

Illegal, Unreported and Unregulated Fishing under the Proceeding of the International Tribunal for Law of the Sea

Zakieh Taghizadeh¹

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Abstract

The global issue of Sustainable marine fisheries is considered as common concern to humankind. The emergence and persistence of noncompliant fisheries practices conveniently labelled ‘Illegal, Unreported and Unregulated fishing’ (IUU fishing), is of particular concern for the international community, regional fisheries management organizations and coastal states. The International Tribunal for Law of the Sea (ITLOS) in its first full-bench Advisory Opinion in 2015 found that Arts. 62(4), 58(3), 192 of the United Nations Convention on the Law of the Sea (UNCLOS) contain obligations for a flag state to ensure that vessels flying its flag do not engage in illegal fishing in the exclusive economic zones of coastal states. By this explanation, the Advisory Opinion initially has clarified the inadequate international fisheries law regime through ITLOS interpretive approach, which this paper attempts to examine by applying an exact legal scrutiny. The framework set by the Tribunal may allow States affected by IUU fishing, to exert greater pressure on flag states, particularly flag states of convenience, that do not comply with their responsibilities under UNCLOS. This paper suggests that the regulations on IUU fishing under international law should be enhanced and revised in order to draw an appropriate solution suitable for sustainable fisheries management.

Key Words: Sustainable Fisheries; IUU Fishing; Exclusive Economic Zone, Transnational Crimes; International Tribunal for Law of the Sea

¹ International Legal Department, Ministry of Foreign Affairs and Adjunct assistant professor, University of Science and Culture, Tehran, Iran.

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Introduction

Illegal, unregulated and unreported fishing (“IUU fishing”) is recognized as a global concern of the international community and, it constitutes the single most threat to the sustainable management of fisheries resources.² One of the major challenges in the field of the international law of the sea refers to the overexploitation of fisheries worldwide. According to the recent data, approximately 75 percent of the world’s fisheries are either over or fully exploited, mainly due to IUU fishing. (Ventura, 2015)

A growing amount of illegal, unreported and unregulated fishing is the result of expansion into new “business ventures” by transnational organized groups that are easily facilitated within the margins of the law by unregulated access to flags of convenience, little regulation of transshipments, the existence of ports of convenience, and an active business in offshore shell companies and tax havens. (Telesetsky, 2014) As the President of the International Tribunal for Law of the Sea (ITLOS), Mr Wolfrum indicates; “the causes of unsustainable fisheries are complex and due to many factors: illegal fishing; overfishing; inadequate or ineffectively implemented conservation and management measures; disregard for the interdependency of marine living resources; and environmental degradation, to mention but a few. Among all these factors, the main factor would be IUU fishing. What has become clear to the international community in the last few years is that IUU fishing not only seriously undermines efforts to conserve and manage fishery resources but also has serious economic implications for some of the poorest countries in the world, which are dependent on fisheries for their food, livelihood and revenue.”³

² Fighting against Illegal, Unreported and Unregulated (IUU) Fishing: Impacts and Challenges for ACP Countries (2009, April 29). *Brussels Briefing*, 10.

³ Presentation given by the President of the ITLOS to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the UN in New York (2007, June). Last retrieved: (31 May 2020)

https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf



The definitions of the nature and scope of IUU fishing encompasses three aspects;⁴ Illegal fishing means fishing within a declared Exclusive Economic Zone (EEZ) without the permission of the relevant coastal State or fishing within an Regional Fisheries Management Organization (RFMO) area of application by a vessel flagged to a contracting party. It also encompasses fishing in violation of national or international obligations. Unregulated fishing includes fishing within a RFMO area of application by a vessel either without nationality or flagged to a non-contracting party and which is either inconsistent with, or contravenes the conservation and management measures of the relevant RFMO. It also includes fishing on the high seas in the absence of flag State authorization. Unreported fishing includes misreporting catch levels or failing to report catches. (*IPOA-IUU*, Section II(3))

Despite salient efforts by the international community to comprehensively tackle IUU fishing threat in maritime areas especially the EEZ, it is flourishing. The threats that it poses, ranging from adverse effects on fish stocks to the destabilization of coastal communities, warrant renewed urgent concern about its proliferation. (Fontaubert, & Lutchma, 2003; Ndiaye, 2011; Churchill, 2007) There is general agreement amongst commentators, regulators and those on the ground alike that a multi-pronged approach to tackling IUU fishing is required which creatively employs the complementary legal tools currently available. The potential power of port state controls, as a relatively simple and economic means of hitting at the profitability of IUU fishing has recently received attention, in part due to the adoption of the 2009 FAO Agreement on Port State Measures.⁵ (Witbooti, 2014)

In order to spread lights over the legal framework and clarify the obligations and duties of States with regard to IUU fishing, the

⁴ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) adopted by the 25th session of the FAO Committee on Fisheries on 2 March 2001. Section II, 3.

