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The European Union is not a State: International Responsibility for Illegal, Unreported and Unregulated Fishing Activities

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Abstract

This paper focuses on the responsibility of the European Union in the context of illegal, unreported and unregulated fishing activities. It aims to debate some of the legal issues that characterize its role as a global actor dealing with marine resources and the protection of the environment. For this purpose, I analyse an Advisory Opinion of the International Tribunal for the Law of the Sea in order to describe the interplay between obligations of due diligence and attribution of conduct. Finally, I focus on international customary law possibly binding EU Member States. The paper points out the unnecessary level of complexity employed by ITLOS to establish the responsibility of the EU excluding that of its Member States and constructs a simplified form of EU responsibility applying the articles developed by the International Law Commission on the responsibility of international organizations.

Keywords: European Union; international responsibility; normative control; European exceptionalism; responsibility of international organizations; illegal, unreported and unregulated fishing activities

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1. Introduction

This paper focuses on the responsibility of the European Union (EU) in the context of illegal, unreported and unregulated (IUU) fishing activities. It aims to debate some of the legal issues that characterize its role as a global actor dealing with marine resources and the protection of the environment. For this purpose, I will analyse an Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS)¹ (first section) in order to describe the interplay between obligations of due diligence (second section) and attribution of conduct (third section). Finally, I will focus on international customary law possibly binding EU Member States (fourth section).

Due to the significant absence of judicial practice concerning the international responsibility of the EU, this Advisory Opinion serves as a fundamental decision in the discussion on the complexities of its status in international law and, in particular, under the law of the sea. The reason I wish to discuss this opinion after a conspicuous number of academic commentaries, is that I would like to present

¹ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, 4.

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a way to reduce the complexities of the argumentative structure employed by ITLOS. I believe that the intention to preserve the status of the EU as a *sui generis* international organization played an unnecessary role, which complicates the argumentation and negatively affects the protection of biodiversity. Conversely, I will apply to the present case the articles developed by the International Law Commission (ILC) on the responsibility of international organizations (ARIO), which are not mentioned by ITLOS even though they were extensively debated during the proceedings.²

I have three main claims that clearly diverge from the position of ITLOS: the standard of due diligence applicable to the EU is different from the standard of due diligence that is applicable to Member States; the relevant conduct is attributable to the EU on the basis of Article 6 ARIO and not on the basis of the so-called 'normative control'; EU Member States cannot hide behind the institutional veil, but bear obligations based on customary international law to provide all means to enable the organization to fulfil its obligations.

2. The Advisory Opinion

The Sub-Regional Fisheries Commission (SRFC) is an international organization established in 1985 which has seven Member States (Cape Verde, The Gambia, Guinea Bissau, Mauritania, Senegal, Guinea and Sierra Leone). Its purpose is to strengthen cooperation between these countries in the field of fisheries management.³ In 1993, the SRFC Member States signed a Convention on the Definition of the Conditions of Access and Exploitation of Fisheries Resources off the coastal zones of SRFC Member States. This was reviewed in 2012 by the Convention relating to the definition of the minimum conditions of access and exploitation of fisheries resources within the maritime zones under the jurisdiction of SRFC Member States.⁴ The 2012 Convention conferred to its members the right to authorize access to fishing vessels belonging to non-members to the allowable surplus of resources in the maritime areas under their jurisdictions, establishing a system of fishing licences and the conditions for the management of the resources. As of 2013, there are eighteen agreements in force between SRFC Member States and between a third party and an SRFC State.⁵ The EU, the only international organization involved, currently has two agreements with Cape Verde and Mauritania.⁶

2 ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries', Yearbook of the International Law Commission, 2011, vol II, part two, UN Doc A/66/10 (ARIO). See, for instance, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Verbatim Record of the public sitting, 5 September 2014) ITLOS/PV.14/C21/4/Rev.1.

3 FAO, 'Regional Fishery Bodies Summary Descriptions SRFC' <www.fao.org/fishery/rfb/srfc/en> accessed 2 January 2020.

4 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 (adopted 8 June 2012, entered into force 16 September 2012), permanent secretariat (Minimal Conditions Convention).

5 SRFC, 'Request for an Advisory Opinion to the International Tribunal for the Law of the Sea, Written Statement (November 2013), annex III, p. 85 (SRFC Written Statement).

6 European Commission, 'Cape Verde: Fisheries Partnership Agreement' <https://ec.europa.eu/fisheries/cfp/international/agreements/cape_verde> accessed 2 January 2020; European Commission, 'Mauritania: Fisheries Partnership Agreement' <<https://ec.europa.eu/fisheries/cfp/international/agreements/mauritania>> accessed 2 January 2020.



The SRFC reported several cases of IUU fishing activities in the areas it regulates. IUU activities are a threat to the conservation of ecosystems, causing the drastic decline in major stocks of fish resources in the sub-region. Moreover, they cause financial losses for West African countries and endanger local communities of artisanal fishermen. The 2012 Convention defines IUU activities, distinguishing between three practices:

4.1 'Illegal fishing': fishing activities:

- 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;
- conducted by vessels flying the flag of States that are parties to a relevant regional fisheries 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
- in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

4.2 'Unreported fishing': fishing activities:

- which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- 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.

