

Written Statement of the United Nations

Case No. 21

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)

Written statement submitted to the International Tribunal for the Law of the Sea by the Secretary-General of the United Nations

1. On 28 March 2013, a Request for an advisory opinion under article 138 of the Rules of the Tribunal was submitted to the Tribunal by the Sub-Regional Fisheries Commission pursuant to article 33 of the 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 Sub-Regional Fisheries Commission.
2. On 24 May 2013, the Tribunal adopted an Order on the conduct of the proceedings in Case No. 21 concerning the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*. By that Order, the Tribunal, inter alia, “invited, in accordance with article 133, paragraph 3, of the Rules of the Tribunal, the States Parties to the Convention, the SRFC and the other organizations [...] to present written statements on the questions submitted to the Tribunal for an advisory opinion”.
3. On 5 June 2013, pursuant to the said Order, the United Nations was invited to present a written statement on the questions submitted to the Tribunal for an advisory opinion. Accordingly, the following statement is submitted.

Introduction

4. The present statement focuses on the 1982 United Nations Convention on the Law of the Sea (“the Convention”) and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“the United Nations Fish Stocks Agreement”).¹ It also highlights potentially relevant resolutions of the General Assembly of the United Nations and reports of the Secretary-General of the United Nations.
5. This statement does not provide information regarding other potentially relevant international instruments, such as those adopted under the auspices of the Food and Agriculture Organization of the United Nations and regional fisheries management organizations and arrangements, since the secretariats of those entities have also been invited to provide statements to the Tribunal.

The United Nations Convention on the Law of the Sea

6. The Convention sets out the legal framework within which all activities in the oceans and seas must be carried out.² In this regard, the Convention establishes the limits of the maritime zones and sets out the respective rights and obligations of States on all aspects of

¹ As of 27 November 2013, the Convention had 166 parties, including the European Union, and the United Nations Fish Stocks Agreement had 81 parties, including the European Union.

² As recognized by the General Assembly (see General Assembly resolution 67/78).

ocean space, including maritime delimitation, conservation and management of living resources, navigation, protection and preservation of the marine environment and marine scientific research. The Convention also contains procedures for the peaceful settlement of disputes between States.³

7. The Convention is supplemented by two implementing agreements, namely the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the 1995 United Nations Fish Stocks Agreement. The Convention and its implementing agreements are at the core of a comprehensive international legal framework for oceans and seas, which also includes numerous international instruments developed at the global and regional levels.

8. The Convention sets out the rights and duties of the flag State in the various maritime zones described in the Convention. In that regard, it may be noted that a table setting out the obligations of flag States pursuant to the various provisions in the Convention was included in the report of the Consultative Group on Flag State Implementation referred to in paragraph 25 below.

9. The Convention also sets out the sovereign rights of coastal States for the purposes of exploring and exploiting, conserving and managing living resources within areas under national jurisdiction, as well as their duties with regard to the conservation and utilization of such resources. For example, a coastal State has the obligation to give other States access to any surplus in the determined allowable catch from its exclusive economic zone, through agreements or other arrangements. However, nationals of other States fishing within areas under national jurisdiction of a coastal State must comply with the conservation measures and with other terms and conditions established in the laws and regulations of the coastal State. The coastal State can take enforcement measures to ensure compliance with its laws and regulations adopted by it in conformity with the Convention.

10. Coastal States and flag States have a general duty to cooperate in the implementation of the provisions of the Convention, as well as specific duties to cooperate in the implementation of particular provisions, such as those relating to the conservation and sustainable management of shared stocks and stocks of common concern.⁴

11. States Parties to the Convention are required to fulfil in good faith the obligations assumed under the Convention and exercise the rights, jurisdiction and freedoms recognized in the Convention in a manner which would not constitute an abuse of right.

12. The Convention does not explicitly address the issue of the possible liability of a State for illegal, unreported and unregulated fishing activities⁵ conducted by vessels flying its

³ As matters of interpretation and application of the Convention and the United Nations Fish Stocks Agreement will be addressed by the Tribunal, the Secretariat of the United Nations does not consider it appropriate to take a position as to the potential relevance of specific provisions of the Convention or the United Nations Fish Stocks Agreement in the present statement.

