

Written Statement of the Democratic Socialist Republic of Sri Lanka

**The International Tribunal for the Law of the Sea
Case No. 21**

**REQUEST FOR AN ADVISORY OPINION
SUBMITTED BY THE SUB-REGIONAL FISHERIES
COMMISSION (SRFC)
(REQUEST FOR ADVISORY OPINION
SUBMITTED TO THE TRIBUNAL)**

**Written Statement of the
Democratic Socialist Republic of Sri Lanka**

18th December 2013

Chapter 1 – Request for an Advisory Opinion

1. On 28 March 2013, the International Tribunal for the Law of the Sea received a request from the Sub-Regional Fisheries Commission (SRFC) to render an Advisory Opinion. The SRFC is located in Dakar, Senegal and comprises seven member states: Cape Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. In a resolution adopted during its fourteenth extraordinary session (25-29 March 2013), the Conference of Ministers of the SRFC authorized the Permanent Secretary of the SRFC “to seize the International Tribunal for the Law of the Sea [...] in order to obtain its advisory opinion on the following matters:
 - a. 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?
 - b. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
 - c. 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?
 - d. 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. The Advisory Opinion has been entered in the List of cases of the International Tribunal for the Law of the Sea as Case No. 21. Pursuant to article 138 of its Rules, the Tribunal may give 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 an opinion.
3. By a Note Verbale dated 8 April 2013, pursuant to article 133, paragraph 1, of the Rules of the Tribunal, the Registrar gave notice of the request for an advisory opinion to the States Parties to the United Nations Convention on the Law of the Sea.
4. The Tribunal in accordance with article 133, paragraph 3, of the Rules of the Tribunal, requested the States Parties to the Convention, the SRFC and the other

organizations referred to above to present written statements on the questions submitted to the Tribunal for an advisory opinion.

5. The Tribunal in accordance with article 133, paragraph 3, of the Rules of the Tribunal, has given 29th November 2013 as the time-limit within which written statements may be presented to the Tribunal.

Chapter 2 – Jurisdiction

6. Article 138, paragraph 1, of the Tribunal's Rules states that it "may give 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 an opinion."
7. According to the above provision for the Tribunal to exercise its jurisdiction requires it to find (1) that the advisory opinion needs to be expressly authorized by an international agreement related to the purposes of the Convention, and (2) that the request sets forth legal questions within the meaning of Article 138. In 2012 the SRFC Member States entered into 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 (the MCA Convention). This is an agreement that regulates fishing activities within the 200-nautical-mile Exclusive Economic Zones (EEZs) of SRFC Member States. This includes provisions relating to IUU fishing. The 2012 MCA Convention, which repeals and replaces a 1993 treaty that also regulated fishing activities within the maritime areas of SRFC Member States, relates to the purposes of the United Nations Convention on the Law of the Sea 1982 (hereinafter referred to as UNCLOS), which addresses the conservation and management of living resources within the EEZ (Articles 61-64) and on the high seas (Articles 116-119). Further, the 2012 treaty expressly mandates the SRFC Conference of Ministers to authorize the submission of a request for an advisory opinion to the Tribunal.

Chapter 3 – Submissions on the First and Second Legal Questions

3.1 First Legal Question

8. The first question states 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 Zone of third party States?

9. Under the UNCLOS, coastal States bear primary responsibility for the conservation and management of living resources within the EEZ. On the high seas, regional fisheries management organizations (RFMOs) play significant role. As far as UNCLOS is concerned, the coastal State has sovereign rights for the purposes of conserving and managing the living resources within its EEZ (Article 56(1)(a)) and is authorized to board, inspect, and arrest vessels engaged in IUU fishing in violation of its laws (Article 73(1)). The coastal State, in this regard, must also determine catch limits for its EEZ to avoid over-exploitation (Article 61) and promote "optimum utilization" by giving third States access to the excess "allowable catch" (Article 62). As far as Article 62 is concerned, further provides that nationals of third States who fish within the EEZ shall comply with the applicable laws and regulations of the coastal State and authorizes the coastal State to undertake "judicial proceedings" to ensure such compliance.
10. It is observed that Article 94 of UNCLOS gives primary responsibility to flag States to ensure the seaworthiness of vessels, safe navigation, and acceptable labor conditions.
11. Sri Lanka is of the firm opinion that this advisory opinion must clarify whether the exercise of Article 91 through the duty-compliance standards set through Article 94 for flag states, can be used to cause harm by series of persistent acts and/or omissions from the flag state to the coastal state's EEZ thereby causing harm to provisions in Part V, which in turn prevents the coastal state achieving the objectives of Article 192 and other UNCLOS provisions.

