

Written Statement of the Kingdom of the Netherlands

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

14 March 2014

1 Introduction

- 1.1 The present Written Statement - on the statements made in respect of the questions submitted to the International Tribunal for the Law of the Sea ('ITLOS') in the request for an advisory opinion by the Sub-Regional Fisheries Commission ('SRFC') - serves to highlight several specific issues that the Kingdom of the Netherlands deems of particular relevance for the development of the Tribunal's reply to those aspects of the questions that relate to the responsibility of States for internationally wrongful acts. In particular, this Written Statement addresses the question to what extent the flag State is liable for illegal, unreported and unregulated ('IUU') fishing activities conducted by ships flying its flag.
- 1.2 It is useful at the outset to clarify the Netherlands' understanding of the terms 'responsibility' and 'liability', as the latter term is used in the questions posed in the request by the SRFC. In its Advisory Opinion in Case No. 17, the Seabed Disputes Chamber of the ITLOS established that, in the context of articles 139 and 235, and Annex III, article 4, of the United Nations Convention on the Law of the Sea ('UNCLOS') concerning activities in the Area, the term 'responsibility' refers to primary obligations and the term 'liability' to secondary obligations, i.e. the consequences of a breach of the primary obligation (*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, Seabed Disputes Chamber, paragraphs 64 - 71). This use of the terms seems also appropriate in relation to the questions in the present request.

2 Flag State obligations in cases where IUU fishing activities are conducted by ships flying its flag

- 2.1 The first question submitted to the Tribunal 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 Zone of third party States?

- 2.2 The answer to this question requires the identification and interpretation of the provisions in the relevant instruments that concern the responsibility of the flag State for IUU fishing activities conducted by ships flying its flag.
- 2.3 In paragraphs 30 – 42 of its Written Statement, the European Commission ('Commission') sets out the obligations of the flag State under the relevant binding and non-binding instruments: the United Nations Convention on the Law of the Sea ('UNCLOS'), the United Nations Fish Stocks Agreement ('UNFSA'), the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ('FAO Compliance Agreement'), the 1995 FAO Code of Conduct for Responsible Fisheries ('the Code'), and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ('IPOA-IUU').
- 2.4 The Commission notes that under the UNCLOS the flag State has a general duty to effectively exercise jurisdiction and control over vessels flying its flag in accordance with

article 94. In addition, it notes that the flag State has a general duty of cooperation.

2.5 The Commission further observes that several instruments elaborate the duties of the flag State for ‘fishery activities’, of which the following provisions are illustrative.

Article 18 (1) of the UNFSA provides that

“a State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.”

Likewise, article III (1)(a) of the FAO Compliance Agreement states that

“each Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.”

Furthermore, article 18 (2) of the UNFSA states that

“a State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.”

Article 18 (3) of the UNFSA then lists a number of measures to be taken by the flag State in respect of ships flying its flag. For instance, article 18 (3)(b)(iv) provides that the flag State shall establish regulations “to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States”. Finally, article 19 UNFSA, which concerns compliance and enforcement by the flag State, states that

“a State shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks.”

2.6 It follows from the above that the flag State is obliged to take various measures that amount to both regulatory and enforcement duties. These duties are partly limited to the high seas and partly apply in areas under the jurisdiction of other States. The flag State must adopt laws and regulations and take administrative measures to secure compliance therewith. However, the wording used in the provisions, such as the phrase ‘take such measures as may be necessary to ensure’, indicates that the obligations focus on the action to be taken rather than on the result of such action. In this connection, the Seabed Disputes Chamber observed that

“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)”

(Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, Seabed Disputes Chamber, paragraph 112).

2.7 It appears therefore that the responsibility of the flag State for compliance by ships flying its flag with its international obligations is not absolute, but depends on the efforts of the flag State to secure such compliance: it is an obligation of due diligence. In *Pulp Mills on the River Uruguay*, the International Court of Justice defined the obligation to act with due diligence as

“an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, paragraph 197)

This view is also found in article 3 of the International Law Commission’s Articles on Prevention of Transboundary Harm from Hazardous Activities. This article lays down that the State of origin of the activities involving a risk of causing transboundary harm “shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”. The Commentary to the Articles clarifies that “the obligation of the State of origin to take preventive or minimization measures is one of due diligence” and that “the standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.” (*Yearbook of the International Law Commission, 2001*, vol. II, Part Two, paragraphs 7 and 11). See in this respect also the International Law Commission’s Commentary on article 7 of its Articles on the Law of the Non-Navigational Uses of International Watercourses (*Yearbook of the International Law Commission, 1994*, vol. II, Part Two, article 3, paragraphs 1 - 18).

2.8 The provisions in the relevant instruments pertaining to responsibility of flag States in the context of fisheries fit the above descriptions: not a concrete result is owed by the flag State, but rather the exercise of due diligence. A due diligence obligation requires States to take ‘effective measures’ of a legislative, administrative, or juridical nature to prevent legally protected interests of third States from being harmed by the acts of State and non-State actors. “The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.” (*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, paragraph 117). With regard to the determination of the standard of due diligence in relation to ‘fishery activities’, the Tribunal may be guided by *Pulp Mills on the River Uruguay*.

3 The extent of flag State liability for IUU fishing activities conducted by vessels flying its flag

3.1 The second question submitted to the Tribunal reads as follows:

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

3.2 The answer to the second question requires the identification and, as necessary, interpretation of the rules on liability of the flag State for failure by ships flying its flag to comply with its obligations elaborated in reply to the first question. The UNCLOS does not contain any specific rules on liability for 'fishery activities'. Article 304 of the UNCLOS however provides that "the provisions of this Convention 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." Likewise, article 35 of the UNFSA provides that "States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this agreement."

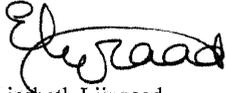
3.3 Under customary international law, every internationally wrongful act of a State entails the international responsibility of that State (Articles on Responsibility for Internationally Wrongful Acts, UN Doc. A/Res/56/83, Annex, article 1). There is an internationally wrongful act of a State when conduct consisting of an action or omission: a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the State (article 2). The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, which includes any damage that may have been caused by the internationally wrongful act (article 31).

3.4 In the exclusive economic zone ('EEZ'), the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources. IUU fishing activities by a ship flying the flag of a State conducted in the EEZ of another State constitute a breach of an international obligation owed to the coastal State in question. However, in order for the breach to constitute an internationally wrongful act it must be attributable to the flag State.

3.5 IUU fishing activities are normally carried out by natural or juridical persons. The UNCLOS directly addresses these persons in article 62 (4) which states that "nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State." In principle, conduct of natural or juridical persons under the jurisdiction of a State is not as such attributable to that State (See commentary of the International Law Commission on Chapter II of the Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, vol. II, Part Two, at 38, paragraph 3). Accordingly, the flag State cannot be held directly responsible for IUU fishing activities conducted by ships flying its flag. In relation to 'fishery activities', in order to comply with its international obligations, it has the responsibility to ensure that ships flying its flag do not conduct IUU fishing activities. This is a due diligence obligation for the breach of which the flag State bears responsibility.

4 Submissions

The Kingdom of the Netherlands submits that the flag State can only be held liable for IUU fishing activities conducted by ships flying its flag if it has not exercised due diligence in complying with its international obligations in relation to 'fishery activities'.



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