



II ITLOS MOOT Case Competition 2020

Dispute Concerning the Fishing Practices of Azurius in the EEZ of Calypso in the Stellar Sea (Stellar Sea case)

Keywords: IUU Fishing, Flag State, Due Diligence, Climate Change, Food Security, State of Necessity

Background

1. Calypso and Azurius are small islands developing States (SIDS) located in the Stellar Sea, South Pacific Ocean, and situated at a maximum of 463 nautical miles from each other.
2. As SIDS, both States face similar challenges including narrow resource base, heavy dependence on external markets, high costs for transportation and infrastructure, growing population, fragile natural environments, and a great vulnerability to climate change.
3. These two States however enjoy significant differences. Calypso is an island of 5,587.1 square kilometers, with a coastline of 6057 km, a population of 126 985 as of 2019, with clean water, abundant forest, mineral and agricultural/fishery resources. It is known for its commitments for coral conservation and the promotion of artisanal fisheries since the last 10 years. With an extremely rich marine biodiversity and ambitious fishery conservation policies in place since 2002, including no-take zones in some parts of its EEZ, the fisheries stocks are in excellent health and are nowadays the first largest natural resource sector, significantly contributing to the diet of its inhabitants. Such efforts have contributed to the development of a stable eco-tourism sector, making up nearly 52% of its GDP since 2010.
4. Azurius is a smaller island of 982 square kilometers with a population of 32 296 people as of 2019. Inhabitants rely mostly on agriculture and forestry, including fisheries, coconuts, root crops and 60% food import. The fishery sector is much less developed than in



Calypso because of around twenty years of harmful fishery practices since 1980s leading to the overexploitation and collapse of many fishery stocks and damages to various marine habitats. Because of the exceptional coral reef biodiversity, Azurius is of interest to the international community. As a result, the current President, in place since 1998, supported new long-term marine restoration policies to secure the economic, social and environmental development of the country. In 2016, Azurius established two large marine protected areas (MPAs) in its EEZ. These MPAs are supported by massive investments from the European and American pharmaceutical industries (25% of its GDP), willing to ensure the restoration of marine biodiversity for the long-term access and exploitation of Azurius marine genetic resources. These MPAs also aim at supporting the long-term transition of the island from mass tourism to eco-tourism. Tourism is indeed key to the economy of Azurius. In 2015, Azurius had more tourists coming in the country than residents and the tourism sector contributed to 58% of its GDP.

5. Both States have enjoyed excellent relationship since their respective ratification of UNCLOS. On 4 September 1996, Calypso and Azurius signed a *Bilateral Fishing Agreement* setting out the cooperation rules, rights and duties of the other States in their respective of their Exclusive Economic Zones (EEZ). Under this agreement, Calypso and Azurius agreed to set out total allowable catch limits (TACs), every two-year, based on scientific advice delivered by the Pacific Ocean Fishery Advisory Body, a highly respected scientific body in the region and the world.

6. On 19 August 2002, Calypso and Azurius updated the 1996 *Bilateral Fishing Agreement* to strengthen their cooperation framework in the fight against IUU fishing (mainly coming from neighboring islands). On the date of the signing of update of the Agreement, they released a public statement acknowledging their excellent relationship and the complete trust they have in each other in the implementation of this Agreement. Calypso and Azurius also announced a fifteen-year- agreement project “Big Eyes on You” being currently negotiated with the European Union, which is planned to deploy and deliver, free of charge, space technologies using both optical and radar imagery to strengthen the monitoring and surveillance of fishing activities in the EEZ of both countries. Signed on 10 June 2005 by Calypso, Azurius and the European Union, the “Big Eyes on You” agreement sets out specific cooperation mechanisms including the fact that the data will be delivered to Calypso who will then be responsible for its management and sharing with Azurius. On the same day,



Calypso and Azurius agreed to add an annex to the 1996 *Bilateral Fishing Agreement* with the names of initial contact points in both countries in order to facilitate cooperation and the exchange of information. The following month, both Calypso and Azurius launched an important communication campaign domestically and abroad on the newly adopted measures and their commitments to fight IUU fishing.

7. In March 2016, the outbreak of a very contagious virus “CURIOUS-16” paralyzed international trade and provoked a worldwide health and economic crisis. Calypso and Azurius reacted promptly and both declared on 8 March 2016 the state of health emergency with a complete ban of international travels. The United Nations General Assembly acknowledged on 15 June 2016 the importance of the world health and resulting economic crisis (freeze of international trade) and reminded the principles of the United Nations Charter and the importance of collective measures for the prevention and removal of threats to the peace and the respect of human rights.