4.3 'Unregulated fishing': fishing activities [:]

- 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
- in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.⁷

Concerning the facts of the case, for the purposes of this paper it is relevant to point out that in 2010 one of the SRFC Member States boarded two vessels which were fishing under a memorandum of understanding signed with an international organization.⁸ The vessels were in breach of the legislation of the coastal state, leading to an outstanding fine. The owner recognized the violation and paid part of the fine on the spot. Consequently, the vessels were released with the assurance of paying the

⁷ Minimal Conditions Convention, art 2.

⁸ The circumstances were anonymized in the SRFC written statement (n 5) 15, but we can safely assume it was the EU, the only international organization signing fishing agreements with SRFC Member States.



entire fine within an agreed period. However, it transpired that the remaining fine was not paid, and the SRFC Member State asked the international organization to take the appropriate measures to pay the fine. In response, the international organization declared itself incompetent both to oblige the flag state to pay the fine and to pay in lieu of the flag state.

Following this event and many others that do not strictly concern the EU but non-member flag states, the SRFC requested an Advisory Opinion from ITLOS. It referred four questions on the interpretation of obligations binding states and international organizations arising from IUU activities conducted by private vessels:

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?
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?⁹

The Tribunal clarified the meaning of the questions, explaining that the first question concerned the obligations of non-member flag states of the SRFC in cases where vessels flying their flag are engaged in IUU fishing within the exclusive economic zones of the SRFC Member States. The second question concerned the responsibility arising from the violation of such obligations, which is not addressed by the applicable law. The third question concerned the apportionment of responsibility between a flag state and the international organization that concluded the agreement that granted its fishing licence. The last question concerned the obligations of SRFC Member States.

As a preliminary step, the Tribunal discussed its competence to issue advisory opinions; a controversial issue that is not discussed in this paper.¹⁰ I will consider how the Tribunal responded to the first three questions. For the purposes of this paper, the exact content of the obligation binding flag states is relevant only when useful in explaining the parallel question of the obligation binding the EU, which will be discussed in the next section. Question four is outside the scope of this paper.

The Tribunal answered the first and second questions on the obligations and responsibility of the flag state by establishing, first, that under the law of the sea 'the primary responsibility for taking the

9 *Advisory Opinion* (n 1) para 2.

10 Massimo Lando, 'The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission' (2016) 29 *Leiden Journal of International Law* 441.



necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State.¹¹ Under the United Nations Convention on the Law of the Sea (UNCLOS), the coastal state has sovereign rights for the purposes of conserving and managing the living resources within its Exclusive Economic Zone (article. 56(1)(a)) and is authorized to board, inspect and arrest vessels engaged in IUU fishing in violation of its laws (article 73(1)).

Subsequently, ITLOS reconstructed the responsibility of the flag states relying on three sets of sources: general provisions of UNCLOS; specific provisions of the 2012 Convention to which only SRFC states are parties; and specific provisions in bilateral fishing agreements between the coastal state and the flag state. UNCLOS contains general provisions concerning flag states' duties in articles 91, 92, 94, 192 and 193. It also imposes specific obligations to flag states in articles 58(3) and 62(4), for the particular case of fishing activities carried out by nationals of the flag state. The 2012 Convention requires that fishing vessels belonging to non-Member States obtain a fishing licence and land all their catches in the ports of a Member State. Moreover, it imposes specific obligations concerning the declaration of catches, prohibition of equipment and giving notice of their entry and exit from maritime zones. Finally, bilateral fishing agreements contain further obligations for the flag state, requiring it to assure compliance with the regulations of the SRFC Member States in order to respect the principle of sustainable exploitation.

In sum, the Tribunal contended that flag states are under an obligation of conduct to assure compliance by vessels flying their flags with the laws and regulations concerning conservation measures adopted by the coastal state.¹² The flag state is under an obligation of due diligence to take all necessary measures to ensure compliance and to prevent IUU fishing. Consequently, the Tribunal stated that the responsibility of the flag state arises from the violation of its due diligence obligation concerning IUU activities conducted by vessels flying its flag. However, it recognized that neither UNCLOS nor the 2012 Convention provide guidance on the issue of liability of the flag state.¹³ It applied the general rules on responsibility of states for internationally wrongful acts, recognizing that responsibility does not arise from the failure of the vessels to comply with the laws of the coastal state, but from the due diligence obligation. This means that the flag state is not obliged to assure compliance by its vessels, but to take adequate regulations and impose its vigilance to prevent IUU activities. In sum, flag states are responsible if they omit to impose and enforce sufficient regulations.

Concerning the standard of due diligence which applies to a flag state, the Tribunal did not provide specific instructions, contending that it is free to determine the means 'in accordance with its legal system'.¹⁴ However, it did mention that flag states are required to establish 'enforcement mechanisms to monitor and secure compliance' with coastal state legislation, including sanctions that are 'suf-

11 *Advisory Opinion* (n 1) para. 106.

12 See, in general, the commentary by Valentin Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47 *Ocean Development & International Law* 327.

13 *Advisory Opinion* (n 1) para. 142.