⁵ The Agreement on Port State Measures (PSMA), adopted on 22 November 2009 is considered as the first binding international agreement to specifically target IUU fishing. Its main objective is to prevent, deter and eliminate IUU fishing by preventing vessels engaged in IUU fishing from using ports and landing their catches. FAO Agreement on Port Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, (2009, November 22). For further information on this agreement, see: <http://www.fao.org/port-state-measures/en/>

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International Tribunal for Law of the Sea (ITLOS)⁶ rendered its advisory opinion on April 2, 2015 in Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion, 2015). This paper examines the proceedings of ITLOS in addressing the serious threat posed by IUU fishing to international security. The first question that the advisory Opinion has shed light on concerns the obligations of third States (not members of the Commission) when fishing vessels belonging to those States operate within the Exclusive Economic Zone (EEZ) of Member States of the Commission. Secondly, the opinion provides a response to the question of the extent to which the flag state could be held liable for IUU fishing activities conducted by vessels sailing under its flag. Thirdly, the tribunal deliberated on the question of who among the Flag State or an international agency should be held liable for violation of fishing legislation of the Coastal State by vessels operating by virtue of a license issued within the framework of an international agreement with the subject Flag State or international agency. The fourth question that the Tribunal addressed has to do with the determination of the rights and obligations of the Coastal State in ensuring sustainable management of shared stocks and stocks of common interests, especially the small pelagic species and tuna.

Therefore, the first part of this paper elaborates the relations between illegal, unreported, and unregulated fishing and transnational organized crimes and set forth the legal framework to tackle the problem under international law. Moreover, it examines the jurisprudence of the International Tribunal for Law of the Sea and its proceedings to clarify the notion and the legal framework encompassing all aspects of the serious challenge of IUU fishing. The serious question which is to be answered in light of the ITLOS proceedings (particularly, the SFRC advisory opinion) is whether the Tribunal was successful to classify and respond to the questions of the international community regarding the IUU problems reposed in front of it?

⁶ ITLOS is a judicial body established by the UNCLOS to adjudicate disputes and matters concerning the interpretation and application of the Convention and other agreements conferring jurisdiction on ITLOS.



1. Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime

Law of the sea which has been in a state of development and evolution since seventeenth century has principally been centred on aspects of maritime security. Since the time of the earliest debates between Grotius and Selden with respect to the freedom of the high seas, maritime security and national security have been fundamental to the progressive development of the law of the sea. (Mossop & Rothwell, 2010) As has been observed, “Formidable acceleration of information exchanges, the increased trade in goods and services as well as the movement of individuals from one part of the world to another, have transformed our economic, social and political environment in both positive and negative ways, as well as the paradigm of national and international security.” (Gandhi, 2009, p.509)

Maritime organized crimes are considered as serious threats to international peace and security. In order to address the issues of regional and international threats to maritime security “in an increasingly networked and multifaceted global environment, a comprehensive and coordinated interagency approach must be adopted.” (Wambua, 2012, p.97) In this regard, to address critical security threats and the applicable international legal framework, the first part of this paper will focus on explaining in detail about the most significant maritime organized crimes committed at seas and the international legal framework applicable in combating maritime crimes.

Maritime security is a very broad issue encompassing many aspects. The term can encompass different meanings depending upon various individual or organizational interests, or even political or ideological basis thereof. Accordingly, the concept may be defined as an interconnected and unpredictable combination of transnational terrorism, and organized crimes which are considered as crucial threats to international security, including but not limited to the risks of intrastate conflicts and instability, terrorism, maritime piracy and armed robbery against ships⁷, smuggling in all its forms, and IUU fishing.

⁷ According to Article 101 of the UNCLOS, Piracy consists of any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a

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From the perspective of the United Nations, the Secretary-General has acknowledged that there is no agreed definition of ‘maritime security’, and has instead identified what activities are commonly perceived as threats to maritime security. In his 2008 ‘Report on Oceans and the law of the Sea’,⁸ the Secretary-General identified seven specific threats to maritime security. These threats are as follows:

“First, piracy and armed robbery against ships, which particularly endanger the welfare of seafarers and the security of navigation and commerce. Second, terrorist acts involving shipping, offshore installation and other maritime interests, in view of the widespread effects, including significant economic impact that may result from such an attack. Third, illicit trafficking in arms and weapons of mass destruction. Fourth, illicit trafficking in narcotic drugs and psychotropic substances, which takes into account that ‘approximately 70 percent of the total quantity of drugs seized is confiscated either during or after transportation by sea’. Fifth, smuggling and trafficking of persons by sea, posing risks due to the common use of unseaworthy vessels, the inhumane conditions on board, the possibility of abandoned at sea by the smugglers, and the difficulties caused to those undertaking rescues at sea. Sixth, illegal, unreported and unregulated (IUU) fishing in light of the identification of food security as a major threat to international peace and security. Finally, intentional and unlawful damage to the marine environment as a particularly grave form of maritime pollution due to the potential to threaten the security of one or more states given the impact on social and economic interests of coastal states.”

According to the report of the High Level Workshop on Transnational Organized Crimes, convened by the European Union and INTERPOL on May 2014, the concept of organized crime at sea has many facets,

private ship or a private aircraft on the high seas and areas in a place outside the jurisdiction of any State. However, according to the IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, armed robbery is defined as “any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; and any act of inciting or of intentionally facilitating an act described above.”

