

STATE RESPONSIBILITY FOR IUU FISHING: A REFLECTION ON THE 2015 ITLOS ADVISORY OPINION ON IUU FISHING AND ITS RELEVANCE TO INDONESIA

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Abstract

Illegal, Unregulated and Unreported (IUU) fishing activities have been widely known as a threat to marine life resources. The International Tribunal for the Law of the Sea (ITLOS) has adopted its advisory opinion on the responsibility and the possible liability of flag States who commit IUU fishing activities in an area under the jurisdiction of the Sub-Regional Fisheries Commission (SRFC). In addition to this opinion, many international scholars and legal instruments have raised the same concern, however the primary source of the Law of the Sea, the United Nations Convention on the Law of the Sea (UNCLOS) remains silent on this matter. The issue is highly relevant to a current case encountered by the Indonesian Government with a Chinese-flagged fishing boat, namely Kway Fey 10078, which was suspected of conducting IUU fishing activities in the Indonesian exclusive economic zone (EEZ). In this particular case, a Chinese coast guard ship assisted the Kway Fey to escape the Indonesian jurisdiction by ramming into Kway Fey 10078. Consequently, the Indonesian Government could not enforce its jurisdiction upon Kway Fey 10078 and the Chinese Government requested Indonesia to release eight Chinese nationals who had been detained. This reaction raises questions about how to provide international legal solutions to deal effectively with IUU fishing activities.

Keywords: IUU fishing, state responsibility, flag state, ITLOS, UNCLOS.

Abstrak

Praktik penangkapan ikan yang tidak sah, tidak dilaporkan dan tidak diatur (IUU fishing) merupakan kegiatan yang mengancam sumber daya hayati laut. Mahkamah Internasional untuk Hukum Laut (ITLOS) telah mengeluarkan rekomendasi terkait tanggung jawab negara bendera yang diduga melakukan praktek IUU fishing di wilayah yurisdiksi negara anggota SRFC. Selain itu, ahli hukum internasional dan instrumen hukum internasional telah menunjukkan perlunya pembahasan hal tersebut terutama dikarenakan adanya kekosongan hukum dalam Konvensi Hukum Laut. Hal ini sangat terkait dengan kasus yang baru saja terjadi di zona ekonomi eksklusif Indonesia yang dilakukan oleh kapal berbendera Tiongkok, Kway Fey 10078. Dalam kasus ini, kapal patroli berbendera Tiongkok telah melakukan intervensi yang menyebabkan Indonesia tidak dapat melaksanakan yurisdiksi dan melakukan proses hukum terhadap kapal Kway Fey 10078. Selain itu, Pemerintah Tiongkok meminta Pemerintah Indonesia untuk melepaskan delapan orang warga negara Tiongkok yang ditahan oleh KKP Indonesia. Hal ini menimbulkan pertanyaan apakah hukum internasional memberikan solusi untuk mengatasi masalah IUU fishing secara efektif.

Kata kunci: IUU fishing, tanggung jawab negara, negara bendera kapal, ITLOS, UNCLOS

I. INTRODUCTION

The International Tribunal for the Law of the Sea (ITLOS) adopted its advisory opinion on 2 April 2015 as a response to a request submitted by the Sub-Regional Fisheries Commission (SRFC). The request should be considered a momentum to implement the United Nations Convention on the Law of the Sea (UNCLOS), to prevent and deter IUU fishing activities which according to the General Assembly are:

"... one of the greatest threats to fish stocks and marine ecosystems and continues to have serious and major implications for the conservation and management of ocean resources, as well as the food security and the economies of many States, particularly developing States..."¹.

This paper emphasizes the urgent need to combat IUU fishing activities by reviewing the Tribunal decision. However, this paper will limit the discussion to the first two submissions out of the four, that refer to the obligations and liability of a ship's flag State that has committed IUU fishing activities in another SRFC member States' exclusive economic zone (EEZ).

As party to UNCLOS, Indonesia should have considered the opinion offered by the Tribunal to respond to incidents related to IUU fishing taking place within its EEZ. A recent case involved a Chinese flagged fishing ship *Kway Fey 10078* suspected of illegal fishing within the Indonesian EEZ. M.Rizal Damanik claimed that 30% of illegal fishing worldwide takes place within the Indonesian maritime zone.² This opinion is supported by a report produced by The Food and Agriculture Organization (FAO) that found from 158 million tons of fish captured, 90% percent were fished within these 200 nautical miles,³ and that between approximately USD 10 billion and USD 23.5 billion are lost worldwide annually⁴. Therefore, the General Assembly underlined the urgent need for all States to participate actively in ensuring the sustainability of marine life resources by taking all the necessary measures to prevent IUU fishing activities. The General Assembly also reiterated the rights and obligations of coastal States in contrast to the rights and obligations of flag States.

