

Further *Amicus Curiae* brief from WWF International, submitted on 14 March 2014



In 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)

FURTHER *AMICUS CURIAE* BRIEF ON BEHALF OF WWF INTERNATIONAL

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14 March 2014

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*WWF Further Amicus Brief***Introduction**

1. WWF much appreciates the decision of the Registry to place its initial *amicus curiae* brief on the website of the Tribunal. WWF notes that the President of the Tribunal, by means of an Order dated 20 December 2013, decided that “States Parties to the Convention and intergovernmental organizations having presented written statements may submit written statements on the statements made”. Although WWF is aware that it is not directly covered by the invitation issued by the Tribunal’s President, it would nonetheless like to submit a second *amicus curiae* brief on the statements made by others and hereby does so. This brief is supplementary to WWF’s initial *amicus curiae* brief. It concerns only two matters, both triggered by the statements made by others. The first concerns the management of shared stocks. The second concerns the responsibility of States in respect of their nationals.

The management of shared stocks

2. Question 4 relates to coastal States’ obligations. It reads as follows:

“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?”
3. One of those obligations is that set out in article 63.1 of the 1982 United Nations Convention on the Law of the Sea (the “Convention”), which reads as follows:

“Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.”
4. Of the States and international organisations that have responded to Question 4, several mention article 63.1. However, few go into any detail on the meaning of this

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provision. In WWF's submission, it is essential to elaborate on the meaning of article 63.1, as this provision is highly relevant in the context of stocks of small pelagic fish species – and small pelagic species are mentioned specifically in Question 4.

5. Article 63.1 has been relatively neglected in the literature on Part V of the Convention. Contrasting the attention given over the years to straddling stocks with that given to shared stocks, Churchill¹ states that:

“There is no specific mention of shared stocks in Agenda 21 or in the Plan of Implementation adopted at the World Summit on Sustainable Development held at Johannesburg in 2002, nor have there been any high profile political disputes over such stocks (at least with a more than local attention). There has also been much less discussion of shared stocks than of straddling stocks in the academic literature. This lack of attention to the issue of shared stocks is regrettable. The limitations of article 63(1) of the [Convention] are as great as those of article 63(2), and the management in practice of shared stocks, which are almost certainly more important in terms of size of catch and fishing effort than straddling stocks, has frequently been less than adequate.”

6. In view of the relevance of article 63.1 in the context of Question 4, the Tribunal now has an opportunity to elaborate on the meaning of this provision. WWF respectfully requests that the Tribunal seizes this opportunity and, by doing so, helps States to understand the nature and content of their obligation.
7. There are several elements to article 63.1, discussed in turn below.
8. **Firstly**, the provision relates to “the same stock or stocks of associated species”. In WWF's submission, this means that the material scope of the provision includes

¹ R.R.Churchill, The management of shared fish stocks: the neglected “other” paragraph of article 63 of the UN Convention on the Law of the Sea, Chapter 1 in: A.Strati, M.Gavouneli and N.Skourtos (eds.), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After*, Martinus Nijhoff Publishers, Leiden/Boston, 2006.

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either a particular stock or, in the case of associated species, a group of stocks. There is no requirement for the species concerned to be finfish; for example, the species concerned could be shellfish.

9. **Secondly**, the stock must “occur” within the exclusive economic zones of two or more coastal States. The word “occur” is neutral in nature. Thus it could encompass a stock that was not migratory but lived in a space that spanned an inter-State boundary; or, alternatively, it could encompass a stock that migrated across the boundary.
10. **Thirdly**, the States concerned are not under a duty to agree. Instead, they are under a duty to “seek ... to agree”. The words themselves imply that this is a duty of conduct. WWF submits that it is in turn a duty of due diligence. Adapting the content of paragraph 110 of the *Seabed Mining Advisory Opinion* to coastal States, the coastal States’ duty to “seek ... to agree” is an obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”. What is more, in line with article 300 of the Convention, coastal States must fulfil their obligation to “seek ... to agree” in good faith.
11. **Fourthly**, the duty to seek to agree is to be effected “either directly or through appropriate subregional or regional organizations”. WWF submits that the Commission Sous-Régionale des Pêches (“CSRP”) is an example of a subregional organisation as referred to in article 63.1.
12. **Fifthly**, the thing that States must seek to agree on is “the measures necessary to coordinate and ensure the conservation and development of such stocks”. Thus “measures” are the intended outcome of any agreement. Such measures must be “necessary” to “coordinate and ensure” two things, namely stock “conservation” and stock “development”.

