



# TODAY'S NEWS

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## What is Illegal, Unreported and Unregulated (IUU) Fishing?

1) Illegal fishing takes place when vessels or harvesters operate in violation of the laws and regulations governing a fishery. This can apply to fisheries that are under the jurisdiction of a coastal state or to high seas fisheries regulated by regional fisheries management organisations (RFMO).

2) Unreported fishing is fishing that has not been reported or misreported to the relevant national authority or RFMO, in contravention of applicable laws and regulations.

3) Unregulated fishing refers to fishing by vessels without nationality, vessels flying the flag of a country not party to the RFMO governing that fishing area or species on the high seas, or harvesting in unregulated areas.



IUU vessel in the Bahamas—Photo: President Bahamas Fishery Union

## CRFM Contributes to Landmark ITLOS Case 21 on IUU Fishing

By Milton Haughton, Executive Director, CRFM

### Introduction

Illegal, Unreported and Unregulated fishing (IUU fishing) remains a major concern for the international community and for developing countries, in particular, Small Island Developing States and small, vulnerable economies. It disproportionately affects many fisheries on which these States depend for food security, livelihood and trade. For these reasons IUU fishing is a high priority for CRFM Member States because we continue to suffer significant economic losses, damage to our marine environment and flagrant violations of our sovereignty and maritime jurisdiction due to illegal fishing.

Case 21 is about the responsibility of States for IUU fishing. On 28 March 2013, the Sub-Regional Fisheries Commission (SRFC) sought the assistance of the International Tribunal for the Law of the Sea (ITLOS) regarding serious IUU fishing by foreign states within the waters of its members.

The (SRFC) is a regional fisheries body comprised of seven West African States. The Members are Cape Verde, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra

Leone and the Gambia. The objectives of the organization are to strengthen cooperation between Member States and coordination of policies for conservation and exploitation of the fisheries resources in the sub-region; adoption of international best practices; development of policies regarding monitoring, control and surveillance; and development of Members' research capacities in fisheries sciences. The SRFC Members are all developing coastal states that rely on the living marine resources within their exclusive economic zones for employment and food security. But the fish resources within the EEZs of the countries have been the target of significant, sustained IUU fishing activity by distant water fishing nations which has been very difficult for the States to prevent or deter.

## What were the Questions Submitted to ITLOS ?

In order to better understand their legal position and international legal rules regarding IUU fishing, the SRFC sought the Tribunal's advice on the following four questions:

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 Zone of third party States?
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing licence 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? and
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?



*Peter Bekker, CRFM's Counsel and Advocate*

## What was the CRFM's Role in the Case?

On 5 June 2013, ITLOS wrote to the CRFM informing us of the Case and inviting us to submit written statements on the questions under consideration. The CRFM Secretariat secured the services of Harvard University educated Professor Pieter Bekker, Chair of International Law, Dundee University, UK, former Professor, Columbia Law School, USA, former staff lawyer at the ICJ, and a former partner in the international law firm, Steptoe & Johnson LLP, to assist with the preparation of the submission on behalf of the CRFM. Prof. Bekker is currently a Partner at CMS Cameron McKenna LLP, London.

Twenty-nine (29) States and international organisations including the CRFM made written submissions on the Case. In September 2014, Legal Counsel for the CRFM, Professor Bekker, joined representatives of nine (9) countries and organisations in presenting oral arguments before the full Tribunal. The CRFM provided the most comprehensive and detailed analysis of the issues under consideration and highlighted the key questions that the Tribunal needed to consider and the relevant legal rules that should be applied by the Tribunal in providing its legal opinion. Full text of the **CRFM's submission may be downloaded from [www.crfm.int](http://www.crfm.int)**.

ITLOS, which is made up of 21 Judges, including two from the Caribbean, namely, Judge L. Dolliver Nelson (Grenada), and Judge Anthony



*21 Judges of ITLOS (Photo: UN)*

Amos Lucky (Trinidad and Tobago), delivered its advisory opinion on the questions asked on 2 April 2015.

## Jurisdiction of ITLOS

Several States did not want ITLOS to answer the questions and therefore challenged the jurisdiction or competence of the full Tribunal to render the advisory opinion requested. These included Argentina, Australia, China, Ireland, Spain, Thailand, United Kingdom, the United States and the EU (dealt with admissibility only). The Tribunal therefore had to settle the question as to whether or not it was competent to provide the opinion requested. After careful review and analysis of the submissions and the law, the Tribunal rejected the argument against proceeding, and found, by a unanimous decision, that it had jurisdiction and competence to give the advisory opinion requested. The Tribunal held that Article 21 of the Statute establishing the ITLOS, and Article 33 of the treaty establishing the SRFC, which conferred jurisdiction on the Tribunal to provide advisory opinion, constitute the substantive legal basis of the advisory jurisdiction of the Tribunal, and in consequence its jurisdiction was limited to the EEZs of the SRFC Member States. This was consistent with the views of the arguments put forward by the CRFM. The States opposing jurisdiction had also argued that even if the Tribunal had jurisdiction, it should decline to exercise that jurisdiction and hear the Case. The Tribunal also rejected this argument as it could find no compelling reasons why it should decline to give the advisory opinion requested by the SRFC.