⁸ Report of the Secretary-General on Oceans and the law of the Sea, 10 March 2008, UN Doc.A/63/63, Para.39.



and covers numerous issues such as piracy, illegal fishing and money laundering and the scope of the challenge posed by the aforementioned organized crimes at sea is much broader than initially perceived.⁹ Accordingly, proper maritime governance and security goes far beyond just acts of piracy and armed robbery at sea. There is also some evidence demonstrating that the IUU fishing could be considered as a derivative for other organized crimes such as piracy and armed robbery at sea. (Taghizadeh, 2012)

While the mere presence of foreign fishing vessels causes direct and visible conflict with the domestic sector, the indirect effects of foreign trawling exacerbates these effects. Better responses are required to a broad range of cross-border and organized crimes including seaborne trafficking of arms, narcotics and human beings, as well as IUU fishing, the illegal dumping of waste, among others. (Murphy, 2011; Sumaila, and Bawumia, 2014; Glaser, et al. 2019) These crimes require a proactive and vigilant approach, as they have widespread impact on the economic, social and security status of vulnerable populations. (Taghizadeh, 2014)

The term IUU fishing covers a wide range of behaviors, only some of which are illegal in the sense that they contravene national or international law and regulations, but all of which tend to undermine any conservation and management measures that are in place for a given fish stock. IUU fishing depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal communities, particularly in developing countries. (Baird, 2004) With the depletion of fish stocks, many coastal villages have lost their basic means of livelihood and have been tempted into illegal activities and have turned into networks through which more sophisticated organized crimes might operate in, for example, human, drug or arms smuggling, maritime terrorism or even piracy. In some-

⁹ The INTERPOL has played key role in very important development in terms of international cooperation against IUU fishing. Meanwhile, the work of INTERPOL's Fisheries Crime Working Group has become fundamental contributions to international efforts to prevent and to combat IUU fishing. Moreover, at the 5th Conference of the Parties to the Convention Against Transnational Organized Crime, IUU fishing was recognized as one of the international environmental crimes. See the Report of the Fifth Global Fisheries Enforcement Training Workshop (GFETW), associated by FAO and MCS Network, New Zealand, 7-11 March 2016, at 144.

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but certainly not all cases, the masterminds behind smuggling, opportunistic businessmen, criminal gangs and other illegal maritime operations usually use the local villagers as “foot soldiers” and thus keep themselves at arm’s length from the illegal activity. (Elleman, et al, 2012)

Some of the developing states have limited resources to invest in their coast guard to make it capable of patrolling their EEZ and enforcing fishery regulations, therefore, in the lack of a development of a national government capable of regulating activities in its own EEZ,¹⁰ many offshore resources will be left vulnerable to IUU fishing, with a great economic loss both to the concerned state and to local fisheries industries. As Judge Ndiaye indicated, “this should be borne in mind that the purpose of enshrining the notion of exclusive economic zone in the United Nations Convention on the Law of the Sea was to put an end to the conflict between the interests of coastal States and those of long-range fishing operators. As shown by experience, the result has been unsatisfactory. That is why the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks gives practical effect to, and complements, the Convention through recourse to the concept of “sustainability”. (SFRC Advisory Opinion, Separate Opinion of Judge Ndiaye)

With regard to the crime of IUU fishing, the international community invested considerable time and effort in developing of various measures to tackle the problem, culminating in an FAO-sponsored International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU).¹¹ The international community has endeavored to address the particular problem of illegal fishing either by globally adopting multilateral instruments, such as the UN Fish Stocks Agreement (1995) and the FAO Compliance Agreement (1993)¹², or regionally by the

¹⁰ For further explanation on the EEZ and the legal framework stipulated under international law of the sea, see: Talaie, International Law of the Sea (In Persian), 5 Edition, Jungle Publications, Tehran, 2019.

¹¹ FAO Agreement on Port Measures. See also FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, Italy, 2012.

¹² The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement 1993), see: <http://www.fao.org/iuu-fishing/international-framework/fao-compliance-agreement/en/>



action of an arrangement of RFMOs. The absence of a single regulatory authority indicates that many high seas stocks (including highly migratory and straddling stocks) are particularly vulnerable to overfishing. In the absence of such a regulatory authority, flag States have been entrusted with the responsibility of exercising jurisdiction over their flagged vessels on the high seas and with ensuring that the general limitations on the exercise of the freedom of fishing, contained within Articles 117-119 of the *LOSC* are observed.¹³ In respect of addressing IUU fishing, an integrated cooperation regime must be applied and the international community of States must come forward to robust regional multilateral solutions to address piracy, hijacking, trafficking, IUU fishing, terrorism, and the integrity of EEZs. In this regard, tackling IUU fishing on the EEZ requires large-scale international cooperation and commitment, both in terms of providing resources to implement agreed measures and of coordinating efforts between relevant national and international authorities.

2. Coastal and Flag State Duties to Ensure Sustainable Fisheries Management

With most fisheries in the region fully exploited or over-exploited, IUU fishing is undermining the capacity of the Sub-Regional Fisheries Management Commission (SRFC) members to maintain their fishing industries and provide fish protein for their populations. The SRFC has expressed frustration over a series of violations of fisheries laws in the SRFC area, including the use of bunkering vessels to support IUU fishing.¹⁴ Subsequently on 02 April 2015, in response to a request for opinion by the SRFC, the International Tribunal for Law of the Sea has issued a landmark advisory opinion. The opinion was sought in the context of efforts to address the problem of IUU fishing in the Exclusive Economic Zone of Member States of the Commission and deliberates on a certain number of substantive legal matters. (Freestone, 2011) This was the first occasion on which the full Tribunal has been requested to provide an advisory opinion, which is significant as it has never been

¹³ The International Law Commission (ILC) emphasized the role of flag states in maintaining order on the high seas in the Report of the ILC on the Work of its Seventh Session 23 April-4 July 1956, *Yearbook of the ILC* (1956) Vol.II. 279.

¹⁴ Written Statement of the Permanent Secretariat of the SRFC.