8. On 2 July 2016, The President of Azurius made a public declaration stating the catastrophic impact of the economic crisis on the country: the tourism sector completely collapsed and, because the paralysis of international trade, Azurius was not anymore able to import and export food, especially fisheries. Inhabitants will soon be forced to subsistence farming & fishing. The President expressed important worries regarding this prospect. Indeed, since 2012, the Pacific Ocean Advisory Body as well as independent experts, with supporting articles published in *Nature*, have warned many times Azurius about the impact of climate change on its fishery stocks and the potential relocation of most of its main fishery stocks (swordfish, albacore, red snappers and mahi mahis) beyond its EEZ from 2015.

9. While Calypso tourism sector also collapsed, the President of Calypso declared on its side its satisfaction regarding the resilience of its agriculture and the great abundance of its fisheries. On the 5 July 2016, the President of Calypso reassured its inhabitants regarding the spectrum of a food crisis declaring that “*there will be none here*”, mentioning that mother Nature has always been generous with Calypso. He also thanked his long-time friend, Azurius, for his long-term cooperation in the fight against IUU Fishing, and the European Union service “Big Eyes on You”, which enable to completely eradicate IUU Fishing activities in Calypso’s waters since 2013. Thus, although the Coast Guards were not able to conduct “activities as usual” due to health precautionary measures, the President of Calypso



was confident that fishery resources will be well preserved from IUU fishing during this crisis.

10. On 26 November 2016, Azurius released a documentary on the website of the BBC showing to the world the distress of its inhabitants. As mentioned by Robert Kakolau, former tourist guide on the northern beaches, “*We don’t have money and now we need to survive with not much food*”. Azurius is not the only country hit by a food crisis. Millions of people around the world are facing acute food shortages since the last three months, to the extent that the Food and Agricultural Organization of the United Nations have declared 2016 the year of the “world hunger crisis”.

11. On 6 March 2017, Calypso, notified Azurius that the service “Big Eyes on You” have spotted two non-authorized small azurian vessels¹ of 19 meters conducting fishing activities in the Dragon Swing area of the EEZ of Calypso on the 16th and 18th February 2017. Although the 1996 *Bilateral Fishing Agreement* requires a special procedure to be followed, Calypso declared its surprise to spot azurian vessels in the no take zone of its EEZ.² As a friend, Azurius stated that it will not apply the procedure of the 1996 *Bilateral Fishing Agreement* and, as a consequence, will not send any warning to Azurius. Calypso however required Azurius to make its best efforts to control its vessels, investigate and apply sanctions. On 10 March 2017, Azurius officially replied to Calypso also stating its surprise, thanking his long-time friend and ensuring that everything will be made to solve the potential issue.

12. On 29 August 2017, Calypso sent again an official notification to Azurius to report, thanks to the service “Big Eyes on You”, that two new non-authorized small azurian vessels³ of 16 meters were spotted, on the 8th, the 10th August and 18th of August 2017, in the Gold Seahorse area of the EEZ of Calypso. In its notification to Azurius, Calypso stated its disappointment to see that Azurius did not come back to Calypso with the results of the investigation for the events occurring in February 2017 and did not seem to have taken any

¹ According to Article 86.2 of the Marine Conservation Act (2002).

² Vessels notified on the 16th and 18th February 2017 their entry and exit of the EEZ of Calypso to Azurius. The two azurian vessels were located on the two days 2,2 nautical miles away from the Dragon Swing Area at the time of the notifications to Azurius and had fishing authorizations in full compliance with the 1996 *Bilateral Fishing Agreement*. These fishing authorizations were matching the locations notified to Azurius.

³ According to Article 86.2 of the Marine Conservation Act (2002).



measures concerning the control of vessels flying its flag. Calypso made it clear that these activities were illegal. Indeed, once again, the azurian vessels did not notify the Port State of Calypso their intention to navigate through a special protected area, they did not have any special authorization onboard, they thus had the intention to hide their illegal fishing activities.⁴ Calypso therefore required his friend to exercise his Flag State duties and made it clear that this was the last time that Calypso will tolerate such accident without implementing the full procedure of the 1996 *Bilateral Fishing Agreement*.