UNCLOS recognizes the sovereign rights of coastal States to explore natural resources within the 200 nautical miles which is recognized as the EEZ. These sovereign rights are not absolute since UNCLOS also reserves other States' rights and obligations within the same range. UNCLOS reaffirms the general obligation of States under Article 192 which binds States to protect and preserve the marine environment. However, UNCLOS remains unclear when coastal States or flag States fail to fulfill their obligations. The failure is caused, as the FAO claims in its website, by the inability of

¹ See 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, and related instruments and UNGA Res A/RES/69/109 (2014) Par.56

² Ella Syafpurti, "Almost Half of Illegal Fishing in the World Occur in Indonesia," *Tempo*, 19 July 2014, <http://en.tempo.co/read/news/2014/07/19/056594269/Almost-Half-of-Illegal-Fishing-in-the-World-Occur-in-Indonesia> accessed on Monday, August 1, 2016

³ Victor Alencar Mayer Feitosa Ventusa, "Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence," *Revista De Direito Internacional Brazilian Journal of International Law, Direito Do Mar E Direito Maritimo Aspectos Internacionais E Nacionais* 12, no .1 (2015): p. 51

⁴ Mike Beke & Roland Blomeyer, "Illegal, Unreported and Unregulated Fishing: Sanctions in the EU," Directorate General for Internal Policies; Policies Department B: Structural and Cohesion Policies, European Parliaments' Committee on Fisheries, July 2014, p.19

the flag State to prevent vessels flying its flag⁵ from committing IUU fishing activities. On the other hand, the coastal States, especially developing States, lack the capacity to protect their maritime zones, and are the most negatively affected by IUU fishing activities.⁶ Thus, the Tribunal opinion can be used to improve the implementation of UNCLOS.

II. ILLEGAL UNREGULATED AND UNREPORTED FISHING IN INTERNATIONAL LAW

As mentioned earlier, IUU fishing activities have been recognized as the greatest threat to fish stocks and marine ecosystems by the FAO, and UNCLOS is inadequate to mediate such matters. Therefore, other legal instruments are needed although UNCLOS should be valued as a primary source. R. Rajesh Babu uses a broad definition of IUU fishing as “*a wide variety of fishing activities that does not comply with national, regional or international fisheries conservation or management legislation or measures*,”⁷ however, there is no universally accepted definition of IUU fishing. Regardless whether there is an adequate definition, there are international instruments that distinguish the rights and obligations of coastal States and flag States to combat IUU fishing activities.

A. The 1982 UNCLOS

UNCLOS is considered the most constructive international treaty despite its ineffectiveness in dealing with certain issues, in particular IUU fishing activities. R. Rajesh Babu identified two major issues related to IUU fishing activities that have not been managed properly; firstly, its inadequate ability to enforce flag State control and responsibility; and, secondly, its inadequate governance of the conservation and exploitation of fisheries resources.⁸ Nevertheless, UNCLOS remains the primary law source governing IUU fishing activities despite its deficiencies, even though international legal instruments have been adopted, as reflected in its preamble which is to :

“create a legal order for the seas and oceans... to have an equitable and efficient utilization of their resources, conservation of their living resources and the study protection and preservation of the marine environment... in particular the special interests and needs of developing countries.”⁹

The FAO underlined the fact that fish are mostly captured within the 200 nautical miles limit which, according to the UNCLOS, determines the EEZ. UNCLOS defines the EEZ as

⁵ Food and Agriculture Organization of the United Nations, “Illegal, Unreported and Unregulated (IUU) Fishing,” *FAO Fisheries and Aquaculture Department*, <http://www.fao.org/fishery/iuu-fishing/en> accessed on Monday, 8 August 2016

⁶ Beke & Blomeyer, “IUU Fishing,” p.22

⁷ R. Rajesh Babu, “State Responsibility for Illegal, Unreported and Unrelated Fishing and Sustainable Fisheries in the EEZ: Some Reflections on the ITLOS Advisory Opinion of 2015,” *Indian Journal of International Law* 55 (2015), p. 247

⁸ *Ibid.* p. 245

⁹ See Preamble of the *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, UNTS Vol. 1833, hereinafter “UNCLOS”

“an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the Rights and freedoms of other States are governed by the relevant provisions of this Convention.”¹⁰

The EEZ extends to a breadth of 200 nautical miles,¹¹ within which a coastal State has sovereign rights to explore and exploit the natural resources¹² as well as the right to protect and preserve the marine environment.¹³ The principle of sovereign rights was confirmed by the United Nations General Assembly by adopting Resolution 1803 (XVII) (1962) recognizing the sovereignty of coastal States over natural marine resources. Furthermore, UNCLOS also confirmed the principle under Article 56 which states:

“the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil...”.

In order to exercise these rights effectively, Article 73 provides the legal basis of enforcement upon violating vessels. It justifies certain jurisdictions to take measures “... including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention”.¹⁴ Moreover, in the following paragraphs of the same article, it confirms the obligation of the coastal State to promptly release the arrested vessels and crews upon the posting of a reasonable bond or other security,¹⁵ which may not include an imprisonment penalty,¹⁶ and a coastal State shall notify the flag State when a vessel has been arrested or detained and if any penalties apply. The notification shall be carried out through appropriate channels.¹⁷

On the other hand, other States also enjoy certain rights and obligations within an EEZ of a coastal State. Article 58 (2) clarifies that Articles 88 to 115, rights applied on the high seas, specifically, the freedom of navigation and overflight, the right to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.¹⁸ However, these rights do not derogate the sovereign rights of a coastal State over their natural resources.