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clear whether ITLOS in plenary has advisory jurisdiction.¹⁵ Previously, the only other advisory opinion rendered by ITLOS was by the Seabed Disputes Chamber in Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. The request presented the ITLOS an opportunity to develop on the responsibility and liability of the flag State for IUU fishing activities by vessels carrying its flag, and restate the coastal and flag State's obligations for sustainable management of living resources in the Exclusive Economic Zones (EEZs), an area beyond and adjacent to the territorial sea of a coastal State stretching 200 nautical miles from the baselines. In doing so, the International Tribunal for Law of the Sea engaged with several issues of general international law, including the responsibility of states and international organizations for IUU fishing. (Salehi, 2014)

The SRFC request for an advisory opinion was made under the Convention on the Definition of the Minimum Access Conditions and Exploitation of Fisheries Resources Within the Maritime Zones under the Jurisdiction of SRFC Member States (MAC Convention), which provides that the SRFC may “bring a given legal matter before [ITLOS] for an advisory opinion.”¹⁶ The International Tribunal for Law of the Sea was asked to address four questions:

1. What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the EEZ 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 license 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

¹⁵ The opinion was sought by the Sub-Regional Fisheries Commission, a fisheries commission comprising seven West African nations, including Guinea, Cape Verde, Gambia, Guinea Bissau, Mauritania, Senegal, and Sierra Leone.

¹⁶ Convention on the Definition of the Minimum Access Conditions and Exploitation of Fisheries Resources within the Maritime Zones under the Jurisdiction of SPRC Member States, art. 33, June 8, 2012.



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? (SFRC Advisory Opinion, Para.5)

1.2. Jurisdiction of the Tribunal to issue an advisory Opinion

Article 138(1) of the ITLOS Rules provides that “[t]he Tribunal may give an advisory opinion if an international agreement related to the purposes of [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion.” However, the issue of jurisdiction was contentious because neither UNCLOS nor the ITLOS Statute makes express reference to ITLOS possessing advisory jurisdiction. (SFRC Advisory Opinion, ITLOS Case 21, Para.40) Indeed, Article 288(1) of UNCLOS only specifies jurisdiction extending to a “dispute concerning the interpretation or application of [UNCLOS].” On the other hand, Article 21 of the ITLOS Statute is cast in more general terms, providing that the jurisdiction of ITLOS “comprises all disputes and applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on [ITLOS].”

In the case concerned, the jurisdiction of the full Tribunal to provide an advisory opinion was contested by several states¹⁷ while others either raised no questions as to the ITLOS’s jurisdiction, or argued that International Tribunal for Law of the Sea did have competence.¹⁸ At last, the ITLOS decided, unanimously, that it had jurisdiction to give the advisory opinion, with that jurisdiction limited to the EEZs of the SFRC member states. (SFRC Advisory Opinion, Para.219). ITLOS observed that under Article 318 of UNCLOS, annexes to the Convention, including the ITLOS Statute (contained in Annex VI)

¹⁷ Argentina, Australia, China, European Union, Ireland, Spain, Thailand, United Kingdom, and the United States. The main arguments against the advisory jurisdiction of the Tribunal were that the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal and that if the Tribunal were to exercise advisory jurisdiction, it would be acting ultra vires under the Convention.

¹⁸ Chile, Federated States of Micronesia, Germany, Japan, New Zealand, Somalia, and Sri Lanka.

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constitute “an integral part of [UNCLOS].” Therefore, the Statute has the same legal status as UNCLOS, and Article 21 of the Statute “should not be considered as subordinate to Article 288 of the Convention.” Article 21 refers to the Tribunal’s jurisdiction over “disputes,” “applications,” and “matters” provided for in any other agreement. The Tribunal found that “matters” must mean something more than just “disputes” and must include advisory opinions. (SFRC Advisory Opinion, Para.52 & 56)

The Tribunal observed that Article 21 of the ITLOS Statute does not itself establish its advisory jurisdiction—rather it is an enabling provision allowing other agreements to confer jurisdiction. (SFRC Advisory Opinion, Para.58) Article 138 of the ITLOS Rules provides the prerequisites to be satisfied before the jurisdiction can be exercised. (SFRC Advisory Opinion, Para.59) In this case these were met: 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 Sub-Regional Fisheries Commission (hereinafter “the MCA Convention”) promotes effective fisheries management and is closely related to the purposes of UNCLOS, and the four questions were framed in legal terms that call for an interpretation and application of the MCA Convention and UNCLOS. (*Ibid.* Paras. 63, 65)

Besides, ITLOS held it is well settled in the jurisprudence of the International Court of Justice (ICJ) that a request for an advisory opinion should not be refused except for “compelling reasons.” (Legality of the Threat or Use of Nuclear Weapons, ICJ, 1996, Para.235) According to the Tribunal, there were no such compelling reasons in the current case as the questions were sufficiently clear. (*Ibid.* Para.71&72.) Therefore, the Tribunal would not be exercising a “legislative role” were it to address them, and made it clear that it does not take a position on issues beyond the scope of its judicial functions (SFRC Advisory Opinion, Para.74) and the Tribunal would not be pronouncing on the rights and obligations of third states not members of the SRFC without their consent. (SFRC Advisory Opinion, Para.75) The Tribunal was particularly mindful that its opinion was being sought to assist the SRFC in performing its functions, thus accordingly, the



Tribunal deems it appropriate to render the advisory opinion requested by the SRFC. (SFRC Advisory Opinion, Para.77).