14 *ibid*, para 138.



ficient to deter violations and to deprive offenders of the benefits' of illegal fishing.¹⁵ As the International Court of Justice contended in the *Pulp Mills* case, a due diligence obligation does not only entail the adoption of appropriate rules, but also a certain level of vigilance.¹⁶ As I will contend in the next section, the obligation of vigilance and the enforcement of sanctions is particularly relevant for differentiating between the standard of due diligence that is applicable to states and the standard that is applicable to the EU.

Finally, the Tribunal faced the third question, concerning the responsibility of international organizations, and of the EU in particular. First, it narrowed the scope of the question contending that it only concerned the organizations that are referred to in article 305 (1)(f) and article 306 UNCLOS, and its Annex IX, to which their Member States have transferred competence on fisheries. Therefore, the Tribunal limited its answer to the EU, the only international organization which is part of UNCLOS, and noted that only the exclusive competence of the EU on fisheries is relevant. Then, it relied on article 6(1) Annex IX UNCLOS to link the responsibility of the EU to its competences and considered that 'an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its Member States, may be held liable if a Member State fails to comply with such obligation and the organization did not meet its obligation of "due diligence"'.¹⁷ In sum, ITLOS applied a so-called 'state analogy', contending that the legal framework that is applicable to states is also applicable to the EU on the basis of the attribution of exclusive competences.¹⁸

Moreover, concerning the flag state which is a member of the EU, the Tribunal considered that it is not part of the fishing agreement concluded only by the organization and, therefore, it cannot be considered responsible for the conduct of the vessels flying its flag. However, the ITLOS repeated that under article 6(2) Annex IX UNCLOS, joint and several liability of the EU and the state concerned could arise if they do not provide information on who is competent for a specific matter.

This Advisory Opinion raises a number of issues concerning the effective protection of biodiversity in the case in which private fishing vessels have access to fishing zones thanks to agreements concluded by the EU and not by their flag states. In particular, the Tribunal relied extensively on the comments made by the European Commission, which adopted a clear defensive strategy. On the one hand, the EU claimed to be the sole responsible entity freeing Member States from any responsibility, and, on the other hand, it claimed that EU regulations and relevant applicable norms did the utmost to prevent IUU fishing.¹⁹ However, the facts of the case showed a different story, under which the

15 *ibid*, para 139.

16 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, para 94.

17 *Advisory Opinion* (n 1) para. 168.

18 On the meaning of the state analogy in the law of international organizations, see: Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2018).

19 European Commission, 'Request for an Advisory Opinion Submitted by the SRFC (Case no 21)', Second Written Statement (March 2014); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Verbatim Record of the public sitting, 4 September 2014) ITLOS/PV.14/C21/3/Rev.1.



conferral of competences limited the capacity of the EU to enforce sanctions and give reparation for the wrongful act.²⁰ Indeed, the facts of the case as presented by the SRFC dangerously resemble those circumstances in which Member States circumvent their international obligations by conferring on an international organization the competences to conclude agreements with third parties.²¹ The origin of my concern is that the EU and the Tribunal relied on the attribution of exclusive competences on the protection of biodiversity to claim that the EU needs to be treated as a flag state in the law of the sea regime, even if it lacks general capacity to take every relevant conduct, such as instituting criminal proceedings.

I believe that a better solution can be found on the basis of the framework established by the ILC articles on the responsibility of international organizations and maintaining a clear distinction between the two constitutive elements of international responsibility: the violation of a primary obligation and the attribution of conduct.

3. The Primary Obligation Binding the EU

The application of the state analogy led the Tribunal to not distinguish between the obligation binding the EU and the obligation binding States. ITLOS described the meaning of due diligence obligations relying on the Seabed Disputes Chamber and the International Court of Justice, as an obligation ‘to deploy adequate means, to exercise best possible efforts, to do the utmost.’²² As mentioned already, the content of the obligation is described relying on the provisions of UNCLOS, and in particular article 58(3) and article 62(4), under which the flag state has the obligation to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States. In general, ‘the flag State has the obligation to take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States.’²³ However, according to the Opinion, due diligence is an obligation of conduct that both flag states and organizations have to ensure that vessels flying their flag, or the one of their Member States, are not involved in IUU fishing.

The absence of distinction by ITLOS relates to the fact that whilst the number of international obligations that now extend to international organizations is substantive, legal scholarship lacks a comprehensive study on how the traditional distinction between obligations of conduct and obli-

20 See, in particular SRFC written statement (n 5).

21 For an analysis of this circumstance in the EU context, see: Esa Paasivirta, ‘Responsibility of a Member State of an International Organization: Where Will it End - Comments on Article 60 of the ILC Draft on the Responsibility of International Organizations’ (2010) 7 International Organization Law Review 49.

22 *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10, at 40-41, para. 110; *Pulp Mills* (n 16) 79, para. 197.