UNCLOS governs the obligations of the coastal State to conserve living marine resources and their utilization. The obligation to conserve living resources, as provided under Article 61, includes the determination of the permitted catch within its exclusive economic zone¹⁹ in order to not endanger the available living resources by over exploitation.²⁰ Meanwhile, coastal States are also under an obligation to promote the optimum utilization of living resources²¹ by determining its EEZ harvest capacity, and may invite other States to enjoy its natural resources subject to that

¹⁰ Article 55 of the UNCLOS

¹¹ Article 57 of the UNCLOS

¹² Article 56 par. (1) (a) of the UNCLOS

¹³ Article 56 par. (1) (b) (iii) of the UNCLOS

¹⁴ Article 73 par. (1) of the UNCLOS

¹⁵ Article 73 par. (2) of the UNCLOS

¹⁶ Article 73 par. (3) of the UNCLOS

¹⁷ Article 73 par. (4) of the UNCLOS

¹⁸ Article 87 of the UNCLOS

¹⁹ Article 61 par. (1) of the UNCLOS

²⁰ Article 61 par. (2) of the UNCLOS

²¹ Article 62 par. (1) of the UNCLOS

capacity²². Article 62 (4) maintains the rights of nationals of other States to fish in the EEZ of a coastal State subject to certain laws and regulations that are established and implemented by the coastal State. These law and regulations may relate to, but are not limited to, licensing, the type of fish that can be caught legally, along with the quota, age, and size of the fish. This is very much related to UNCLOS objectives to protect living resources. Article 117 outlines the clear obligations of any State to take, or cooperate with other States in taking, such measures necessary to conserve the living resources of the high seas. Moreover, UNCLOS confirms the general obligation of all States under Article 192 which obliges all States to protect and preserve the marine environment without limit in its application.

B. The 1993 FAO Compliance Agreement

The Compliance Agreement details the flag State's obligation to ensure that vessels flying its flag do not violate international conservation and management practices. The Compliance Agreement was established to create a comprehensive record of fishing vessels registered under the flag State mechanism.

C. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 September 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement)

The objective of the adoption of the Fish Stocks Agreement is to implement the provisions governing Section 2 of Part VII of the Conservation and Management of the Living Resources of the High Seas of UNCLOS. This objective justifies Article 2 that was set up to:

"...ensure the long term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention."

The Fish Stocks Agreement applies within areas beyond a national jurisdiction²³, and to ensure the sustainability of certain fish stocks where sovereign rights apply due to the national jurisdiction of a maritime zone, the coastal State must apply general principles using the precautionary approach as stated under Article 5. Coastal States and States fishing on the high seas must cooperate with each other to achieve the objective of the Fish Stocks Agreement, which is, to conserve and manage straddling fish stocks and highly migratory fish stocks. The duty to cooperate includes adopting measures to ensure long term sustainability by promoting optimum utilization and applying a precautionary approach as governed by Article 6. However, UNCLOS does not discuss the precautionary approach as stated in the Fish Stocks Agreement and the 1995 FAO Code of Conduct for Responsible Fisheries.²⁴

²² Article 62 par. (2) of the UNCLOS

²³ Article 3 par. (1) *the 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*, New York, 4 August 1995, UNTS Vol. 2167, hereinafter Fish Stocks Agreement

²⁴ Nelle Matz-Luck and Johannes Fuchs, "Marine Living Resources," in *the Oxford Handbook of the Law of the Sea*, eds. Donald R. Rothwell, et. al. (Oxford: Oxford University Press, 2015), p. 497

Part V of the Agreement discusses the duties of the flag State. Article 18 details the obligations of the flag State to ensure that vessels flying its flag comply with sub-regional and regional conservation and management measures, by preventing vessels from engaging in activities that undermine the effectiveness of such measures. The flag State must exercise control over a ship authorized to fly its flag, which includes administrative measures, the establishment of regulations and national records, and enforcing systematic markings to enable identification. Underlining the duty to adhere to regulations, the Fish Stocks Agreement has made it very clear that the flag State must carry out its obligation to ensure that vessels flying its flag do not participate in any unauthorized fishing within the maritime zone of another coastal State's national jurisdiction.

Moreover, it also ensures that State will take measures irrespective of the location where the breach of Fish Stocks Agreement obligations take place.²⁵ Enforcement includes carrying out investigations, legal proceedings and sanctions to prevent violations from occurring.²⁶

The Fish Stocks Agreement was established to deal with matters not governed by UNCLOS. However, the Fish Stocks Agreement has been paid scant attention from States even though it entered into force on 11 December 2001. Only 83 States are bound by it and Indonesia became one of them on 28 September 2009.²⁷

D. The 1995 FAO Code of Conduct for Responsible Fisheries 1995

The FAO Code of Conduct is a voluntary legal instrument furnished with principles and international standards of behavior²⁸ to ensure the sustainability of natural living resources. It is directed at members and non-members of the FAO and more than 170 States participate in it as State parties. It was adopted by the FAO to assure fish supplies for future generations by assisting member States, in particular developing States, to conserve and improve their fishing resources. The code provides a framework for managing and improving the fishing industries of member States. It also obliges flag States to be responsible for any fishing vessels operating outside its maritime zone. This responsibility is established by issuing a license or certificate to permit vessels flying its flag to fish.