2.2. Nations of the flag State in cases where IUU fishing activities are conducted within the EEZ of third party States

ITLOS clarified that the first question concerned only the obligations of states that are not members of the SRFC when their fishing vessels operate within the EEZs of SRFC members, and not the question of IUU fishing generally. Paragraph 88 of the SFRC Advisory Opinion stipulates that: “The Tribunal observes that Article 2, paragraph 9, of the MCA Convention defines the expression “fishing vessels belonging to non-Member States or Third Party States” as “fishing vessels operating under the flag of a State which is not a member of the SRFC...”. Consequently, the term “flag State” in the first question refers to a State which is not a member of the SRFC, as the MCA Convention addresses matters related to access by fishing vessels belonging to non-Member States to fisheries resources within the exclusive economic zones of the SRFC Member States.”

As the Tribunal certifies the question concerned does not relate to the obligations of flag States in cases of IUU fishing in other maritime areas, including the high seas. (SFRC Advisory Opinion, Para.89) Therefore, it is clear from the written and oral submissions of the SRFC that it intends to request the Tribunal to address the problem of IUU fishing within the EEZs of the SRFC Member States. (SFRC Case, Separate Opinion of Judge Paik, Para.2)

The definition of IUU fishing, as contained in Article 2, paragraph 4, of the MCA Convention thus plays an important role in the context of the consideration of the obligations borne within the area of application of the very Convention by the flag States which are not members of the SRFC. As noted above, that area encompasses the exclusive economic zones of the SRFC Member States. (SFRC Advisory Opinion, Para.95)

With respect to “unregulated fishing” as referred to in Article 2, paragraph 4.3, of the MCA Convention, the Tribunal pointed out that, in accordance with UNCLOS, the adoption by the coastal State of conservation and management measures for all living resources within its EEZ is mandatory. Article 61, paragraph 2, of UNCLOS requires

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that the coastal State “shall ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation.”(SFRC Advisory Opinion, Para.96). In light of the foregoing provisions of the MCA Convention, the Tribunal finds it appropriate to reiterate the conclusions it reached in the *M/V “Virginia G” Case (ITLOS Judgment of 14 April 2014, paras.212 & 213)* concerning activities that in accordance with the Convention may be regulated by the coastal State in the exercise of its sovereign rights for the purpose of conserving and managing living resources in the exclusive economic zone. The Tribunal stated: The use of the terms “conserving” and “managing” in Article 56 of UNCLOS 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 UNCLOS, which addresses the issue of conservation as its title indicates, whereas Article 62 of the UNCLOS deals with both conservation and management. (*Ibid*, Para.98)

ITLOS found that in light of the “special rights and responsibilities” of the coastal state in the EEZ, “the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State.” (*Ibid*. Para.106) It is the coastal state’s responsibility to adopt necessary laws and regulations, including enforcement procedures, consistent with UNCLOS, to conserve and manage the living resources in the EEZ. (*Ibid*, Para.104) According to the Tribunal, such a responsibility of the coastal State is also acknowledged in the MCA Convention, which states in Article 25 that the SRFC Member States commit themselves to take such measures, and, to this end, to strengthen cooperation to fight against IUU fishing, in accordance with international law. The fishing activities that coastal states may regulate, consistent with Article 62 of UNCLOS, and the Tribunal’s decision in *M/V Virginia G* must be “directly” connected to fishing. (SFRC Advisory Opinion, Para.100)

In this regard, in accordance with Article 61, paragraphs 1 and 2, of UNCLOS, the coastal State is entrusted with the responsibility to determine the allowable catch of the living resources in its EEZ and to “ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone



is not endangered by over-exploitation.” Pursuant to Article 62, paragraph 2 of UNCLOS, the coastal State is required through agreements or other arrangements to give other States access to the surplus of the allowable catch if it does not have the capacity to harvest the entire allowable catch. To meet its responsibilities, in accordance with Article 62, paragraph 4, of the UNCLOS, the coastal State is required to adopt the necessary laws and regulations, including enforcement procedures, which must be consistent with the Convention. (, SFRC Advisory Opinion, Para.104)

To ensure compliance with its laws and regulations concerning the conservation and management measures for living resources pursuant to Article 73, paragraph 1, of UNCLOS, the coastal State may take such 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 the Convention. (*Ibid*, Para.105)

However, this does not relieve other states of their obligations to combat IUU fishing. Under Articles 58(3), 62(4), and 192 of UNCLOS, and the MCA Convention, flag states have the “responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the [EEZs] of SRFC Member States.” (*Ibid*, Para.124) Judge Ndiaye in his separate opinion believes that “the Tribunal has failed to devote sufficient attention to the nature and the import of the questions submitted to it. According to the Tribunal, the first question relates solely to the exclusive economic zone of the Member States of the SRFC, and the phrase “[IUU] fishing activities ... conducted within the Exclusive Economic Zones of third party States” means such activities conducted within the exclusive economic zones of the SRFC Member States.(Separate Opinion of Judge Ndiaye, Para .7)

The Tribunal explained that the expression “responsibility to ensure” can be inferred by the advisory opinion of the Seabed Disputes Chamber in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*. (*ITLOS Judgment, 2011, Para.10*) As the Seabed Disputes Chamber found, the obligation of a sponsoring state “to ensure” a contractor complied with obligations under UNCLOS is one of “conduct,” not one of “result,”

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and is satisfied if sufficient “due diligence”¹⁹ is exercised. In an effort to overcome traditional approaches, the Tribunal in fact is encrusting the environmental principle of “due diligence” in its decisions and, therefore, contributing to a fructiferous interaction between the law of the sea and international environmental law. (Ventura, *Op.cit.*) Applying this standard here, ITLOS found that the obligation of a flag state not a party to the MCA Convention is a due diligence obligation of conduct to ensure the vessels flying its flag are not involved in IUU fishing. (Salehi, 2017)