23 *Advisory Opinion* (n 1) para. 136.



gations of result affects their operations.²⁴ Some complexities arise from the unclear distinction between primary and secondary rules that affects the perception of due diligence obligations, either as primary obligations of conduct or as secondary rules concerned with the implementation of primary obligations of result.²⁵ More issues derive from the adoption of a concept of due diligence obligation either as a way to compensate the absence of fault in international responsibility or to share responsibility among a plurality of actors.²⁶ The ILC excluded that fault, or diligence, constitutes a third fundamental element that characterizes international responsibility.²⁷ For instance, one of the fields interested in international organizations' due diligence concerns the 'duty of care' that organizations and Member States have towards civilian personnel deployed in missions abroad, in order to prevent a reasonably foreseeable harm occurring to them.²⁸ The legal issue is to clarify the nature of the duty of care as an obligation that guarantees the safety of international organizations' personnel. It could be a primary obligation to employ all means to avoid a certain violation, or a secondary rule to implement the responsibility that arises from the violation of an obligation of result (personal injuries). Furthermore, it could be a way to assess the fault of an IO in the causation of the harm or a way to share the responsibility between the IO, its Member States, and the actor that materially commits the harm.

The question that arises from the characterization of the EU obligation as one of due diligence, concerns how it operates in the context of international organizations. In particular, two issues are relevant: whether the EU possesses jurisdiction over fishing vessels and whether the standard of conduct applicable to states is different from the standard applicable to the EU.²⁹

The possession of jurisdiction is a fundamental requirement for a legal subject to be able to fulfil due diligence obligations. As the ICJ stated in *Pulp Mills*: 'A State is thus obliged to use all the means

24 With few exceptions, see: Evelyne Lagrange, 'La responsabilité des organisations internationales pour violation d'une obligation de diligence' in Société Française pour le Droit International (ed), *Le Standard de due diligence et la responsabilité internationale* (Pedone 2017); Paolo Palchetti, 'La violation par l'Union Européenne d'une obligation de diligence' in Société Française pour le Droit International (ed), *Le Standard de due diligence et la responsabilité internationale* (Pedone 2017). See also: Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European journal of international law* 1133.

25 On the distinction primary and secondary, see: Giorgio Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) *Rivista di Diritto Internazionale* 97.

26 Study Group on Due Diligence in International Law, 'First Report' in International Law Association Report of the Seventy-Sixth Conference (Washington DC 2014) (International Law Commission, London 2014); Study Group on Due Diligence in International Law, 'Second Report' in International Law Association Report of the Seventy-Seventh Conference (Johannesburg 2016) (International Law Commission, London 2016); Joanna Kulesza, *Due diligence in international law* (Brill 2016); Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) 20 *Journal of Conflict and Security Law* 61; Robert P Barnidge, 'The due diligence principle under international law' (2006) 8 *International Community Law Review* 81.

27 Timo Koivurova, 'Due Diligence' *Max Planck Encyclopedia of Public International Law* (OUP 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034>> accessed 2 January 2020.

28 Andrea de Guttry and others (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel* (T.M.C. Asser Press 2018).

29 Palchetti (n 24) 150.



at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction.³⁰ The controversial question that ITLOS did not ask is whether international organizations are able to possess jurisdiction and, in particular, whether the EU has jurisdiction over the activities carried out in vessels flying the flag of a Member States.³¹ Indeed, the fact that EU law applies to the territory of its Member States, including fishing vessels, does not automatically mean that the EU itself, and not its Members, has jurisdiction on IUU fishing activities. The Tribunal bypassed this issue considering that the EU has to be treated exactly as a state and, therefore, it is exercising its proper jurisdiction in the context of exclusive competences. The second issue, concerning whether the standard of conduct is the same for states and for organizations, is also related to the attribution of competences. Indeed, the fundamental issue is whether the Tribunal should take into consideration the competences attributed to the organization in order to define the content of the due diligence obligation binding on the EU.

All in all, ITLOS did not discuss the content of due diligence obligations binding on the EU and relied on the same standard applicable to states. However, only if the EU is treated as a state will the jurisdiction and the content of the obligation of due diligence be the same for the two different subjects. Instead, the attribution of competences limits what can be asked of an international organization and 'to do the utmost' assumes a different meaning for a state than for an international organization. In particular, Evelyne Lagrange contended that organizations have a lower threshold, limited to general principles of good governance.³² However, she also claimed that her argument does not apply when international organizations act '*exactement comme un Etat*'. I do not think that international organizations ever act exactly as a state, even in the field of the law of the sea. In particular, I would like to stress the difference between the regime in which an organization acts and the status of international organizations in international law. Even in the context of the law of the sea, the Tribunal failed to provide a clear answer that could have contributed to explain what the EU must do in concrete situations. For instance, does the EU have obligations of vigilance and of the imposition of sanctions even if these matters – i.e. criminal proceedings – are outside its exclusive competences, as declared by the EU itself? Do Member States have a role to play when their attribution of competences does not cover fundamental functions? I will come back to these questions after a discussion on how competences also bias the attribution of conduct.

30 *Pulp Mills* (n 16) para 101.

31 In the different context of human rights obligations, see Samantha Besson, 'The bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution?' (2015) 32 *Social Philosophy and Policy* 244.