E. Rome Declaration on Illegal Unregulated and Unreported Fishing 2005

This Declaration acknowledges the urgency for developing States to manage and maintain the sustainability of their fishing industries by underlining flag States' responsibilities for vessels flying its flag. It was adopted in Rome during the FAO Ministerial Meeting on Fisheries on 12 March 2005 to establish and revise national regulations and legislation that implement national and regional plans of action to deter or eliminate IUU fishing. It also commits each State to take all necessary measures to prevent its nationals from engaging in IUU fishing activities. These measures include

²⁵ Article 19 par. (1) of the Fish Stocks Agreement

²⁶ Article 19 par. (2) of the Fish Stocks Agreement

²⁷ See United Nations, "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements," the United Nations Division for Ocean Affairs and the Law of the Sea, accessed on Friday, 12 August 2016, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

²⁸ Melba B. Reantaso, "FAO's Code of Conduct for Responsible Fisheries and Technical Guidelines on Aquaculture," *FAO Aquaculture Newsletter No.41*, p.22

establishing a mechanism of inspection consistent with international law.

F. The International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU)

The IPOA-IUU was adopted by the FAO in 2012. The idea behind the adoption was brought by the current condition of IUU fishing activities which undermines the conservation and management of natural living resources. It emphasizes the obligations of both flag and coastal States to meet UNCLOS objectives. Therefore, the FAO committed to developing an international plan of action consisting of provisions to prevent, deter, and eliminate IUU fishing activities.²⁹

The IPOA-IUU covers three activities; illegal fishing, unreported fishing, and unregulated fishing,³⁰ with each category explained as follows :

1. *Illegal fishing refers to activities:*
 - a. *Conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;*
 - b. *Conducted by vessels flying the flag of States that are parties to a relevant regional management organization but operate in contravention of the conservation and management measures adopted by that organization, and by which the States are bound, or relevant provisions of the applicable international law; or*
 - c. *In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.*

2. *Unreported fishing refers to fishing activities:*
 - a. *Which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or*
 - b. *Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.*

3. *Unregulated fishing refers to fishing activities:*
 - a. *In the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization, or*
 - b. *In areas of fish stocks in relation to which there are no applicable conservation or management measures and where such fishing*

²⁹ see the Food and Agriculture Organization, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted in Rome, 2001, available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> accessed on Monday, 1 August 2016

³⁰ *Ibid*

activities are conducted in a manner inconsistent with State responsibility for the conservation of living marine resources under international law.

Three types of activities are categorized to cover numerous wrongful and illicit fishing activities.³¹ “Illegal” fishing refers to activities that violate national and international obligations while “unreported” would amount to fishing activities that have not been reported or misreported according to national law or regional fisheries management, while “unregulated” amounts to activities conducted in an area beyond the scope of any regional fisheries management organization, or conducted in contravention of the conservation and management principles of international law.

The IPOA-IUU claims to be the first instrument to deal with IUU fishing.³² It sets out the responsibilities of flag, coastal, port States and regional fisheries management organizations.³³ It definitely encourages States to make a commitment to take necessary measures to enforce the prevention, deterrence, and elimination of IUU fishing activities. In addition, IPOA-IUU recognizes the primary responsibility of flag States to effectively control ships flying its flag and prevent them engaging in IUU fishing activities, including its nationals.

G. The 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (Port State Agreement)

The Port State Agreement was adopted to combat IUU fishing and ensure that primary responsibility should be borne by the flag States. Flag States must take all necessary measures within their jurisdiction in accordance with international law. Within the Port State Agreement, implementing jurisdiction includes implementing measures at a port State, which has been confirmed to be the most effective means of combating IUU fishing.

According to the Port State Agreement, each port State is entitled to conduct inspections on board a vessel which has requested to entry its port. The inspections should be conducted in accordance with the minimum standard provided by the Port State Agreement. The inspections must be applied to vessels not flying its flag with exceptions.³⁴ The result of the inspection is transmitted to the flag State of the vessel, and other relevant parties, such as States within the scope of its national jurisdiction where IUU fishing activities were conducted, the State of which the vessel’s master is a national, relevant regional fisheries management organizations, the FAO, and other relevant international organizations.³⁵

If the State conducting the inspection finds clear evidence a vessel has engaged in IUU fishing, it sends notification to the flag State and other relevant parties³⁶ and denies the vessel the use its port for landing, transshipping, packaging and processing

³¹ Ventusa, “Tackling IUU Fishing,” p. 51

³² Babu, “State Responsibility for IUU Fishing,” p. 245

³³ Beke & Blomeyer, “IUU Fishing,” p.31

³⁴ Article 3 of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 21 November 2009, hereinafter “Port State Agreement”

³⁵ Article 15 of the Port State Agreement

³⁶ Article 18 par. (1) (a) of the Port State Agreement

of fish, and other relevant activities inconsistent with the Port State Agreement.³⁷

The flag State plays an important role according to the Port State Agreement. It must require all vessels flying its flag to cooperate with the port State³⁸ and when it has a clear evidence that its vessels had engaged in IUU fishing activities, it must notify the port State where the vessel is requesting entry and demand to inspect the vessel.³⁹

The Port State Agreement entered into force on 6 May 2016, thirty days after the twenty fifth instrument was deposited according to Article 29. It was ratified by 46 States, including Indonesia on 23 June 2016. However, China is not yet party to it.⁴⁰

III. THE 2015 ADVISORY OPINION OF THE ITLOS ON THE RESPONSIBILITY OF STATES ON IUU FISHING

The SRFC is an organization that consists of seven African countries (Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, and Sierra Leone) with the objective of enhancing cooperation between member States' fishing activities, including conservation and exploitation of fishing resources, within member States territorial waters and their EEZ. The submitted questions were part of the Resolution⁴¹ adopted during the Conference of Ministers of the SRFC. It was delivered to the Permanent Secretary of ITLOS through a formal letter, dated 27 March 2013, on the basis of Article 138 of the Tribunal Rules and Article 21 of the Tribunal Statute.