⁴ The Convention requires States to cooperate in the conservation and sustainable management of straddling fish stocks, highly migratory fish stocks, anadromous stocks and catadromous stocks.

⁵ The term, "illegal, unreported and unregulated fishing" ("IUU fishing"), is not defined in the Convention or the Agreement. A definition is contained in Part II of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), of the Food and Agriculture Organization of the United Nations (FAO). It is noted that Part II of the IPOA-IUU

flag. However, with regard to the general issue of liability, the Convention stipulates that its provisions regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.⁶

13. The Convention also contains detailed provisions on the settlement of disputes concerning the interpretation or application of the Convention, including compulsory procedures entailing binding decisions. It also sets out limits and exceptions to the applicability of the compulsory procedures entailing binding decisions that may apply to disputes concerning the interpretation or application of the provisions of the Convention with regard to fisheries.

The United Nations Fish Stocks Agreement

14. The United Nations Fish Stocks Agreement implements the provisions of the Convention relating to the conservation and management of straddling stocks and highly migratory fish stocks. In this regard, the United Nations Fish Stocks Agreement elaborates on the principle, established in the Convention, that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone. In particular, the United Nations Fish Stocks Agreement contains a number of specific rights and obligations of both flag and coastal States.

15. States Parties are required to fulfil in good faith the obligations assumed under the United Nations Fish Stocks Agreement and exercise the rights recognized in the Agreement in a manner which would not constitute an abuse of right.

16. The United Nations Fish Stocks Agreement sets out the obligations of the flag State, which may be relevant in cases where illegal, unreported or unregulated fishing activities are conducted in relation to straddling and highly migratory fish stocks within the exclusive economic zone of a coastal State.⁷ In that regard, it may be noted that a table setting out the obligations of flag States pursuant to the various provisions in the Agreement was included in the report of the Consultative Group on Flag State Implementation referred to in paragraph 25 below.

17. Under the United Nations Fish Stocks Agreement, coastal States are, inter alia, required to apply certain general principles in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction. Provisions relating to the precautionary approach and the compatibility of conservation and management measures also apply to the conservation and management of such stocks within areas under national

refers to three distinct fishing activities (“illegal fishing”, “unreported fishing” and “unregulated fishing”).

⁶ In this regard, it can be noted that the International Law Commission adopted articles on the responsibility of States for internationally wrongful acts (see General Assembly resolution 56/83 of 12 December 2001) and articles on the responsibility of international organizations (see General Assembly resolution 66/100 of 9 December 2011).

⁷ The United Nations Fish Stocks Agreement also contains provisions on the obligations of flag States in respect of vessels flying their flag on the high seas relating to compliance and enforcement, which may be relevant to the extent that measures of subregional or regional fisheries management organizations or arrangements apply to fishing in the exclusive economic zone of a coastal State.

jurisdiction, subject to the different legal regimes as provided for in the Convention. The United Nations Fish Stocks Agreement recognizes the special requirements of developing States in relation to conservation and management of straddling and highly migratory fish stocks, including in the development of, and participation in, fisheries for such stocks.

18. The United Nations Fish Stocks Agreement does not explicitly address the issue of the possible liability of a State for illegal, unreported and unregulated fishing activities conducted by vessels flying its flag. However, with regard to the general issue of liability, the United Nations Fish Stocks Agreement provides that States Parties are liable in accordance with international law for damage or loss attributable to them in regard to the Agreement.

19. The United Nations Fish Stocks Agreement sets forth procedures for the peaceful settlement of disputes, which, inter alia, apply the provisions relating to the settlement of disputes contained in the Convention *mutatis mutandis*.

20. A Review Conference was held in 2006 and 2010 to assess the effectiveness of the United Nations Fish Stocks Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks. At these meetings, recommendations were adopted relating to, inter alia, the conservation and management of stocks, and monitoring, control and surveillance and compliance and enforcement.⁸

Resolutions of the General Assembly

21. Over the past 20 years, the General Assembly adopted a number of resolutions on fisheries issues.⁹ For example, resolution 49/116 of 19 December 1994, specifically addressed unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas. In its most recent resolution on sustainable fisheries, resolution 67/79 of 11 December 2012, the General Assembly addressed the rights and duties of flag States and coastal States with respect to the conservation and management of living marine resources. The resolution includes measures to, inter alia, prevent, deter and eliminate illegal, unreported and unregulated fishing; achieve sustainable fisheries; strengthen the implementation of the United Nations Fish Stocks Agreement; improve monitoring, control and surveillance and compliance and enforcement; and enhance subregional and regional cooperation.

