creation in the artisanal fishing sector in the region. ITLOS Advisory opinion should serve to reinforce the political will at regional level to manage these resources in a coordinated manner, including when negotiating fishing agreements, taking into account sustainability and food security concerns.
  - In its written statement provided to ITLOS in the context of the SRFC request, the EU described the EU IUU Regulation as an efficient tool to fight against IUU fishing, highlighting in particular the trade sanctions: identified non-cooperating countries receive a ‘yellow card’ warning, followed – if the country does not take appropriate measures to fight IUU fishing-, by a ‘red card’, which means fish products from that country cannot access the EU market. However, the implementation of the IUU regulation has revealed its limits when the EU recently withdraw Korea<sup>3</sup> from the list of non-cooperating, ‘yellow carded’ States, under the pretext that it had undertaken legislative reforms on paper. Indications are that vessels flying Korean flag continue to engage in dubious activities off the West African coast, in particular in Guinea. Meanwhile, Guinea, member of the SRFC, was itself listed as a non-cooperating State by the EU in 2013 although it also undertook legislative reforms ‘on paper’. This situation creates a suspicion that the EU is applying double standards when implementing the IUU regulation to Korea and Guinea.
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<sup>3</sup> For more details, see CFFA note: “Delisting Korea From The Eu 'IUU List': Too Much, Too Fast”, 23 April 2015: <https://cape-cffa.squarespace.com/new-blog/2015/4/23/delisting-korea-from-the-eu-iuu-list-too-much-too-fast>.