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13. The concept of stock “development” is referred to in the Convention only in article 63.1. On the meaning of “development” as used in article 63.1, Nandan *et al.*² state that:

“The reference to the “development” of transboundary stocks relates to the development of those stocks as fishery resources. This includes increased exploitation of little-used stocks, as well as improvements in the management of heavily-fished stocks for more effective exploitation. Combined with the requirement in article 61 of not endangering a given stock by overexploitation, this envisages a long-term strategy of maintaining the stock as a viable resource.”

14. It is not entirely clear how Nandan *et al.* derived their interpretation of the word “development” in article 63.1. That said, WWF supports their interpretation that article 63.1 in combination with article 61 “envisages a long-term strategy of maintaining the stock as a viable resource”. WWF submits that any “development” should ensure conservation, not least because article 63.1 refers to “conservation and development” rather than the other way round. WWF further submits that “development” should entail stock restoration where necessary. This may be what is meant by Nandan *et al.* when they refer to making “improvements in the management of heavily-fished stocks for more effective exploitation”.
15. **Lastly**, the duty set out in article 63.1 is without prejudice to the other provisions of Part V of the Convention. In WWF’s submission, that means that the article 63.1 duty does not detract from the conservation obligations set out in, in particular, articles 61 and 62 of the Convention – including the duty in article 61.2 to “ensure ...that the

² S.N.Nandan, S.Rosenne and N.R.Grandy, *United Nations Convention on the Law of the Sea 1982—A Commentary*, Volume II, Martinus Nijhoff Publishers, Dordrecht, 1993, p.647, para.63.12(b).

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maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation”.

16. Beyond its reference to “the measures necessary to coordinate and ensure the conservation and development of such stocks”, article 63.1 lacks detail on what measures States must seek to agree upon. However, the Code of Conduct for Responsible Fisheries published by the Food and Agriculture Organization of the United Nations (“FAO”) provides some assistance. The following provisions are particularly relevant:

- “7.1.3 For transboundary fish stocks ..., where these are exploited by two or more States, the States concerned ... should cooperate to ensure effective conservation and management of the resources. This should be achieved, where appropriate, through the establishment of a bilateral, subregional or regional fisheries organization or arrangement.”
- “7.3.1 To be effective, fisheries management should be concerned with the whole stock unit over its entire area of distribution and take into account previously agreed management measures established and applied in the same region, all removals and the biological unity and other biological characteristics of the stock. The best scientific evidence available should be used to determine, *inter alia*, the area of distribution of the resource and the area through which it migrates during its life cycle.”
- “7.3.2 In order to conserve and manage transboundary fish stocks, ... conservation and management measures established for such stocks in accordance with the respective competences of relevant States or, where appropriate, through subregional and regional fisheries management organizations and arrangements, should be compatible. Compatibility should be achieved in a manner consistent with the rights, competences and interests of the States concerned.”

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“12.17 States, either directly or with the support of relevant international organizations, should develop collaborative technical and research programmes to improve understanding of the biology, environment and status of transboundary aquatic stocks.”

17. WWF notes that the FAO has been active on the subject of shared stocks in terms of running workshops and commissioning reports. In particular, over the period 2002 to 2004, the FAO published various reports on the subject. WWF would like to draw the attention of the Tribunal to these reports, as follows:

- (1) FAO, “Report of the Workshop on the Management of Shared Small Pelagic Fishery Resources in Northwest Africa, Banjul, Republic of the Gambia, 30 April–3 May 2002”
FAO Fisheries Report No. 675 (FIRM/R675), Rome, FAO, 2002, 35pp.
<http://www.fao.org/docrep/005/y4102B/y4102b01.htm>
- (2) FAO, “Report of the Norway–FAO Expert Consultation on the Management of Shared Fish Stocks, Bergen, Norway, 7–10 October 2002”
FAO Fisheries Report No. 695 (FIPP/R695), Rome, FAO, 2002, 34pp.
<ftp://ftp.fao.org/docrep/fao/005/y8173e/y8173e00.pdf>
- (3) FAO, “Papers presented at the Norway–FAO Expert Consultation on the Management of Shared Fish Stocks, Bergen, Norway, 7–10 October 2002”
FAO Fisheries Report No. 695, Supplement (FIPP/R695 (Suppl.)), Rome, FAO, 2003, 240pp.
<http://www.fao.org/docrep/006/y4652e/y4652e00.htm>

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- (4) D. Owen, “Legal and Institutional Aspects of Management Arrangements for Shared Stocks with Reference to Small Pelagics in Northwest Africa”
FAO Fisheries Circular No. 988 (FIRM/C988), Rome, FAO, 2003, 258pp.
<http://www.fao.org/docrep/006/y4698b/y4698b01.htm>
- (5) G. Munro, A. Van Houtte and R. Willmann, “The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects”
FAO Fisheries Technical Paper 465, Rome, FAO, 2004, 67pp.
<http://www.fao.org/docrep/007/y5438e/y5438e00.htm>