22. For example, in resolution 67/79, the General Assembly urged States to exercise effective control over their nationals, including beneficial owners, and vessels flying their flag, in order to prevent and deter them from engaging in illegal, unreported and unregulated fishing activities or supporting vessels engaging in such activities and to facilitate mutual assistance to ensure that such actions can be investigated and proper sanctions imposed. It also called upon States not to permit vessels flying their flag to engage in fishing on the high seas or in areas under the national jurisdiction of other States, unless duly authorized by the authorities of the States concerned and in accordance with the conditions set out in the authorization. With regard to access agreements and arrangements, the General Assembly requested distant-water fishing nations, when negotiating with developing coastal States, to do so on an equitable and sustainable basis, to take into account the legitimate expectation of

⁸ See http://www.un.org/depts/los/convention_agreements/review_conf_fish_stocks.htm.

⁹ See http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm. It should be noted that the resolutions of the General Assembly on fisheries issues have usually been adopted without a vote.

the developing coastal States to fully benefit from the sustainable use of the natural resources of the exclusive economic zone, and to ensure that vessels flying their flag comply with the laws and regulations of the developing coastal States adopted in accordance with international law.

23. The General Assembly also adopted resolutions endorsing the outcomes of the major conferences on sustainable development, which addressed illegal, unreported and unregulated fishing. For example, in resolution 66/288 of 27 July 2012, the General Assembly endorsed the outcome document of the United Nations Conference on Sustainable Development, entitled “The future we want”. In that outcome document, Member States of the United Nations, *inter alia*, recommitted to eliminate illegal, unreported and unregulated fishing as advanced in the Johannesburg Plan of Implementation; to prevent and combat these practices, including by developing and implementing national and regional action plans, implementing effective and coordinated measures by identifying vessels engaged in such fishing and by depriving offenders of the benefits accruing from it; and to cooperate with developing countries to systematically identify needs and build capacity, including support for monitoring, control, surveillance, compliance and enforcement systems.¹⁰

Reports of the Secretary-General

24. Pursuant to the requests of the General Assembly, the Secretary-General reports on fisheries issues, including by describing the measures taken by States to implement the provisions of the Convention and the United Nations Fish Stocks Agreement and relevant General Assembly resolutions.¹¹ For example, in 1995, the Secretary-General focused his report on unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world’s oceans and seas, pursuant to a request by the General Assembly in resolution 49/116 of 19 December 1994.¹² The Secretary-General also prepared reports for submission to the Review Conference on the United Nations Fish Stocks Agreement.¹³

25. In addition, in 2004, the Secretary-General reported on the outcome of the Consultative Group on Flag State Implementation, an inter-agency task force formed by the Secretary-General in response to calls for an investigation into the causes of the failure of some vessels to conform to international requirements regarding ship safety, labour conditions, fisheries conservation and protection of the marine environment (A/59/63 and Corr.1). The Group, comprising the International Maritime Organization, the International Labour Organization, the Food and Agriculture Organization of the United Nations, the United Nations Environment Programme, the United Nations Conference on Trade and Development, the Organization for Economic Cooperation and Development and the United Nations, met in May 2003 to discuss the issues and each agreed to contribute to the report of the Secretary-General, outlining studies undertaken and measures adopted to address flag State implementation of international obligations. The report includes tables setting out flag State obligations in the Convention, the United Nations Fish Stocks Agreement and a broad range of other international instruments. The General Assembly, in its resolution 59/24 of 17 November 2004, welcomed the report of the Consultative Group on Flag State Implementation, and invited all concerned organizations to disseminate it widely.

¹⁰ The future we want, General Assembly resolution 66/288, annex, paragraph 170.

¹¹ See www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

¹² A/50/549.

¹³ See A/CONF.210/2006/1 and Corr.1 and A/CONF.210/2010/1.