32 Lagrange (n 24). See also: *International Law Association* 2016 (n 24) 39ss, and 43 in particular.



4. The Attribution of Conduct to the EU

ITLOS attributed the relevant conduct to the EU relying on the so-called 'normative control', which is a rule to attribute the conduct of Member States to an international organization not included in ARIO. For instance, this is a proposal by Frank Hoffmeister:

Conduct of organs of a Member State of a regional economic integration organization.

The conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred.³³

Similar draft articles found the endorsement of the European Commission, which claimed that the status of the EU in international law requires that in matters that fall under its exclusive competence, the relevant conduct is attributable to itself even if carried out by its Member States.³⁴

I should first point out that in the context of the protection of biodiversity and of due diligence obligations, the EU acts primarily through its organs and not through its Member States. In the context of IUU activities and the ITLOS Advisory Opinion, the EU would be responsible if it omitted to pass the legislation to do the utmost to prevent the wrongful act. The relevant conduct is an omission which is directly attributable to EU organs. There is no reason to rely on normative control to claim that EU regulations on IUU fishing are attributable to the EU itself. ITLOS would have reached a better result if it had distinguished between the conduct that is directly attributable to the EU and the conduct that is directly attributable to its Member States. On the former, it could have relied on article 6 ARIO, which states: 'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.'³⁵

However, the relevance of the conduct of Member States is triggered by the fact that the full respect of the due diligence obligation, contracted with a third party, requires a conduct that is attributable to Member States under article 4 of the ILC project on state responsibility (ASR).³⁶ I believe that article 6 ARIO can also cover this hypothesis on the basis of dual attribution, under which the same

33 Frank Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 *European Journal of International Law* 723, 746.

34 As discussed in: José Manuel Cortés Martín, 'European exceptionalism in international law? The European Union and the system of international responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill 2013).

35 ARIO (n 2).

36 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', Yearbook of the International Law Commission, 2001, vol II, part two, UN Doc A/56/10.



conduct is attributable to both the EU and to its Member States at the same time.³⁷ Indeed, under article 6(2) ARIO, 'the rules of the organization apply in the determination of the functions of its organs and agents' and under article 2(c) an "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization'. If, under EU law, Member States are considered as organs of the organization for the fulfilment of specific tasks, there is no reason why the conduct should not be attributed to it and, at the same time, to its members. I contend that dual attribution would drastically reduce the complexities of the actual system, enhancing a form of shared conduct.³⁸ This hypothesis was considered by the ILC, but only in the context of military operations.³⁹

Conversely, the ILC and the EU had different and opposing views on how to give relevance to the conduct that is attributable to Member States under article 4 ASR. The EU claimed the existence of a secondary rule on the attribution of conduct that gives relevance to the normative control possessed by the organization. The ILC claimed that a primary obligation can establish that an organization is responsible for an act that is attributable to a Member State.

The ILC did not include an article on normative control to attribute the conduct to an international organization, claiming that the project does not require a special rule to deal with the attribution of exclusive competences. It relied on the attribution of responsibility without the attribution of conduct. The Special Rapporteur on the responsibility of international organizations contended that the attribution of responsibility without attribution of conduct is based on the nature of the primary obligation binding the organization.⁴⁰

Under ILC lenses, Annex IX UNCLOS is a primary and not a secondary obligation which contains an exception to the general rules of responsibility that require a conduct to breach an obligation.⁴¹ In Gaja's words: 'It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States.'⁴² This theory has two main shortcomings. First, the absence of conduct is a complex issue to bypass by claiming an exception. Second, under this theory the nature of the obligation plays a fundamental role. An organization could be responsi-

37 Compare: Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) 43, and: Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 *International Organizations Law Review* 87, 111.

38 In a different context, see: Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcom Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013).

39 Giorgio Gaja, Second Report on Responsibility of International Organizations, UN doc. A/CN.4/541 (2004) para 6.

40 *ibid.*, para. 10 ss.

41 Tullio Treves, 'The European Community and the Law of the Sea Convention: New Developments' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Nijhoff 2002).

42 Gaja (n 37) para. 11.



ble for the violation of an obligation of result despite the attribution of conduct.⁴³ However, an obligation of due diligence is an obligation of conduct. International organizations could be responsible if the obligation imposes on them a result despite the attribution of conduct to their Member States, but they cannot be directly responsible if due diligence requires a conduct that is only attributable to Member States.

Conversely, ITLOS relied on the EU position and prepared the reader for the application of normative control when it exclusively focused on the transfer of competences over fisheries.⁴⁴ However, this finding is treated as a matter of fact, without explaining the relationship between the obligations contained in UNCLOS and the obligations that the EU assumed with SRFC Member States. The Tribunal merely stated that the EU had submitted its declaration of competences under article 5(1) Annex IX UNCLOS, which distinguishes between exclusive and shared competences, and concluded that for the case at hand only EU exclusive competences were relevant.⁴⁵ Thus, the Tribunal bypassed the attribution of conduct, stating that responsibility is where competences are.⁴⁶

Normative control is applied when the Tribunal did not attribute the conduct to avoid interfering with the distribution of competences and their complex distinction between shared and exclusive. However, competences are not clear-cut and the limits of this approach are evident when the prevention of IUU fishing activities involve fundamental competences that Member States retain.⁴⁷ For instance, the Tribunal did not accept the proposal of the International Union for the Conservation of Nature and Natural Resources, which in its written intervention underlined the matters in which the EU has no competence, such as instituting criminal proceedings against vessels.⁴⁸ A similar lack of competence was alleged in the case raised by SRFC in its written statement to ITLOS, when the EU refused to pay the fine claimed by an SRFC Member State.⁴⁹ The reasoning employed by ITLOS provides for a sufficient level of protection of biodiversity only if the state analogy is applied in full and the EU is considered as a federal state and not an international organization. The ITLOS reasoning is flawed because the EU still relies on the attribution of competences by Member States and does not enjoy a general capacity to perform any relevant action.