The SFRC submitted four questions to the Tribunal, however as mentioned above, this paper will only discuss the first two submissions which are as follows:

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 zones 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?*

The Tribunal considered the first submission by examining the provisions 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 SRFC (MCA Convention). The Tribunal needed to clarify the definition of IUU fishing, and its applicability and meaning for the flag State according to the MCA Convention. On conclusion, the Tribunal determined the elements of the applicability of the MCA Convention with reference to flag States. This defines the obligations of flag States not party to the MCA Convention, in cases where vessels

³⁷ Article 18 par. (1) (b) of the Port State Agreement

³⁸ Article 20 par. (1) of the Port State Agreement

³⁹ Article 20 par. (2) of the Port State Agreement

⁴⁰ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, updated on 11 July 2016 accessed on 19 August 2016 at http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf

⁴¹ the 14th Session of the Conference of the Ministers 27th to 28th March 2013, Dakar, Senegal, adopted a Resolution of the Conference of Ministers of the Sub-Regional Fisheries Commission (SFRC) on authorizing the Permanent Secretary to seek Advisory opinion pursuant to Article 33 of the Convention on the Definition of the minimum access conditions and exploitation of fisheries resources within the maritime zone under the jurisdiction of SRFC Member States (MAC Convention).

flying their flags are engaged in IUU fishing within the exclusive economic zones of the SRFC member States.⁴²

The MCA Convention defines IUU Fishing activities similarly to the definition and scope outlined by the Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU), as well as the reflection stipulated in the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port States Measures Agreement). Furthermore, the Tribunal also carefully considered the application of Article 31 (1) of the MCA Convention on the integration of the MCA Convention provisions into member States' national legislation, and member States' commitment to take all necessary measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.⁴³ The Tribunal took the position that a violation of the MCA Convention on IUU fishing activities *mutatis mutandis* amounts to a violation of the national legislation of member States.⁴⁴

In response the first submission, the Tribunal further noted the obligation of member States to take necessary measures to ensure the conservation and management of the living marine resources within the EEZ of member States. It also reconsidered its earlier decision related to the *M/V Virginia G* case which stipulated that conserving and managing are two different elements, and confirmed the sovereign rights of coastal States...

“the use of the terms “conserving” and “managing” in Article 56 of the Convention indicates that the rights of coastal States go beyond conservation in its strict sense. The fact that conservation and management cover different aspects is supported by Article 61 of the Convention, which addresses the issue of conservation as its title indicates, whereas Article 62 of the Convention deals with both conservation and management. The Tribunal emphasizes that in the exercise of the sovereign rights of the coastal State to explore, exploit, conserve and manage the living resources of the exclusive economic zone the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone (Article 56, paragraph 1, and 62 paragraph 4, of the Convention). Under Article 62 paragraph 4, of the Convention the laws and regulations thus adopted must conform to the Convention and may relate to, inter alia, the matters listed therein. The Tribunal notes that the list of matters in Article 62, paragraph 4, of the Convention covers several measures which may be taken by coastal States. These measures may be considered as management. The Tribunal further notes that the wording of Article 62, paragraph 4, of the Convention indicates that this list is not exhaustive”⁴⁵

The Tribunal considered the rights and obligations of coastal States according to UNCLOS. Coastal States possess sovereign rights to explore and exploit their natural marine resources while on the other hand it is also mandatory for them to conserve and manage living marine resources governed further by Article 56 (1), Article 61 and Article 62 (4). Consequently, coastal States have a right to take measures to manage

⁴² International Tribunal for the Law of the Sea, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) Advisory Opinion, Case No. 21, par.89, hereinafter “ITLOS Advisory Opinion.”

⁴³ *Ibid* par.93

⁴⁴ *Ibid* par.94

⁴⁵ *Ibid* par.98

their living resources.

Moreover, the Tribunal considered one UNCLOS objective which is to “*establish a legal order for the seas and oceans which... will promote*” inter alia “*the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.*”⁴⁶ To achieve this goal, the Tribunal took the position that ships of other States conducting activities within an EEZ must comply with the laws and regulations adopted by the coastal State. It also confirmed the coastal State’s rights to take any measures including boarding, inspection, arrest, and judicial proceedings⁴⁷ to ensure that ships of other States comply with its laws and regulations. This provision underlines the coastal State’s primary responsibility to take measures to prevent IUU fishing activities⁴⁸ which is reflected in Article 25 of the MCA Convention.⁴⁹

The Tribunal further discussed the international obligations of other States within the EEZ of the SRFC member States from two different perspectives. The first entailed an examination of the general obligations set out under Articles 91, 92, 94, 192-193 of UNCLOS and, the second examined the specific obligations of the flag State under Article 58 (3) and Article 62 (4) of UNCLOS.