13. On 2 October 2017, Calypso sent a warning to Azurius reporting that two azurian vessels of 27 meters were arrested on 30th September 2017 by the Calypso Coast Guard while conducting illegal fishing activities in the EEZ of Calypso. At the time of the arrest, the two azurian fishing trawlers had a full fishing hold. They were equipped with operational vessel monitoring systems (VMS) but did not have any fishing logbooks nor any adequate fishing authorizations.⁵ The vessels and the crews were arrested and escorted to the Palm Port of Calypso by the Coast Guards where the entire fish hold was seized. The crews and the vessels were released the following day and escorted by the Coast Guards of Calypso up to the outer limits of the EEZ of Azurius. The same day, a fine of 12 006 euros (to be paid within 3 months) was sent to Azurius for illegal fishing activities in the EEZ of Calypso along with a report explaining the details of the arrest & location, the size of the fish hold seized (a total of 120 kg of red snappers, spanish mackerels & mahi mahis), as well as recommendations to comply with Coastal and Flag State duties under UNCLOS and international law.

14. On 6 November 2017, Calypso sent another warning to Azurius reporting that three new non-authorized vessels⁶ of 20 meters were arrested the 3rd of November 2017 by the Calypso Coast Guards for the conduct of illegal fishing activities in the Gold Seahorse area of the EEZ of Calypso.⁷ The Calypso Coast Guards seized a total of 74 kg of red snappers,

⁴ Vessels notified on the 8th, 10th and 18th August 2017 their entry and exit of the EEZ of Calypso to Azurius. The two azurian vessels were located on the two days 1,9 nautical miles away from the Gold Seahorse area at the time of the various VMS notifications to Azurius and had fishing authorizations in full compliance with the 1996 *Bilateral Fishing Agreement*. These fishing authorizations were matching the locations notified to Azurius.

⁵ The fish species and location of fishing activities indicated on the fishing authorizations were not matching with the actual species fished and the location of these fishing activities.

⁶ According to article 86.2 of the Marine Conservation Act (2002).

⁷ The Gold Seahorse area is located 54 nautical miles away from the outer limit of the Honikulu marine protected area of Azurius.



138kg mahi mahis as well as 12 devil rays, very appreciated in the traditional culinary culture of Azurius. The vessels had fishing authorizations mentioning the required elements of the 1996 *Bilateral Fishing Agreement*, but the species targeted and the location of the fishing activities were not matching with the actual species fished and the location of these fishing activities.⁸ The vessels and crews were released on the following day of the arrest and were taken back to the outer limits of the EEZ of Azurius by the Calypso Coast Guards. A fine of 150 862 euros (to be paid within 3 months) was sent on 6 November 2017 for the conduct of illegal fishing activities, as well as a report mentioning the violations by Azurius of the 1996 *Bilateral Fishing Agreement*, CITES & UNCLOS and customary international law obligations and the urgent need to settle the dispute by peaceful means.

15. On 20 November 2017, Azurius replied to Calypso acknowledging the prompt payment of the first fine of 12 006 euros to ease the growing tensions with its long-time friend. Azurius reassured Calypso that he did not have any knowledge of these potential illegal activities occurring in September 2017. Azurius indeed issued fishing authorizations for the two azurian vessels in full compliance with the 1996 *Bilateral Fishing Agreement* and the related 2016-2017 TACs. It was also notified of their time of entry into the EEZ of Calypso and their location 106 minutes before their arrest, location which was matching the fishing authorizations. Azurius then explained that an investigation has been conducted between the 4th and 13th October 2017. According to the vessel records, the crew members and owner are part of a small coastal community located North of the island facing nowadays important malnutrition issues. Following their arrest for alleged illegal fishing activities, no proofs were gathered proving any illegal activities and thus no prosecution was organized. The crew members were thus released by the police with a warning for fishing activities conducted in a location of the EEZ of Calypso different than the one indicated in the fishing authorizations.

16. Concerning the events occurring in November 2017, Azurius rejected the accusations of Calypso and supported that the vessels and crews acted under a state of necessity, replying to a serious peril and acting to safeguard an essential interest: food security and the right to food. Furthermore, the crew members who conducted fishing activities were simply

⁸ Vessels notified their entry in the EEZ of Calypso to Azurius. Azurius however did not receive any notifications, every two hours, following their entry into the EEZ of Calypso. At the time of the arrest, the three small vessels were equipped with operating VMS and did not have any fishing logbooks.



following fishery stocks which have moved away from the area of Honikulu because of climate change. They were conducting subsistence fishing activities on what they believed to be their own fishery resources to ensure the survival of their community and country. They thus had no intention to trade any of the fish caught and were not damaging the marine environment because of the small amount of the fish caught. Azurius therefore refused to pay the fine of 150 862 euros to Calypso.

17. On 7 December 2017, Calypso invited Azurius to exchange views in a video conference meeting organized on 12 December 2017. Azurius accepted. The meeting ended with an acknowledgement of strong disagreements between the two countries, a refusal to pay the fine of 150 862 euros by Azurius and the establishment of a dispute negotiation calendar for 2018-2019 period between the relevant ministries and diplomats.