In the case of IUU fishing in the exclusive economic zones of the SRFC Member States, the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation “of conduct”. In other words, as stated in the Advisory Opinion of the Seabed Disputes Chamber, this is an obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost” to prevent IUU fishing by ships flying its flag. However, as an obligation “of conduct” this is a “due diligence obligation”, not an obligation “of result”. This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag. (SFRC Advisory Opinion, Para.129)

Judge Lucky in his separate opinion, although agreed with the response set out in the Advisory Opinion of the Tribunal, stated that: UNCLOS “does not provide a definition of illegal, unreported and unregulated (IUU) fishing. Nevertheless, without referring specifically to IUU fishing, the Convention does specify where and when fishing activities are legal, lawful and regulated in the exclusive economic zone (EEZ) of coastal States and the adjacent waters.” The relevant articles are article 56 (Rights, jurisdiction and duties of the coastal State in the

¹⁹ It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. ICJ case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at p. 79, para. 197.



exclusive economic zone); article 58 (Rights and duties of other States in the exclusive economic zone); article 61 (Conservation of the living resources in a coastal State's EEZ) and article 62 (Utilization of the living resources in the EEZ). Article 73, which provides for the enforcement of laws and regulations of the coastal State, can also be included. Therefore, it seems to me that fishing activities in contravention of the abovementioned Articles can be considered IUU fishing.” (SFRC Advisory Opinion, Separate Opinion of Judge Lucky, Para.29)

3. Threshold of liability of the flag State for IUU fishing activities conducted by vessels sailing under its flag

The second important question which was set in front of the Tribunal was: to what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? ITLOS noted in response that neither UNCLOS nor the MCA Convention contain guidance on flag state liability, and so the question falls to be decided by general rules of international law set out in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)²⁰ (*Ibid.* Paras. 142–143.). Pursuant to Article 293 of the Convention, the Tribunal, in examining this question, will therefore be guided by relevant rules of international law on responsibility of States for internationally wrongful acts. (*Ibid.*, Para.143)

In light of international jurisprudence, including its own, the Tribunal finds that the following rules reflected in the 2001 Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter “the ILC Draft Articles on State Responsibility”) are the rules of general international law relevant to the second question:

(i) Every internationally wrongful act of a State entails the international responsibility of that State (Article 1 of the ILC Draft Articles on State Responsibility);

²⁰ See Articles 1, 2 and 31 (para.1) of the ASR.

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(ii) There is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State (Article 2 of the ILC Draft Articles on State Responsibility); and

(iii) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act (Article 31, paragraph 1, of the ILC Draft Articles on State Responsibility). (*Ibid*, Para.144)

According to the Tribunal, the flag state's liability does not derive from the fact that vessels flying its flag engage in IUU fishing in breach of SRFC laws and regulations, as the conduct is not attributable to the flag state. (*Ibid*. Para.146) Rather, ITLOS held, the liability of a flag state arises only if it fails to meet its due diligence obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the EEZs of the SRFC member states. (*Ibid*. Paras. 146–149) Moreover, a flag state may be in breach of its obligation irrespective of the frequency of such activities and irrelevant to the issue as to whether there is a breach of “due diligence” obligations by the flag State. (*Ibid*, Para.150) According to only Para.147 of the ITLOS advisory Opinion, the Tribunal is of the view that the SRFC Member States may hold liable the flag State of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach, attributable to the flag State, of its international obligations referred to in the reply to the first question. (M/V “SAIGA” Case, Saint Vincent and the Grenadines v. Guinea, Judgment of ITLOS, 1999)

The Tribunal finds that a breach of “due diligence” obligations of a flag State arises if it has not taken all necessary and appropriate measures to meet its obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States. Therefore, the frequency of IUU fishing activities by vessels in the exclusive economic zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of “due diligence” obligations by the flag State. (SRFC Advisory Opinion, Para.150) Some authors believe that the Tribunal was set out by a vague and uncertain question in here, as Judge Lucky states in his separate



opinion that, “It seems to me that the liability of the flag State depends on proof of a failure to comply with a specific law relating to IUU fishing. Consequently, the requirement of evidence is crucial. Therefore, the question as framed is not clear and specific. I do not agree with the construction of the term “responsibility as meaning liability” in the paragraph 145 of the Opinion. In order to be liable, a person has to be responsible, and to be responsible for an act there must be a duty of care and knowledge of an obligation...the *ratio decidendi* in this case is still accepted and applied by judges in several jurisdictions.” (SFRC Advisory Opinion, Separate Opinion of Judge Lucky, Para.33-35)

4. Threshold of Liability of the flag State or an international agency for the violations of the fisheries legislation of the coastal State by the vessels obtained a fishing license

Third question was as follows: “Where a fishing license 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?”

ITLOS observed that the third question relates to the liability of flag states on the one hand and international organizations on the other, and that as the jurisdiction of the Tribunal is limited to the EEZs of SRFC member states the scope of the question is limited to flag states or international organizations that have concluded a fisheries access agreement with a State party to the MCA Convention. (SFRC Advisory Opinion, Para.154) Accordingly, the Tribunal believes that this question concerns the liability of a flag State or of an international agency for the violation of the fisheries legislation of a coastal State by a vessel holding a fishing license issued within the framework of an international agreement with that flag State or international agency and the expression “international agency” is considered synonymous with “international organization”. (*Ibid*, Para.152)

The Tribunal will now deal with the issue of liability of an international organization where fishing licenses are issued within the framework of a fisheries access agreement between the SRFC Member States and the

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organization. The Tribunal also emphasizes that the third question is not to be understood as relating to international organizations in general, but only to international organizations, referred to in Articles 305, paragraph 1(f), and 306 of the Convention, and Annex IX to the Convention, to which their member States, which are parties to the Convention, have transferred competence over matters governed by it; in the present case the matter in question is fisheries.