Article 94 (6) stipulates the obligation of the flag State to conduct an investigation whenever it receives a report from the coastal State that it has not applied sufficient control and jurisdiction over a particular ship. The flag State is requested to establish domestic legislation to ensure all ships flying its flag comply with UNCLOS, especially to protect the conservation and management of live marine resources.⁵⁰ The Tribunal in the Southern Bluefin Tuna Cases concluded that “*...the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment...*”

Furthermore, the Tribunal considered a specific obligation governed by Article 58 (3) of UNCLOS which states “*...States...shall comply with laws and regulations adopted by the coastal State...*”. Moreover, it examined the flag State’s obligation under Article 62 (4) of UNCLOS to ensure its nationals involving in fishing activities within an EEZ of a coastal State comply with coastal State laws and regulations specifically related to IUU fishing. The Tribunal considered carefully the “*responsibility to ensure*” and its connection with the obligation “of due diligence” and obligations “of conduct”⁵¹

In its opinion, the Seabed Disputes Chamber defines the “*responsibility to ensure*” as an obligation to create a mechanism under domestic legislation to deploy adequate means⁵² to implement obligations under international law.⁵³ Furthermore, the Chamber also noted that this can be categorized as the obligation of “*due diligence*” and considered the decision adopted by the International Court of Justice, regarding the *Pulp Mills on the River Uruguay*, as an obligation to apply and enforce administrative

⁴⁶ *Ibid* par:102

⁴⁷ Article 73 of the UNCLOS

⁴⁸ ITLOS Advisory Opinion, par:106

⁴⁹ *Ibid* par:107

⁵⁰ Article 192 of the UNCLOS

⁵¹ See Seabed Disputes Chamber ITLOS, *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011

⁵² The 2015 ITLOS advisory opinion, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), par:128

⁵³ See Seabed Disputes Chamber ITLOS, *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011

measures.

The Tribunal on the present case reflected upon the relevance of obligations born under Article 58 (3) and Article 62 (4) of the Convention.⁵⁴ These obligations also bind members of other States not party to the MCA Convention to ensure that ships registered under its nationality not to engage in IUU fishing activities.

The Tribunal continued to discuss the second submission on liability. The SRFC submitted that a flag State can be held liable for any vessels flying its flag committing IUU fishing activities. The Tribunal scrutinized the general principles on State responsibility using the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. The general principles considered by the Tribunal were those born under Article 1, Article 2 and Article 31 (1) of the ILC Articles. Liability arises as a secondary element of responsibility thus the Tribunal needed to examine whether there was a breach of international obligations. The Tribunal confirmed that obligations have been breached when failure to comply with due diligence to monitor IUU fishing activities has occurred.⁵⁵ Therefore, the flag State is liable if it has not taken all the necessary and appropriate measures to meet its obligation to exercise due diligence, and ensure that vessels flying its flag do not⁵⁶ participate in IUU fishing activities.

In conclusion on the first submission, the Tribunal unanimously declared that :

*“the flag State has the obligation to take necessary measures, including... enforcement, to ensure compliance by vessels flying its flag with the law and regulations enacted by the SRFC member States concerning marine living resources within their EEZ for purposes of conservation and management of these resources.”*⁵⁷

This obligation is detailed under Article 58 par. (3), Article 62 par. (4) and Article 192 of UNCLOS. It also considered a flag State’s obligation underlined by Article 94 of UNCLOS.

For the second submission, the Tribunal declared by 18 votes to 2 :

*“the liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the EEZ of the SRFC member States”*⁵⁸

The flag State’s exercise of due diligence means it *has taken all necessary and appropriate measures*.⁵⁹

IV. THE CONCEPT OF FLAG STATE

International society has paid great attention to IUU fishing activities in addition to the Advisory Opinion discussed above. The question of responsibilities of flag States arose to determine solutions in the absence of UNCLOS. John N.K. Mansell classified the flag as a symbol of nationality and development of the nation.⁶⁰ UNCLOS

⁵⁴ ITLOS Advisory Opinion, par.126

⁵⁵ *Ibid* par.146

⁵⁶ *Ibid* par.148

⁵⁷ *Ibid* p. 60

⁵⁸ *Ibid* p. 61

⁵⁹ *Ibid* p. 62

⁶⁰ John N.K. Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues*, (Berlin: Springer, 2009), p.13

does not provide a definition of a flag State, it only determines that a ship may obtain its nationality whenever it is registered in its territory by issuing documents to that effect.⁶¹ In addition, international law does not stipulate how to govern registry mechanisms under national law. The International Maritime Organization (IMO) Conventions, such as SOLAS and MAPROL, also do not provide any registration requirements.⁶²

The concept of a flag State's responsibility refers to the flag State's effectiveness in applying its jurisdiction and control in administrative, technical, and social matters.⁶³ Flag States are required to exercise effective control over ships flying their flag to ensure their compliance with international and national legislation through monitoring and legal enforcement.⁶⁴