Although the Tribunal decided that its jurisdiction was limited to the EEZs of the



Photo— Fisheries Div. Jamaica

*Shark fins and carcasses on board Venezuelan flagged fishing vessel arrested & found guilty of IUU fishing in Jamaica*

## What is important

- ◆ Flag States have a duty to ensure that vessels flying their flag do not conduct IUU fishing within the EEZs of other states,;
- ◆ The obligation of a flag state is an obligation of conduct or due diligence to ensure the vessels flying its flag are not involved in IUU fishing
- ◆ A Flag State must ensure its vessels comply with both the provisions of UNCLOS and the laws and regulations of the coastal States to protect the environment and conserve and manage the fisheries resources within their EEZs
- ◆ The primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State, but this does not discharge the flag State from its responsibilities for IUU fishing
- ◆ SRFC Member States have the obligation to ensure the sustainable management of shared stocks, including to: cooperate to ensure proper management; seek to agree on measures to ensure conservation and management; consult each other when setting up management measures for shared stocks; and in relation to tuna, cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of the tuna

## The CRFM is Working...

The CRFM continues to monitor events on the international scene to be in a position to contribute to global decision making on behalf of its Member States

This is also in keeping with the objective of the Caribbean Community Common Fisheries policy to prevent, deter and eliminate illegal, unreported and unregulated fishing.

It is also consistent with the responsibility to disseminate relevant information to stakeholders to enable them to be familiar with regional and international developments in fisheries .

## IUU Fishing is rampant in the Caribbean



Top to bottom: *Turtle shell, berried and undersized lobsters taken from the Honduran flagged fishing vessel Kristen Marie arrested for IUU fishing in Jamaica. (Photos - courtesy of Fisheries Division, Jamaica)*

SRFC members, it arrived at its decision by relying largely on the rights and duties of States enunciated by UNCLOS. On the basis of this approach and the reasoning used by the Tribunal, it is reasonable to conclude that the advisory opinion has global implications. The obligations and rights of flag States and coastal States enunciated by the Tribunal for the conservation, management and development of the marine living resources would therefore apply equally in other areas apart from the EEZs of the SRFC States, including within the EEZs of Caribbean States.

## Responsibility of States for IUU Fishing

After confirming its jurisdiction, ITLOS then conducted a comprehensive analysis of the duties and responsibilities of flag and coastal States and international organisations concerning fisheries conservation and management, and specifically for IUU fishing, based on international law.

The Tribunal found that as a consequence of the special rights and responsibilities of the coastal State within the EEZ, the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State. In other words, the coastal State must ensure that it has in place laws, regulations and administrative and enforcement capacity to conserve and manage its fishery resources, protect the marine environment and prevent, deter and eliminate IUU fishing.

The Tribunal, however, made it absolutely clear that this would not discharge the flag State from its responsibilities for IUU fishing. The Tribunal clearly established that flag States have a duty to ensure that vessels flying their flag do not conduct IUU fishing within the EEZs of other states, and can be held responsible for such activity if they fail to live up to that duty by taking all the necessary measures to meet their international legal obligations.

More important for present purposes, the Tribunal found that the obligation of a flag state is an obligation of conduct or due diligence to ensure the vessels flying its flag are not involved in IUU fishing. Due diligence responsibility means that the flag state is required to take all necessary measures to ensure its vessels **comply with the coastal States' laws and regulations and do not engage in IUU fishing**. The flag State must therefore deploy adequate resources and do its utmost to stop its fishing vessels from engaging in IUU fishing.