18. Following a total of eight meetings conducted during the year 2018, and six meetings conducted in the first semester 2019, Calypso and Azurius agreed in writing on 24 April 2020 to promptly settle the dispute by peaceful means before the International Tribunal for the Law of the Sea.

19. On 27 April 2020, Calypso respectfully invited the International Tribunal for the Law of the Sea to exercise its jurisdiction over the fisheries dispute between Calypso and Azurius in the Stellar Sea and required the Tribunal to adjudge and declare that:

- (1) In accordance with the principles and rules set forth in UNCLOS and international law, the fishing activities of Azurius in the EEZ of Calypso, including in the no take zone, are illegal and violated article 58.3, 61.1, 62.1, 62.4 and 192 of UNCLOS;
- (2) Azurius breached its due diligence obligations under Article 58.3, 62.4, 94 and 192 of UNCLOS and customary international law;
- (3) The conduct of illegal fishing activities in the EEZ of Calypso cannot be justified by a state of necessity and/or climate change;
- (4) Azurius is responsible for the food security issues its inhabitants are facing. It indeed failed to plan well ahead, on the basis of best scientific evidence available, the management, preservation and restoration of its marine environment and resource.

Calypso reserves the right to supplement, modify and amplify the present Application in the course of the proceedings.



20. Azurius asks the Tribunal to adjudge and declare that:
- (1) Azurius is not liable for the violation of the alleged UNCLOS and international law rules and principles as it has taken all necessary and appropriate measures to comply with its duties and ensure that vessels flying its flag do not conduct any illegal fishing activities.
 - (2) Calypso does not have any proofs of illegal fishing activities conducted by the azurian fishing vessels in its EEZ in February and August 2017 (apart from satellite images testifying only of the location of fishing vessels). Moreover, the fishing activities conducted in October 2017 fully respected the TACs of the 1996 *Bilateral Fishing Agreement*.
 - (3) The alleged illegal fishing activities of November 2017 do not have any economic dimension and were only subsistence fishing activities, which replied to a grave and imminent danger faced by Azurius inhabitants (the shortage of food and their right to food) exacerbated by climate change, well known from the international community.
 - (4) Azurius is thus not liable for the fishing activities conducted in November 2017 by vessels flying its flag.

Azurius reserves the right to supplement, modify and amplify the present arguments in the course of the proceedings.

Relevant Legal Instruments

Calypso and Azurius are both parties to United Nations Convention on the Law on the Sea (UNCLOS), having ratified the Convention on 7 June 1984 and 6 November 1985 respectfully.

Both States are signatories to the UN Fish Stocks Agreement as well as the Washington Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES). They have not yet ratified the FAO Agreement on Port State Measures (PSMA) and are not member of any regional fisheries management organizations.



Calypso and Azurius strongly support the implementation of Agenda 2030 and SDG14, and have implemented the FAO Code of Conduct for Responsible Fisheries and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) within their domestic legislations.

- Calypso's domestic instruments

- Criminal Code : Art. L 92(3) "IUU fishing activities conducted by Calypso vessels in maritime zones of other Coastal States and by foreign flag conducted in the maritime zones of Calypso are subject to a fine of a minimum of 12 000 euros and a minimum of 3 months of imprisonment. The amount of the fine, as well as the relevance and length of the imprisonment are subject to the gravity of the crime and the economic value of the fish caught."(this article was introduced in 2002 following the update the 1996 *Bilateral Fishing Agreement*)
- Marine Conservation Act (2002): Art. 86.2 " To promote conservation and restoration of significant marine habitats and species, three special protected areas are created around the following marine features: the Dragon Swing, the Neptune Trench and the Gold Seahorse (replying the coordinates 1, 2 and 3 of the EEZ Planning Act of 2001). No activities are allowed in these three protected areas. Each vessel, flying a foreign flag or flying the flag of Calypso, willing to exercise its freedom of navigation in any of these special protected areas shall notify the Port State of Calypso prior its passage for the issuance of a special authorization, which shall be carried on board during the passage in any of these special protected areas."