From the EU perspective, the reason to focus on exclusive competences in the attribution of conduct lies in the need to avoid interferences from external regimes. The interpretative monopoly of the European Court of Justice would be threatened if a third actor interpreted competences to allocate

43 Giorgio Gaja, 'How does the European Community's international responsibility relate to its exclusive competence?', *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004).

44 *Advisory Opinion* (n 1) para 157.

45 *ibid*, para 164.

46 *ibid*, para 168.

47 Joni Heliskoski, 'EU declarations of competence and international responsibility' in Malcom Evans and Panos Koutrakos (eds), *The international responsibility of the European Union* (Hart 2013); Casteleiro (n 35) 110.

48 International Union for Conservation of Nature and Natural Resources, World Commission on Environmental Law, Specialist Group on Oceans, Coasts and Coral Reefs, '(case no 21) request for an advisory opinion submitted by the sub-regional fisheries commission, Written Statement (November 2013) para. 78.

49 SRFC written statement (n 5).



responsibility.⁵⁰ However, this necessity has the undesirable consequence of giving too much power to the rules of the organization. Indeed, internal rules would have the effect of determining the attribution of conduct between the organization and its Member States, despite injured third parties. Normative control is based on the internal institutional link established between the organization and its Member States, which is created by the internal law of the organization. In areas of exclusive competence, Member States act as organs of the organization, their conduct becomes the conduct of the organization and the institutional rules are considered internal law, trying ‘to satisfy the central operational features of EU legal system based on “executive federalism”’.⁵¹ Member States vanish behind the institutional veil of the organization when the rules are considered to be internal law, conferring exclusive competences.

During the proceedings, the EU demanded the application of a *lex specialis*, which would derogate from the general regime established by the ILC in its draft articles and apply the theory of normative control to attribute the responsibility to the EU. Endorsing this position, ITLOS did not even mention ARIO and did not explain how the relationship *lex specialis/lex generalis* applies in the present case.⁵² In particular, it should be noted that normative control cannot be understood under the *lex specialis* principle if considered as a norm that is based on the status of the EU in international law and not as a norm considered in the primary obligation. Indeed, under normative control, the internal legal nature of the competences that connect the Member States with the international organization prevents the application of an international *lex specialis* on the basis of internal rules. The rules are not *lex specialis* in relation to international law because they belong to a different legal system. The attribution of conduct to the organization based on exclusive competence cannot be considered as a form of *lex specialis* developed to meet the specificities of the EU, since it necessarily involves that EU law is not international law. Consequently, normative control is a special secondary norm on the attribution of conduct only if considered in the regime in which the organization acts. This is the case for Annex IX UNCLOS, which establishes that the responsibility for the failures to comply with its obligations falls on the party to the convention that has the competence over the specific matter, as declared under its article 5.

In conclusion, normative control is of little help because the differences between states and the EU also affect the attribution of conduct. States possess a self-contained structure and an act of their organs or agents is directly attributable to them, with a margin of controversy which is relatively

50 The same issue is faced for the EU accession to the European Convention of Human Rights (ECHR), see: Turkuler Isiksel, ‘European Exceptionalism and the EU’s Accession to the ECHR’ (2016) 27 *European Journal of International Law* 565.

51 Pieter-Jan Kuijper and Esa Paasivirta, ‘EU international responsibility and its attribution: from the inside looking out’ in Panos Koutrakos and Esa Paasivirta (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 54.

52 Article 64 ARIO (n 2): ‘These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.’



low.⁵³ From the external perspective of international law, the national law that applies in determining the quality of state organs or agents appears to be a matter of fact. Conversely, international organizations, and the EU among them, do not possess a self-contained legal system that is comparable to states' structure. They are so-called 'transparent' institutions, under which the law that applies in determining the quality of the organ or agent is not clearly identifiable as belonging to an internal legal system developed by the international organization. Quite the contrary, it is often considered as belonging to international law.⁵⁴ The definition of organ or agent is subjected to the specific rules of each organization, but there is no clarity on whether these rules are, from an international law perspective, a matter of fact, or if they are applicable law that determines who is responsible between an organization and its Member States.⁵⁵ Consequently, adopting this approach, there is no clarity whether the acts of Member States within the organization can be considered as an act of the organization as such.⁵⁶ For instance, a collective act of EU Member States prepared in the EU context can arguably be distinguished from an act of the EU itself.⁵⁷ Conversely, the dual attribution of conduct to both the EU and its Member States would provide certainty and simplicity. Obviously, this does not mean that both entities are also responsible, because they do not share the same primary obligation in every circumstance. As discussed in the previous section, only the EU bears the obligation of due diligence, which was contracted with SRFC Member States. The last step that needs to be taken is to ascertain whether Member States bear different obligations that could be relevant in this context.