12. The question here is whether the ITLOS can state that article 91 and 94 is a right *simpliciter* which does not carry any obligations for reparation by the flag state when a series of *persistent acts and/or omissions from the flag state* is present. If the ITLOS interprets *Saiga* principle beyond its context then, it may silence or subordinate the other provisions of the UNCLOS, like Part V. Sri Lanka does not believe that provisions in Part V read with Article 192 should be subordinated to Article 94, especially read in the context with the "responsibility doctrine" enunciated in the Seabed Disputes Chamber Advisory Opinion in 2011.
13. Sri Lanka also believes that in the event of a conflict between the exercise of Article 94 and Part V, liability for a flag state should arise like the same way the coastal state is responsible for damages caused to a vessel. If one is to assert that there is no liability or state responsibility for the flag state in the exercise of their flag state responsibilities over a vessel, then it also follows that the coastal state shall not be responsible in the exercise of their rights under Part V for a vessel of a flag state (which always take-up the cause of a vessel) in arrests and detentions.
14. Within an EEZ, States Parties are required to have "due regard" to the rights of the coastal State and to comply with the laws and regulations adopted by the coastal State in accordance with the Convention (Article 58(3)). On the high seas, States Parties have "the right for their nationals to engage in fishing" subject to other treaty obligations and the rights, duties, and interests of coastal States (Article 116). States Parties also have a duty to co-operate with other States regarding high seas fisheries (Articles 117-118). Where a flag State has failed to prevent IUU fishing by not taking reasonable measures to prevent such conduct, these provisions may provide a basis for the coastal State to invoke the international responsibility or liability of the flag State.
15. Under Article 58(3) of the UNCLOS which comes under part 5 dealing with the EEZ it is expressly stated that third states should comply with the laws and regulations of the coastal state made in accordance with the convention. Article 97(3) of the UNCLOS states that "no arrest or detention of the ship, even as a measure of investigation shall be ordered by any authorities other than those of the flag state." Therefore it is implicit that the responsibility of the flag state is not confined to the provisions contained in Article 94 of the UNCLOS.

16. The 1995 U.N. Agreement on Straddling Fish Stocks lays down that the flag State must ensure that vessels flying its flag do not undermine the effectiveness of conservation and management measures on the high seas.
17. The Tribunal should take note of the extent to which "soft law" instruments have been incorporated into State practice. UN General Assembly Resolution 62/177 (2008) urges States to exercise "effective control" over vessels flying their flag "to prevent and deter" IUU fishing. In February 2013, an FAO-led consultative process resulted in the publication of the Voluntary Guidelines for Flag State Performance, which lists flag State responsibilities relating to IUU fishing. The SRFC itself referred to the FAO 2001 International Plan of Action to Prevent, Deter and Eliminate IUU Fishing in explaining its request. State practice under RFMO agreements can also be taken into account. The first question posed by the SRFC hence raises issues of treaty interpretation, the development of customary norms, and State responsibility, which are relevant for the instant case.

3.2 Second Legal Question

15. The Second question states 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 second question, which might benefit from clarification in the course of proceedings, asks to what extent flag States can be held liable for IUU fishing by their vessels. The SRFC might ask the Tribunal to address the consequences for the flag State of a breach of the obligations identified in response to the first question, including potential remedies. The question could also lead the Tribunal to consider the distinction between the responsibility of the flag State for internationally wrongful conduct relating to IUU fishing and the notion of international liability arising from the harm caused by the failure of a vessel to comply with the laws and regulations of the coastal State (which do not themselves necessarily impose obligations on the flag State).
17. The Republic of Sri Lanka is of the view that it is obligatory on the part of the Flag States to take all possible steps to ensure that ships flying their flags do not

conduct IUU fishing in the EEZs of 3rd party states. It is also of the view that a breach of this obligation should attract liability on the Flag State.

18. As reiterated above, Sri Lanka is of the firm opinion that this advisory opinion must clarify whether the exercise of Article 91 through the duty-compliance standards set through Article 94 for flag states, can be used to cause harm by series of persistent acts and/or omissions from the flag state to the coastal state's EEZ thereby causing harm to provisions in Part V, which in turn prevents the coastal state achieving the objectives of Article 192 and other UNCLOS provisions. The question here is whether the ITLOS can state that article 91 and 94 is a right *simpliciter* which does not carry any obligations for reparation by the flag state when a series of *persistent acts and/or omissions from the flag state* is present. If the ITLOS interprets *Saiga* principle beyond its context then, it may silence or subordinate the other provisions of the UNCLOS, like Part V. Sri Lanka does not believe that provisions in Part V read with Article 192 should be subordinated to Article 94, especially read in the context with the "responsibility doctrine" enunciated in the Seabed Disputes Chamber Advisory Opinion in 2011.

Chapter 4 – Conclusion

19. Sri Lanka is of the firm opinion that this advisory opinion must clarify whether the exercise of Article 91 by duty-compliance standards set through Article 94 for flag states can be used to cause harm by series of persistent acts and/or omissions from the flag state to the coastal state's EEZ thereby causing harm to Article 61 and other provisions in Part V, which in turn prevents the coastal state achieving the objectives of Article 192 and other UNCLOS provisions.
20. Therefore, in response to the above two questions, Sri Lanka takes the view that State responsibility and international liability attracts liability to the flag State for series of acts and omissions.

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