- Azurius domestic instruments

- Criminal Code: Art. 78.4 "IUU fishing activities conducted by azurian vessels in maritime zones of other Coastal States and by a foreign flag in the maritime zones of Azurius are subject to a minimum fine of 16 000 euros and a minimum of 2 months of imprisonment. The amount of the fine, as well as the relevance and length of the imprisonment are subject to the gravity of the crime and the economic value of the fish caught." (this article was introduced in 2002 following the update of the 1996 *Bilateral Fishing Agreement*)
- Marine Policy and EEZ Management Act (2014)
 - Article 168.1 (introduced in 2016)" A marine protected area called " Pagus kaohu" is created and defined by the following three limits, the geographical



coordinated being expressed in the WGS 84 system: A1 -13 382356, -176 217957, A2 -13 383441, -176 215038, A3 -13 386823, -176 218514. Only artisanal fishing activities are allowed in this marine protected area.”.

- Article 168.2 (introduced in 2016) “A marine protected area called Honikulu is created and defined by the following three limits B1 -13 385028, -176 212592, B2 13 386974, -176 212289, B3 -13 386481, -176 211385. Fishing activities both industrial and artisanal are allowed from 1st October to 1st May. This timeframe can be revised when necessary.”

To regulate fishing activities within their respective EEZ and create a cooperation framework between the two countries, Calypso and Azurius signed in 1996 *Bilateral Fishing Agreement*, implementing the FAO Code of Conduct for Responsible Fisheries. This agreement was updated on 18th August 2002 to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) and integrate the principles related to Flag State Responsibilities, Coastal State Measures, Port State Measures, Research, Training & Education on IUU Fishing as well as Monitoring, Control and Surveillance, including control mechanisms at the point of landing, fast authorization schemes for vessels through internet, records of vessels and owners and vessels monitoring system (VMS).

Although following closely the IPOA-IUU, the 1996 *Bilateral Fishing Agreement* introduced some specificities through the following articles:

Article 3 “The Flag State is required to respect at all times the domestic legislations of the Coastal State who has jurisdiction and control over the activities conducted, as well as the relevant bilateral agreement(s) and international law.”

Article 3.2 “TACs are not applicable to marine and special protected areas which are solely regulated by the relevant domestic instrument(s) of the Coastal State under the jurisdiction of which the marine and special protected area is located.”

Article 6 “Vessels conducting activities in the EEZ of another Coastal State shall:



- Possess a valid fishing authorization issued by the Flag State (with clear indications of location, scope, duration, fishing method and species targeted as well as a fishing logbook);
- Report time of entry and exit from the EEZ of the other Coastal State to the Flag State,
- Send their positions to the Flag State every two hours from the time of the entry into the EEZ of the other Coastal State;
- Be equipped with operational vessel monitoring systems (VMS) using satellite data transmission;
- Are not required to have observers on board.”

Article 7 “Vessels are required to refrain from using prohibited gear & equipment.”

Article 12 “ In case of IUU fishing conducted by one of the two parties to this Agreement in the EEZ and/or territorial waters of the other country, a specific procedure will apply: The Port State will arrest the vessel and crew conducting IUU fishing activities in its territorial waters or EEZ, seize the entire fish hold and shortly release the vessel(s) and the crew, which will be accompanied by the Coastal Guard up to the outer limits of the EEZ of the Coastal State in which the vessel is flagged. A fine will then be sent to this Coastal State with a warning and a report explaining the details of the arrest, the fish seized and potential recommendations”.

Article 24 “States Parties to this Agreement shall cooperate and make their best efforts to promote best fishing practices and mutually beneficial marine conservation & restoration policies with the view to protect and conserve the marine environment and species facing extinctions, taking in consideration the list established by the Washington Convention on International Trade and Endangered Species of Wild Fauna and Flora (CITES) and its appendices and the scientific advice of relevant experts, including the Pacific Ocean Fishery Advisory Body”.

Article 32 “ Any dispute concerning the interpretation or application arising out of this Agreement, which it has not been possible to settle by negotiations, shall be settled on the basis of the procedure provided in Part XI of the UNCLOS before the International Tribunal for the Law of the Sea”.



Annexe 1 “TAC 2016-2017”

Species	TAC for Calypso in Azurius EEZ (tonnes or pieces)	TAC for Azurius in Calypso EEZ (tonnes or pieces)
Swordfish	1,35t	1,78t
Yellowfin Tuna	0*	0*
Albacore	0,78t	1,22t
BigEye Tuna	0*	0*
Black Martin	0,29t	0,45t
Red Snapper	1,7t	2,4t
Indo-Pacific Sailfish	0,42t	0,85t
Sea Cucumber	3,09t	2,01t
Surgeonfish	0,85t	0,004t
Blue Shark	36 pieces	36 pieces
Devil Rays	0*	0*
La Plata Skate	12 rays	12 rays
Mahi Mahi	0,75 t	1,07 t
Nata electric Ray	11 rays	11 rays
Spanish mackerels	1,9 t	3,4 t

*=protected due to potential extinction