5. Member States and Customary International Law

ITLOS rightly observed that only the EU contracted obligations with SRFC coastal states and, consequently, EU Member States do not have obligations based on the fishing agreements. In practical terms, the outcome is that vessels flying EU Member States' flags do enjoy fishing rights granted by the membership of their flag states to the EU, but their flag states do not have treaty obligations towards SRFC Member States. I contend that this position is untenable and that EU Member States do not completely disappear behind the institutional veil of the organization. The final section of this paper will discuss whether Member States do incur international obligations, even if they did not sign the agreement with SRFC Member States.

The position of Member States in a treaty concluded by the organization has been one of the most

53 Djamchid Momtaz, Gérard Cahin and Olivier de Frouville, 'Attribution of Conduct to the State' in James Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

54 Gasbarri (n 35).

55 Catherine Brölmann, 'Member States and International Legal Responsibility' (2015) 12 *International Organizations Law Review* 358.

56 Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010).

57 Enzo Cannizzaro, 'Denialism as the Supreme Expression of Realism A Quick Comment on NF v. European Council' (2017) 2 *European Papers* 251.



debated issues faced by the ILC and the 1986 Vienna Conference.⁵⁸ The troubled history of article 36bis of the ILC project explains the complexity of the topic.⁵⁹ Special Rapporteur Reuter identified two different situations in which an agreement produces rights and obligations for Member States:

1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty. 2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of areas of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to: (i) rights, which the member State is presumed to accept, in the absence of any indication of intention to the contrary; (ii) obligations when the member State accepts them, even implicitly.⁶⁰

Reuter's proposal is based on the idea that third states when concluding an agreement with the organization are de facto contracting with its Member States too. The text of the article was modified during the debate of the ILC and the final draft is different:

Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if: (a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and (b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and the negotiating organizations.⁶¹

This proposal seeks to obtain a balance between the interests of third parties and the interests of the organization. Finally, the outcome in the 1986 Vienna Conference is the deletion of the provision, including only a saving clause in article 74(3) of the 1986 Vienna Convention: 'The provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of

58 Catherine Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: the History of Draft Article 36 bis' in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag* (Brill Nijhoff 1998) 121.

59 Neri Sybesma-Knol, 'The New Law of Treaties: The Codification of the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations' (1985) 15 *Georgia Journal of International and Comparative Law* 425.

60 Paul Reuter, Sixth report on the question of treaties concluded between States and international organizations or between two or more international organizations, UN Doc A/CN.4/298 (1977) 128.

61 Discussed and adopted at the 1740th meeting, ILC, Yearbook of the International Law Commission 1982, Vol I, 261–263, para 21–40.



obligations and rights for States members of an international organization under a treaty to which that organization is a party.⁶²

Under article 36bis Members States would have been directly involved in the treaty concluded by the organization. In practical terms, every agreement would have been a mixed agreement and Member States would have been directly responsible for the treaty concluded only by the organization. Endorsing this proposal, Brownlie contested the principle of independent responsibility of international organizations, claiming that it is 'contrary to existing general international law and to all the principles of the law of treaties and the law of State responsibility because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization.'⁶³ These words resonate in the ITLOS Advisory Opinion, under which EU Member States avoided obligations by conferring to the EU the exclusive competence to conclude agreements on access to fisheries.

Applying the first version of article 36bis to the present case, the fishing agreement concluded with SRFC Member States by the EU would also bind EU Member States, and they would share with the EU an obligation to do the utmost to prevent IUU activities. This approach safeguards the interest of third parties, which will always find an entity to address their claims. Circumstances such as those mentioned in the SRFC submission would not arise. However, this scenario would undermine EU autonomy and independence from Member States. Under this theory, both UNCLOS and the fishing agreement are primary obligations and flag states, Members of the EU, do not find a different treatment in comparison with other flag states. Article 36bis and other version of this approach, under which Member States are always responsible for the wrongful act committed by the organization, is rarely upheld by scholarship because it is against the principle of independent responsibility.⁶⁴

The opposite approach is based on the idea that Member States do not have any obligations derived from the treaty concluded only by the EU. The state analogy is applied and international organizations would not be that different from federal entities.⁶⁵ Under this theory, the internal relationship between the organization and the Member States does not affect third parties. For instance, article 216(2) TFEU, which imposes on Member States an obligation to implement the international agreements concluded by the EU, is a matter of EU law. Indeed, EU law would be different from international law. In this case, the autonomy of the organization is enhanced by its constitutional structure, and Member States would not be responsible for the ships flying their flags. Even this approach is rarely upheld in the literature, because it goes against the limited competences conferred by Member

62 For an analysis, see Giorgio Gaja, 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary' (1988) 58 *British Yearbook of International Law* 253.

63 2892nd meeting, ILC, *Yearbook of the International Law Commission*, 2006, Vol 1, 157, para 17.

64 Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005).