V. INDONESIAN CASE: THE KWAY FEY INCIDENT

On 19 March 2016, at 14.15hrs, the Indonesian Ministry of Marine Affairs and Fisheries patrol boat, KP Hiu 11, suspected a Chinese-flagged *Kway Fey 10078*, a 300 metric ton fishing boat,⁶⁵ of committing IUU fishing activities at the coordinates N05°05.866' E109°07.046'⁶⁶ or approximately 4.34 kilometers off the Natuna Islands⁶⁷. The coordinates show this area lies within the Indonesian exclusive economic zone which is located to the north of the Natuna island⁶⁸. KP Hiu 11 was conducting its task within the framework of Indonesia's Fisheries Monitoring Task Force⁶⁹ to protect the interests of Indonesia in its maritime zone. KP Hiu 11 seized *Kway Fey 10078* and arrested eight Chinese nationals whom were taken on board KP Hiu. *Kway Fey 10078* was tugged into Indonesian waters for further processing, however, a Chinese patrol boat immediately appeared and rammed into the *Kway Fey 10078*. Not long after that, a bigger Chinese boat appeared and gave a warning to KP Hiu 11 to release the tow within 30 minutes.⁷⁰ To avoid the tension, KP Hiu left *Kway Fey 10078* and decided to return to its base, Tiga Island,⁷¹ with the Chinese crew on board. *Kway Fey 10078* escaped just before entering Indonesian territorial waters.

The Indonesian Minister for the Ministry of Fishery and Marine Affairs, Susi Pudjiastuti, strongly condemned the Chinese intervention and the incident in her official media release. Shortly afterwards, she delivered her official disappointment and demanded the return of the *Kway Fey 10078*⁷² through diplomatic channels in

⁶¹ Article 91 (1) and (2) of the UNCLOS

⁶² Mansell, *Flag State Responsibility*, p. 28

⁶³ Article 94 of the UNCLOS

⁶⁴ Matz-Luck and Fuchs, "Marine Living Resources," p. 505

⁶⁵ Shafiah F. Muhibat, "Whither the Honest Broker? Indonesia and the South China Sea," Maritime Awareness Project, 20 May 2016

⁶⁶ Pingit Aria, "Indonesia Navy Confirms Kway Fey Boat Arrest," Jakarta, <http://en.tempo.co/read/news/2016/03/21/055755485/Indonesian-Navy-Confirms-Kway-Fey-Boat-Arrest>, accessed on 17 August 2016.

⁶⁷ Muhibat, "Whither the Honest Broker?"

⁶⁸ Donald E. Weatherbee, "Re-Assessing Indonesia's Role in the South China Sea," *ISEAS Perspective* 18 (2016)

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ See Riau Island Magazine, TNI AL Halau Kapal Tiongkok dari Perairan Natuna "TNI AL deters Chinese vessels from Natuna waters," 25th edition, p.46, http://kominfo.kepriprov.go.id/e_mag/Edisi%2025_draf_final%20triwulan%201%20%20202016.pdf, accessed on 18 August 2016.

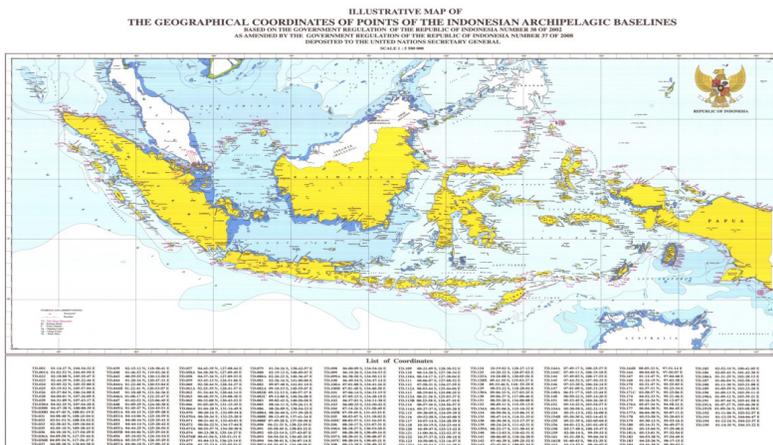
⁷² Weatherbee, "Re-assessing Indonesia's Role."

Jakarta.⁷³

The Chinese Government responded to the Indonesian protest by requesting the release of the arrested Chinese nationals and claiming the area where *Kway Fey 10078* conducted fishing activities lay within its “*traditional fishing ground area*”⁷⁴. It claimed the area was within its nine-dash-line.⁷⁵ These claims were denied⁷⁶ with reference to UNCLOS.

The *Kway Fey 10078* incident is not the first to happen in Indonesia. During its 2015 report, the Ministry of Fisheries and Maritime affairs detailed the capture of 63 fishing boats suspected of IUU fishing activities within Indonesian waters.⁷⁷ On 27 December 2015, the Ministry of Fisheries and Maritime Affairs identified the Panamanian-flagged⁷⁸ fishing boat *MV Hai Fa* had been conducting IUU fishing activities in Indonesian waters. The Ministry seized 4306 gross tons, the biggest Chinese boat ever captured by the Ministry, and arrested 24 Chinese nationals together with 900.7 tons of frozen fish and prawns, 66 hammerhead sharks and oceanic white tip sharks.⁷⁹ The boat was chartered by an Indonesian company and had failed to comply with Indonesian authorization regulations. It had switched off its transmitters to confuse the Indonesian authorities.⁸⁰

Figure 1.



⁷³ Kementerian Kelautan dan Perikanan Republik Indonesia, “Menteri Susi Sayangkan Sikap Intervensi Pemerintah Tiongkok [Minister Susi regrets Intervention from Chinese Government],” accessed on 16 August 2016 <http://kkp.go.id/2016/03/21/menteri-susi-sayangkan-sikap-intervensi-pemerintah-tiongkok/>, Jakarta, 21 March 2016.