The Tribunal provided further clarification on some of the specific actions that flag States must do to fulfill their due diligence obligations. Thus, a Flag State must ensure its vessels comply with both the provisions of UNCLOS and the laws and regulations of the coastal States to protect the environment and conserve and manage the fisheries resources within their EEZs. The Flag State must adopt measures such as: legislation, regulations, and administrative and enforcement capacity to monitor, regulate and control vessels flying their flag. Furthermore, the flag State must also:

- ◆ Prohibit fishing by its vessels unless they are authorized by the coastal State;
- ◆ Ensure its fishing vessels are properly marked;
- ◆ Ensure that its fishing vessels comply with coastal State fisheries conservation and management measures as well as marine environmental protection measures;
- ◆ Deploy surveillance, monitoring, and enforcement mechanisms to secure compliance with its obligations;

- ◆ Have adequate sanctions in place to deter violations and deprive wrongdoers of the benefits accruing to them from IUU fishing;
- ◆ Investigate reports of IUU fishing submitted by another State and take appropriate action to remedy the situation and inform the reporting State of the action taken; and
- ◆ Cooperate in good faith with other States in addressing cases of alleged IUU fishing

The due diligence obligation is not an obligation to achieve an actual result, that is, to stop all its vessels from engaging in IUU fishing activities. It is an obligation to take all the steps deemed necessary by international law to stop its vessels from engaging in IUU fishing. If the flag state complies with these legal requirements it will not be held responsible for IUU fishing by its vessels. If, however, the flag State fails to take all these necessary measures, it will be held responsible for a breach of its international obligation to prevent its vessels from engaging in IUU fishing.

## Can States be held Liability for IUU Fishing?

An important question that arise is whether and under what circumstances could a State be held liable for IUU fishing by vessels flying its flag. ITLOS found that failure of the flag State to comply with its international legal obligations concerning IUU fishing could indeed lead to liability and the payment of damages to the coastal State for the harm caused. It should however be noted that the flag state would not **be liable because its vessels violate the coastal State's laws and regulation and engage in IUU fishing**. Such wrongful acts on the part of the fishing vessels cannot be attributable to the flag State *per se* and would not necessarily lead to liability. Liability would only arise if the flag State fails to discharge its due diligence responsibility to take the measures necessary to fulfill its international obligations and is therefore in breach of its legal duty. So if the flag State can demonstrate that

## TRADE & IUU Fishing

- ◆ Fish is by far the most highly traded commodity globally.
- ◆ In 2013 international trade in fish was valued at US\$130 billion.
- ◆ Soybeans is the second most highly traded commodity globally with a value of US\$58 billion in 2013.
- ◆ IUU fishers target high value species such as lobster, shrimp, conch, tunas, snappers, groupers and groundfish which fetch high prices on local, regional and international markets



*Facilitating the sustainable use of regional fisheries.*



it has complied with its international obligations and made every effort to prevent its vessels from engaging in IUU fishing, it would not be liable, even if its vessels were found to be engaged in actual IUU fishing.

## Responsibility for Management of Shared Stocks

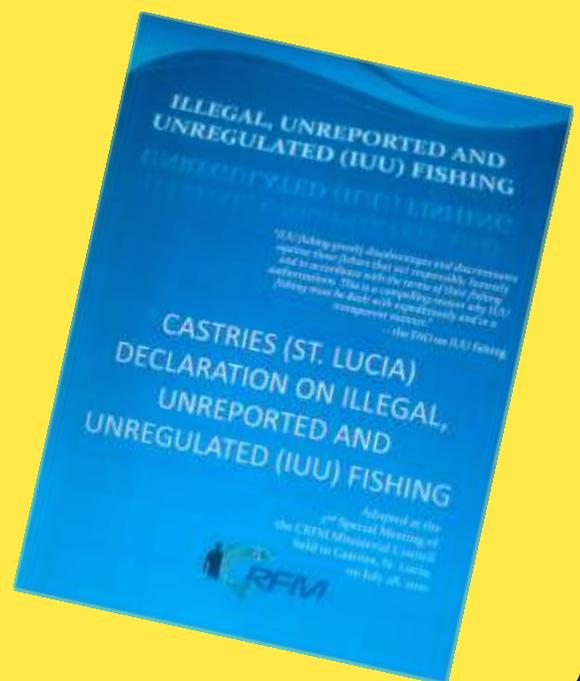
The 4<sup>th</sup> question before the Tribunal dealt with rights and obligations of coastal States for sustainable management of stocks within the EEZs that are shared with other SRFC States or between them and non-Member States fishing in an area beyond and adjacent their EEZs. The species in question include both small pelagic and the tunas that are managed by ICCAT. This subject is of relevance to us in the Caribbean as we have a similar situation to the SRFC States with several shared stocks or stocks of common interest. ITLOS spent considerable time explaining the legal rights and obligations of coastal States regarding these stocks.

The Tribunal first had to determine the meaning of the popular expression “sustainable management” since the term is not defined in UNCLOS. After analyzing the issue, the Tribunal concluded that “sustainable management” meant “conservation and development” as referred to in Article 63(1) of UNCLOS.