65 Bordin (n 18) 149.



States and the distinction between exclusive and shared competences.⁶⁶ However, ITLOS did support this extreme version of constitutionalism by claiming that the standard of due diligence which applies to states also applies to the EU.

It should be stressed that Member States are neither parties to the fishing agreement which was concluded only by the organization, nor can they be considered third parties to it. Indeed, international law is developing primary obligations, based on customary international law, that acknowledge the dual position.⁶⁷ I contend that it is necessary to recognize the progressive development of a norm establishing that Member States do not assume direct rights or obligations from the treaty concluded by the organization, but, nonetheless, they have a primary obligation to do the outmost to allow their organization to respect the treaty provisions, granting competences, funds and material aid. This obligation is based on the status of international organizations in international law and not on the particular treaty signed with a third party. Bordin speaks in terms of ‘an evolving rule of incorporation for international organizations’.⁶⁸ Rosalyn Higgins, as Rapporteur of the Institute of International Law on the topic ‘The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties’ expressly stated that:

Our brief survey of the international law relating to the conclusion of treaties by international organizations suggests that, while states are not parties to such treaties, neither are they ‘third parties’, in the sense that they may not engage in acts that run counter to the effective implementation of such treaties. If the obligation of an international organization is engaged through contract, or a duty of care, the legal consequences for a Member State entail a requirement to put the organization in funds to meet such obligations.⁶⁹

Indeed, international institutional law is developing rules showing that Member States are affected by the legal effects of the agreement concluded only by the organization. For instance, according to article 40 ARIO, Member States have a primary obligation to take all appropriate measures in order to enable the organization to fulfil its obligations of reparation.⁷⁰ The ILC upheld the principle of independent responsibility, but also identified limited circumstances in which it is possible to invoke the responsibility of Member States. In the present case, article 61 is particularly relevant because it establishes that:

A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

66 See, in general, Finn Seyersted, *Common law of international organizations* (Martinus Nijhoff Publishers 2008).

67 Bordin (n 18) 168: ‘There is nothing preventing general international law from developing so as to provide for rules that make sense of “layered subjects”’.

68 *ibid*, 184.

69 Institut de Droit International, ‘Annuaire de l’Institut de Droit International’ (1995) 284.

70 Paolo Palchetti, ‘Exploring Alternative Routes: The Obligation of Members to Enable the Organization to Make Reparation’ in Maurizio Ragazzi (ed), *Responsibility of International Organizations Essays in Memory of Sir Ian Brownlie* (Brill 2013).



Article 62 is also relevant, even if its application is rather limited:

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if: (a) it has accepted responsibility for that act towards the injured party; or (b) it has led the injured party to rely on its responsibility. 2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

The fact that Member States do not disappear through the creation of an organization is also reflected in Annex IX UNCLOS, under which organizations and Member States are jointly and severally responsible for failing to provide a declaration of competence.⁷¹

6. Conclusion

To sum up, the paper pointed out the unnecessary level of complexity employed by ITLOS to establish the responsibility of the EU and exclude that of its Member States. In particular, I focused on the interplay of two elements – violation of international obligations and attribution of conduct – to contest the application of a concept of the EU under which the attribution of so-called exclusive competences would trigger the application of a state analogy. I described that this approach involves unnecessary risks for the protection of biodiversity. In particular, the absence of fundamental competences to prevent IUU fishing, such as the possibility to institute criminal proceedings against private vessels, impairs the effective protection of fisheries resources. Indeed, ITLOS did not explain how EU competences would guarantee the same standard of due diligence that is required of flag states.

Conversely, this paper constructed a simplified form of EU responsibility applying the 2011 project of the ILC. Concerning primary obligations, I described forms of indirect participation of Member States to the treaty concluded only by the organization, relying on the obligations identified by the ILC, which bound Member States to provide sufficient means to their organizations. In particular, I claimed that the standard of due diligence that is applicable to the EU is lower than the standard that is requested of flag states, because the EU does not possess a general capacity to take every possible action. However, Member States do not disappear behind the institutional veil of the organization and they assume a form of responsibility towards third entities. Consequently, I supported a form of shared responsibility which is not based on joint and several obligations, but on differentiated forms of responsibility deriving from the same wrongful act. It is a way to balance the autonomy of the organization with the autonomy of its Member States.

Concerning the attribution of conduct, the case at hand is a paradigmatic example of the possibility to claim dual attribution, under which the conduct of Member States is, at the same time, the conduct of their organization. In the case of omission, such as the absence of sufficient vigilance to enact relevant regulations to prevent IUU fishing activities, the possibility to attribute the same conduct to

⁷¹ Treves (n 39).



both entities is straightforward. Indeed, there is no reason to rely on the so-called normative control to claim that Member States act as quasi-organs of the EU. Dual attribution bypasses the relevance of the internal attribution of exclusive competences on which the complexities of normative control is based. Alternatively, the omission of the EU to enact sufficient legislation is directly attributable to the EU itself. In the case at hand, the limited responsibility of the EU does not obliterate the responsibility of its Member States, which arises from the violation of a different international obligation that derives from their status of members. Therefore, the answer to the abstract question addressed to ITLOS is that, potentially, both entities can be responsible for the violation of different obligations and different conducts.