18. WWF notes that the CSRP, in its written statement, makes some interesting observations about cooperation between coastal States. For example:

- p.16: “Small pelagics species and tuna are migratory species that concentrate seasonally, depending on the environmental conditions, in the waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management. It has to be highlighted that, in general, the concerned States do not consult each other when setting up management measures on those resources. In fact, these pelagic resources are subject to fishing authorization through fishing agreement signed between the coastal State and foreign companies without consultation with neighbouring coastal States that are along the migration routes of those resources.”
- p.17: “... some Member States [of the CSRP] continue to act in isolation, issuing fishing licenses on the shared resources, thereby undermining the interests of neighbouring States and the initiatives of the [CSRP].”
- p.17: “Today, the practice shows the lack of cooperation among [CSRP] Member States in managing sustainably the stocks of

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common interest or shared stocks. As part of the efforts to harmonize the fishing policies, the [CSRP] Member States considered it important to establish a sub-regional instance on cooperation for management of shared stocks or stocks of common interest. This body has a purely advisory mandate.”

p.17: “The Tribunal could, as part of the advisory opinion it will issue, bring clarifications on the rights and duties of the coastal State in the sustainable management of shared stocks or stocks of common interest. Indeed these rights and obligations need to be clarified by international law.”

p.70: “... an examination of the situation of fisheries in the [CSRP] area ... shows that pelagic fisheries, especially small pelagic fish (sardines, mackerel, mullet) are the species the most valued in the sub-region as they contribute to the fight against poverty and to the animal protein intake of the population. However, there is recognition that these pelagic resources are subject to fishing agreements between the coastal State and foreign companies without consultation with neighbouring coastal States on whose territories these species are migrating.”

19. Overall, it is WWF’s submission that article 63.1 is an important, but neglected, provision that deserves more attention. WWF would respectfully encourage the Tribunal to use the opportunity of the Advisory Opinion proceedings to elaborate on its meaning with a view to achieving sustainable management of shared stocks. Although the obligation in article 63.1 amounts to a duty to seek to agree, rather than to reach agreement, WWF submits that this duty should be fulfilled in good faith and using due diligence. The measures that coastal States are required to seek to agree upon are those “necessary to coordinate and ensure the conservation and development” of shared stocks. According to the FAO Code of Conduct for Responsible Fisheries (see above), one particular element of coordination should be

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compatibility between coastal States' respective measures. In WWF's submission, any "development" under article 63.1 should ensure conservation and should entail restoration where necessary. And, in any event, the article 63.1 duty does not detract from the conservation duties in article 61 and 62, including the duty in article 61.2 to "ensure ... that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation".

20. More generally, WWF reiterates its submission already set out in its first *amicus curiae* brief (in paragraph 98) whereby, except to the extent that shared stocks are also straddling stocks or highly migratory stocks and managed as such by a regional or sub-regional fisheries management organisation, coastal States should, pursuant to article 63.1, have a cooperative management arrangement in place between themselves before they issue access permits for the shared stocks – whether to their own fishers or other States. In practical terms, this would mean firstly putting into place such cooperative arrangements, then designing and implementing their proper conservation and management measures, before permitting their own nationals to exploit identified fishing opportunities, or granting other States access to any identified surplus pursuant to article 62.2 of the Convention.

Responsibility of States in respect of their nationals

21. WWF observes that New Zealand, in the part of its written statement that addresses Question 1, has stated (at paragraph 33) that:

“New Zealand considers that States ... have a responsibility to exercise effective control over their nationals, including the beneficial owners or operators of vessels, in order to prevent and deter them from engaging in IUU fishing.”

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22. WWF accepts that Question 1 relates only to flag States rather than States of nationality. However, WWF would like to use this opportunity to support the standpoint of New Zealand and to respectfully invite the Tribunal to elaborate as far as it feels able on the obligations of States of nationality. By “nationals” in this instance, WWF means natural and legal persons, such as companies owning, operating or chartering fishing vessels and individuals who are officers or members of the crew of fishing vessels.
23. In WWF’s submission, two particular provisions of the Convention are relevant in this respect, namely article 58.3 and article 94. Article 58.3 states that:
- “In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”
24. Article 94 is located in Part VII of the Convention, and Part VII deals with the high seas. However, by virtue of article 58.2, article 94 is applicable to the exclusive economic zone “in so far as [it is] not incompatible” with Part V of the Convention. (Part V deals with the exclusive economic zone.) Article 94 states, *inter alia*, that:
- “1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
 2. In particular every State shall ... assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.”