The Tribunal reiterated that when it comes to flag state liability, its conclusions in relation to question 2 would apply. As regards international organizations, the question was concerned not with international organizations in general but only those referred to in Article 305 and 306 of UNCLOS to which parties to UNCLOS have transferred competence in fisheries or other matters. (*Ibid.* Para.157) There is only one such organization, the European Union (EU), which has assumed exclusive competence from its members in relation to the conservation and management of sea fishing resources. (*Ibid.*, Para.159) The Tribunal notes that in the present case, pursuant to the declaration of the EU with regard to “the conservation and management of sea fishing resources”, it is only the exclusive competence of the EU that is relevant. (*Ibid.*, Para.164) The Tribunal is of the view that the issue of liability in respect of vessels that are owned or operated by a national of a member State of an international organization and which are flying the flag of a State that is not a member of that international organization is beyond the scope of the third question. (*Ibid.*, Para.166)

During the oral proceedings, the EU submitted that it was the only contracting party with the SRFC member states and exercised exclusive competence in respect of EU member states with regard to EU fishing vessels. The Tribunal considered that the liability of an international organization for the violation of fisheries laws of a coastal state by a vessel flying the flag of a member state of the organization depended on whether the agreement between the organization and the coastal state contains specific provisions regarding liability. (*Ibid.* Para.170)

The Tribunal holds that in cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which



provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization. The international organization, as the only contracting party to the fisheries access agreement with the SRFC Member State, must therefore ensure that vessels flying the flag of a member State comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the EEZ of that State. (*Ibid.* Para.172)

It further follows that only the international organization can be held liable for any breach of obligations arising from the fisheries access agreement, and not its member states. (*Ibid.* Para.173) Therefore, according to the court, if the international organization does not meet its “due diligence” obligations, the SRFC Member States may hold the international organization liable for the violation of their fisheries laws and regulations by a vessel flying the flag of a member State of that organization and fishing in the exclusive economic zones of the SRFC Member States within the framework of a fisheries access agreement between that organization and such Member States.

5. 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

The final question was the most general of the four questions, reads as “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?” ITLOS responded to the question at length in setting out the responsibilities of SRFC member states in cooperatively managing SRFC fisheries. In its written submission, the SRFC gave some details as to the background of this question posed to the Tribunal. It stated that: “Small pelagic species and tuna are migratory species that concentrate seasonally, depending on the environmental conditions, in the waters under national jurisdiction of several coastal States. Accordingly, the concerned States should take concerted action for their sustainable management. It has to be highlighted that, in general, the concerned States do not consult each other when setting up management measures on those resources. In fact, these pelagic resources are subject to fishing

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authorization through fishing agreement signed between the coastal State and foreign companies without consultation with neighboring coastal States that are along the migration routes of those resources”. The SRFC adds that “some Member States continue to act in isolation, issuing fishing licenses on the shared resources, thereby undermining the interests of neighboring States and the initiatives of the SRFC.” The SRFC concludes that “today, the practice shows the lack of cooperation among SRFC Member States in managing sustainably the stocks of common interest or shared stocks.” Before addressing the rights and obligations of the coastal State, certain preliminary issues need to be clarified, namely: which States are covered by the reference to the coastal State; what is the scope of the rights and obligations; what do the expressions “shared stocks”, “stocks of common interest” and “sustainable management” as used in this question mean? (*Ibid*, Paras. 176-178)

The Tribunal notes, however, that the fourth question addresses specifically the rights and obligations of the SRFC Member States in ensuring the sustainable management of shared stocks and stocks of common interest, especially small pelagic species and tuna. The Tribunal recalls that its jurisdiction in this case is limited to the exclusive economic zones of the SRFC Member States. Therefore, the rights and obligations of the coastal State referred to in the fourth question are to be construed as rights and obligations of the SRFC Member States (*Ibid*, Para.179) The Tribunal observes that the Convention contains several provisions, namely Articles 61, 62, 73, 192 and 193, concerning general rights and obligations of the coastal State in ensuring the conservation and management of living resources in its exclusive economic zone.

ITLOS observed that Article 61(2) of UNCLOS provides that coastal states, taking into account the best scientific evidence, must ensure through proper conservation and management measures the maintenance of the living resources of the EEZ. Such measures are to be designed to maintain or restore fish stocks at levels which can produce the maximum sustainable yield (Article 61(3)), and coastal states shall take into consideration effects of measures on associated and dependent species (Article 61(4)). ITLOS considered that the ultimate goal of sustainable management of fisheries “is to conserve



and develop them as a viable and sustainable resources,” and that therefore “sustainable management” meant “conservation and development” as referred to in Article 63(1) of UNCLOS. (*Ibid.* Paras 190–191)