⁷⁴ Ristian Atriandi Supriyanto, “National Commentaries: a View from Indonesia,” *The Asan Forum*, 28 April 2016

⁷⁵ Collin Koh, “Post-South China Sea Arbitral Ruling and Indonesia’s Pivot to the Natuna Islands,” *Broader Horizons*, S. Rajaratnam School of International Studies, July 2016, p. 6

⁷⁶ Lawfare, “Water Wars: in the South China Sea, Beijing Faces Twin Threats of New U.S. Military Presence and Pushback from an Old Friend,” <https://www.lawfareblog.com/water-wars-south-china-sea-beijing-faces-twin-threats-new-us-military-presence-and-pushback-old>, accessed on 17 August 2016.

⁷⁷ Melati Kaye, “Hai Fa Controversy just a Hiccup in Indonesia’s Illegal Fishing Crackdown,” 2 May 2015, <https://news.mongabay.com/2015/05/hai-fa-controversy-just-a-hiccup-in-indonesias-illegal-fishing-crackdown/>, accessed on 17 August 2016.

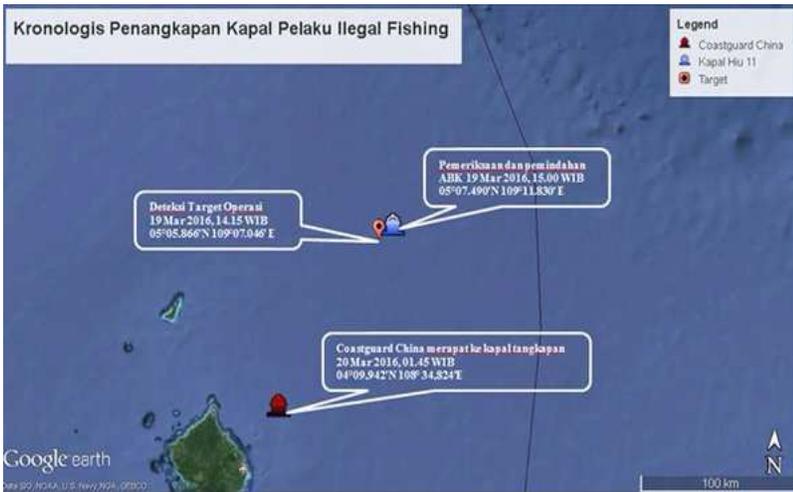
⁷⁸ *Ibid.*

⁷⁹ Tama Salim and Bagus T. Saragih, “Indonesia Takes on China,” the Jakarta Post, 25 January 2015, <http://www.thejakartapost.com/news/2015/01/25/indonesia-takes-china.html>, accessed on 17 August 2016.

⁸⁰ Kaye, “Hai Fa Controversy.”

source : http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/idn_mzn67_2009.jpg

Figure 2. The chronology of capture of the Kway Fey 10078



Source : the Indonesian Ministry of Fisheries and Maritime Affairs

Figure 3. Map of the ship manouvre



Source : the Indonesian Ministry of Fisheries and Maritime Affairs

VI. CONCLUSION

The 1982 UNCLOS is one international law source serving as a primary instrument to solve the problem of illegal, unreported and unregulated fishing activities. It recognizes the sovereign rights of coastal States over their EEZ to explore and exploit the natural resources under the coastal State's jurisdiction, and ensure the living marine resources are protected and preserved in a sustainable manner. However, as the EEZ is also part of the high seas, these sovereign rights are not exclusive, since coastal States are under obligation to allow other States to use the zone subject to UNCLOS. In short, flag States are under an obligation to obtain permission from the coastal States to fish within a coastal States EEZ. This obligation is sometimes denied by vessels entitled to fly a coastal State's flag. Therefore, many vessels are suspected to have conducted or engaged in illegal, unregulated, and unreported fishing activities. These activities have been recognized by international society as a dangerous threat to fish stocks that have a serious impact upon marine ecosystems. UNCLOS provides a solution to IUU fishing activities under Article 73 including going on board, detaining the vessel, and arresting the crew.

The Indonesian Ministry of Fisheries and Marine Affairs capture of the Chinese-flagged vessel, *Kway Fey 10078*, must be considered legal under UNCLOS because *Kway Fey 10078* was caught red-handed committing IUU fishing activities in the Indonesian EEZ to the north of Natuna island. However, this enforcement was interrupted by a Chinese coast guard vessel just before entering Indonesian territorial waters. Indonesia protested the Chinese boat's action and demanded the return of the escaping *Kway Fey 10078*. In this particular situation, UNCLOS was silent and fail provide a solution, therefore, the ITLOS advisory opinion adopted in 2015 can be used in such cases in the future, especially when determining whether flag States are responsible for vessels entitled to fly its flag. The ITLOS confirms flag States are obliged to ensure that none of their vessels engage or support IUU fishing activities. The flag State can be held liable for any damage caused to coastal States.

Other international legal instruments share similar perspectives on the obligations of flag States. Therefore, Indonesia as the biggest archipelagic State plays an important role in combating and eliminating IUU fishing activities, by instigating the necessary legal proceedings consistent with UNCLOS. Finally, the Chinese coast guard's intervention in the Indonesian Government's right to apply its jurisdiction to *Kway Fey 10078* should be considered a violation of international law.

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