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25. In addition, article 62.4 of the Convention, which relates to the granting by a coastal State to other States of access to fisheries in the exclusive economic zone, 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. These laws and regulations shall be consistent with this Convention ...”
26. Although article 62.4 refers to “[n]ationals”, WWF notes that the word as used in article 62.4 has tended to be interpreted to refer to vessels rather than natural or legal persons. However, as State practice changes regarding the role of States of nationality (see further below), WWF submits that there is increasing room for a more expansive interpretation of the word “[n]ationals” as used in article 62.4.
27. WWF submits that article 58.3 and article 94, and potentially also article 62.4, of the Convention help to form a basis in international law for the position that, as New Zealand puts it, “States ... have a responsibility to exercise effective control over their nationals, including the beneficial owners or operators of vessels, in order to prevent and deter them from engaging in IUU fishing”.
28. In its first *amicus curiae* brief, WWF concluded (at paragraph 52) that a flag State has two obligations in respect of the exclusive economic zone of third States. The first is an obligation to ensure that its vessels do not undertake IUU fishing in a foreign State’s exclusive economic zone. The second is an obligation to ensure that its vessels do not participate in a fishery in the exclusive economic zone of another State if that fishery is not properly regulated in conformity with the Convention and other applicable international law.
29. WWF supports New Zealand’s standpoint on nationals. However, WWF submits more specifically that the above two obligations on flag States as referred to in

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WWF's first *amicus curiae* brief apply, *mutatis mutandis*, to States of nationality.

Thus WWF submits that: (a) a State of nationality has an obligation to ensure that its nationals do not undertake IUU fishing in a foreign State's exclusive economic zone; and (b) a State of nationality has an obligation to ensure that its nationals do not participate in a fishery in the exclusive economic zone of another State if that fishery is not properly regulated in conformity with the Convention and other applicable international law.

30. It is WWF's submission that the two duties of the State of nationality referred to above are obligations of conduct and, within that, are obligations of due diligence. As such, in WWF's submission, they are obligations "to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result" (see paragraph 110 of the *Seabed Mining Advisory Opinion*).
31. International support for the role of States of nationality in addressing IUU fishing is growing. Some examples of this growing support are provided below. As noted by Chile in its written statement (at page 6), the 2012 Rio+20 *Future We Want* outcome document stated (at paragraph 170) that:

"We recommit to eliminate illegal, unreported and unregulated fishing as advanced in the Johannesburg Plan of Implementation, and to prevent and combat these practices including through the following: ... implementing – in accordance with international law – effective and coordinated measures by coastal States, flag States, port States and chartering nations *and the States of nationality of the beneficial owners and others who support or engage in illegal, unreported and unregulated fishing* by identifying vessels engaged in such fishing and by depriving offenders of the benefits accruing from it; ..." [Emphasis added]

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32. As noted by the FAO in its written statement (at paragraph 37), the FAO International Plan of Action on IUU Fishing (“IPOA-IUU”) “provides that States should embrace all measures to prevent, deter and eliminate IUU fishing, building on the primary responsibility of the flag State and using jurisdiction in accordance with international law, including port State measures, coastal State measures, market-related measures *and measures to ensure that nationals do not engage in or support IUU fishing*” (emphasis added; citing paragraph 9.3 of the IPOA-IUU).
33. In its written statement, the FAO also noted (at paragraph 38) that “[e]ach State should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction be of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing” (citing paragraph 21 of the IPOA-IUU) and that “States should take measures or cooperate to ensure that *nationals subject to their jurisdiction* do not support or engage in IUU fishing” (emphasis added; citing paragraph 18 of the IPOA-IUU).
34. As noted by New Zealand in its written statement (at paragraphs 34 and 35), regional fisheries management organisations are starting to adopt measures on nationals. New Zealand cites practice by the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) and a relevant provision in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.
35. In conclusion, although WWF accepts that Question 1 relates only to flag States rather than States of nationality, WWF respectfully invites the Tribunal to elaborate as far as it feels able on the obligations of States of nationality. WWF submits to the Tribunal

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that a State of nationality has two obligations in respect of the exclusive economic zone of third States, both of which are obligations of due diligence, namely: (a) to ensure that its nationals do not undertake IUU fishing in a foreign State's exclusive economic zone; and (b) to ensure that its nationals do not participate in a fishery in the exclusive economic zone of another State if that fishery is not properly regulated in conformity with the Convention and other applicable international law.

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