ITLOS then set out the various obligations on SRFC member states to ensure the sustainable management of shared stocks as including obligations: to cooperate through competent international organizations (Article 61(2), UNCLOS), to seek agreement on measures to coordinate and ensure the conservation and development of stocks (Article 61(3), UNCLOS), and in relation to tuna species, the obligation to cooperate directly or through the SRFC to ensure conservation and promoting the objective of optimum utilization of such species. (*Ibid.* Para.207) ITLOS noted that conservation and management measures should be based on the best scientific evidence available and, when such evidence is insufficient, the precautionary approach should apply. (*Ibid.* Para.208) It should also be added that the migratory nature of these species could lead to movement from the EEZ of a coastal State in West Africa to the EEZ of neighboring States as well as into adjacent waters and coastal States are obliged to ensure the sustainable management of shared stocks and stocks of common interest.” (Separate Opinion of Judge Lucky, Para.38)

The duty to cooperate under the *LOCS* was judicially considered and affirmed by ITLOS in the *Southern Bluefin Tuna cases*.²¹ This dispute between Australia and New Zealand, and Japan arose out the unilateral declaration by Japan of a three year experimental fishing program for Southern Bluefin tuna setting a total allowable catch of 1464 tonnes per annum over the limit set for the total allocated catch and the legality of Japan’s experimental fishing program to test the recovery of the tuna stocks at various places. (Romano, 2001) Of relevance to this study, Australia and New Zealand argued that Articles 64, and 117-119 of the *LOSC* imposed a duty on Japan to cooperate in the conservation and management of high seas resources (Australian and New Zealand Statement of Claim, 15 July 1999).

²¹ *New Zealand v. Japan and Australian v. Japan (Southern Bluefin Tuna Cases)* (Order for Provisional Measures) ITLOS Case Nos. 3 and 4, 27 August 1999.

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In granting Provisional Measures, ITLOS considered that there was a duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species. (*Southern Bluefin Tuna Cases*, paragraph 48) Further, ITLOS considered that the conduct of the member parties to the *Commission for Conservation of Southern Bluefin Tuna* as between themselves, and in interaction with non-member States, was to be judged with reference to their obligations under the *LOSC*.

6. Conclusion

A network of regional fisheries management organizations exists under the framework of international law of the sea to provide for the long-term sustainability of global fish stocks and these regional organizations more or less are facing serious legal challenges to their ability to conserve and manage living resources as a result of insufficient political will to overcome IUU fishing challenges. Clarification of the duty to cooperate, via a “model case” or advisory opinion before the ITLOS, could potentially improve compliance rates with the conservation measures of regional fisheries management organizations. (Clark, 2011) This paper tried to elaborate the common grounds lies between illegal, unreported, and unregulated fishing and transnational organized crimes, and it set forth the legal framework to tackle the problem under international law of the sea. Moreover, it examined the jurisprudence of ITLOS and its proceedings to clarify the notion and the legal framework encompassing all aspects of the serious challenge of IUU fishing.

The majority of cases submitted to ITLOS have related to fishing or fisheries enforcement, and the recent *SRFC Advisory Opinion on 2015* provides the Tribunal’s most comprehensive analysis to date of coastal and flag state duties to ensure sustainable fisheries management. Significantly in this opinion, the Tribunal reemphasized the connections between managing marine living resources and marine environmental protection, repeating its statement in the *Southern Bluefin Tuna* cases that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.” (*Southern Bluefin Tuna, Australia v. Japan, Order of ITLOS, 1999*)



The ITLOS has firmly established its general advisory jurisdiction and the capacity not only to resolve contentious disputes but also to provide guidance on the interpretation and application of UNCLOS and agreements designed to advance its objects and purposes. The 2015 Advisory Opinion of the Tribunal has invoked considerable excitement for its elaboration of the concept of ‘due diligence’ obligation in the UNCLOS context and their consideration of the issue of responsibility and the potential liabilities of flag States and their vessels operating in EEZ to combat IUU fishing where these due diligence obligations are not discharged. The Tribunal’s interpretation of the Convention has brought some clarity to the IUU regime that is inadequately addressed in the UNCLOS. The Opinion has the potential to strengthen international norms on IUU fishing and sustainable fisheries resources management.

In conclusion, this should be noted that the serious question laid in the introduction of this paper could be answered in light of the ITLOS proceedings (particularly, its recent advisory opinion as the most important of it) as the Tribunal has been successful to classify and respond to the questions of the international community regarding the IUU problems raised in front of it. Despite the view of some writers which believes that the Tribunal has failed to devote sufficient attention to the nature and the import of the questions submitted to it, (SFRC Advisory Opinion, Para.7) as has been detailed, ITLOS’s proceedings shed light on the legal vagueness of the issue concerned. Besides all elaborations and most importantly, the value of the Tribunal’s examination of coastal state responsibilities for fisheries management, which is set out in quite general and abstract terms, should be underlined. Consequently, the framework set by the Tribunal may allow States affected by IUU fishing, to exert greater pressure on flag states, particularly flag states of convenience, that do not live up to their responsibilities under UNCLOS.

Moreover, the responsibility for the proper management of living resources is a shared one; it places not only coastal States but also flag States and – more recently – port States under an obligation. In particular, as far as IUU fishing is concerned, port States play an increasing role in the implementation of the rules governing the

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elimination of IUU fishing as their purpose is to prohibit the landing of fish whose origin is clearly documented and show that it was harvested legally. Dispute settlement procedures may be the most appropriate means of preventing the development of ports where fishing inspections do not live up to the applicable international standards. Therefore, in order to address global threat of IUU fishing, a holistic approach should be taken based on recognizing the IUU fishing as a transnational environmental crime, rather than mere estimating as a challenge for the international community in applying the fisheries management and ocean governance strategies.

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