ITLOS then found that SRFC Member States have the obligation to ensure the sustainable management of shared stocks, including the obligation to cooperate to ensure proper management; the obligation to seek to agree on measures to ensure conservation and management; the obligation to consult each other when setting up management measures for shared stocks; and in relation to tuna, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of the tunas. The Tribunal emphasized that fishery management measures should concern the whole stock across its entire area of distribution or migration routes, and that co-operation of other States within the range or along the migration routes should be sought. The measures taken for tunas should therefore be consistent and compatible with those taken by ICCAT. But the SRFC Member States have the right to require cooperation from non-member States that fish for tuna in the region.

## CRFM 'S ACTIONS AGAINST IUU FISHING

- 1) In 2010 the CRFM Ministerial Council adopted the Castries Declaration on IUU fishing. It establishes a comprehensive and integrated approach to prevent, deter and eliminate IUU fishing in the region.
- 2) In 2014 the CRFM Ministerial Council approved three policy documents aimed at combating IUU fishing:
  - (a) Regional Strategy on Monitoring, Control and Surveillance to combat IUU fishing in the CARICOM / CARIFORUM Region
  - (b) Fisheries Prosecution Manual for CARIFORUM States
  - (c) Fisheries Enforcement Standard Operating Procedures Manual for CARIFORUM States
- 3) The CRFM took the lead in proposing the establishment of a WECAFC Working Group on IUU Fishing to spearhead dialogue and action at the Wider Caribbean level in combating IUU fishing. This was established in WECAFC in 2014.
- 4) The Caribbean Community Common Fisheries Policy also addresses the issue of IUU fishing.
- 5) In addition to regional efforts, CRFM Member States have invested significant resources in improving monitoring, control and surveillance capacity to fight IUU fishing. For example, the Bahamas has invested US\$200 million in new patrol vessels. Suriname has also invested in new patrol vessels to combat IUU fishing, while Belize has strengthened its laws and regulations against IUU fishing as well as its vessel monitoring system to track its flagged vessels.



## Conclusion

IUU fishing is a priority issue for all CRFM Member States that depend on their marine living resources for food security, employment and foreign exchange earnings.

The CRFM contributed significantly to this Case by way of both written and oral submissions to the Tribunal. The CRFM Ministerial Council maintained a keen interest in the Case from the beginning, recognizing that it could have significant implications and be a game-changer in the fight against IUU fishing.

Based on the reasoning and conclusions of the Tribunal, it is clear that the submissions of the CRFM regarding the jurisdiction of the Tribunal as well as the arguments on the substantive issues before the Tribunal were well received, very persuasive and greatly assisted the Judges in arriving at their final decisions.

This case is a significant development in international law concerning IUU Fishing. It clarifies the jurisdiction of ITLOS to provide Advisory Opinion on matters related to UNCLOS. It provided clarity on the responsibilities of coastal States and flag States for IUU fishing. The flag state may be held liable for damages for IUU fishing if it fails to observe its legal obligations which are set out in detail in the Advisory Opinion and summarized above.

CRFM States are both coastal states and flag states and should carefully examine the implications of their responsibilities in light of the Advisory Opinion.

States and stakeholders that are victims of IUU fishing should start to carefully document the alleged incidence of IUU fishing to collect evidence that may one day be useful in future litigation for damages.



*Jamaican Coast Guard Vessel used for fisheries surveillance and enforcement*

## The Way Forward

Future investment is needed to address weaknesses identified in the region to effectively combat IUU fishing, including the following:

1. Upgrading national legislation and regulations including having adequate sanction to deter IUU fishing.
2. Preparation of National Plans of Action to combat IUU fishing
3. Development of regional agreements on the management and conservation of key species and ecosystems and cooperation on MCS.
4. Improve public awareness and understanding of the economic, ecological and social losses and damage caused by IUU fishing and strengthen policy commitment to combat IUU fishing.
5. Improve public participation in MCS and the fight against IUU fishing.
6. Improved cooperation among Caribbean states and territories in the Wider Caribbean in the fight against IUU fishing
7. Capacity building of enforcement personnel and agencies.
8. Consider the possibility of litigation for continuing IUU fishing from know flag States.



*Facilitating the sustainable use of regional fisheries.*



## ABOUT THE CRFM

The Caribbean Regional Fisheries Mechanism (CRFM) was established following the signing of the “Agreement Establishing the CRFM” on February 4, 2002 by the CARICOM States during the Thirteenth Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community, 3-5 February 2002, Belize City, Belize.

The CRFM is an inter-governmental organization whose mission is to “To promote and facilitate the responsible utilization of the region's fisheries and other aquatic resources for the economic and social benefits of the current and future population of the region”.



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