Written Statement of Thailand, attached:
- PowerPoint presentation (not reproduced)

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC) TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

WRITTEN STATEMENT OF THAILAND

14 MARCH 2014

I. INTRODUCTION

1. In its Written Statement dated 29 November 2013, Thailand respectfully submits that:

(1) the International Tribunal for the Law of the Sea (ITLOS) has no jurisdiction to give an advisory opinion on any of the four questions asked by the Sub-Regional Fisheries Commission (SRFC); and that

(2) the request for the advisory opinion in this Case No. 21 is not admissible.

The above submission is notwithstanding Thailand's strong support for collective international efforts to effectively put an end to IUU fishing.

2. Thailand's fight against IUU fishing has been pursued by the Department of Fisheries (DOF) through the control of vessel registration, licence issuance, and enforcement of fishing regulations under the Thai Fisheries Act 1947 (B.E. 2490), and with the follow-up on fishing logbooks. A number of measures for vessel registration have been coordinated with Thailand's Marine Department since 2010, resulting in the increase of vessel registrations from 23,744 vessels before January 2010 to 71,162 vessels in August 2013. There are six types of Thai fishing logbooks; namely, trawler and push-net, purse seine, gill-net, lift-falling net, trap-net and other gears. Logbook information includes fishing vessel registration, licence number, type of fishing gear, fishing ground area, fishing duration, port of departure/arrival, species and quantities of catch and the certification by master fishermen. Logbooks are reported to coastal provincial fisheries offices located along 22 coastal provinces of Thailand and 5 fishery inspection offices located in Bangkok, Songkhla, Samut Sakorn, and Ranong Provinces and Lad Krabang District in Bangkok. The DOF has set up 6 fishing patrol units in the coastal Provinces of Samut Prakarn, Rayong, Chumporn, Songkhla, Krabi, and Pattani to deal with unregulated fishing. In addition, the DOF has upgraded its information technology to include a certificate scheme to validate and report the data before the issuance of certificates.

Thailand has implemented the Indian Ocean Tuna Commission (IOTC) resolutions Nos. 10 and 11 and the FAO port state measures (PSM) in relation to fish caught by means of IUU fishing in IOTC areas which lands in Thailand.

The FAO Regional Office for Asia and Pacific has been supporting Thailand through a technical assistance agreement to conduct the Third Country Project (TCP) as a pilot project to establish a Model Port Scheme for the implementation of PSM to combat IUU fishing from May 2013 to April 2014. The objectives of the TCP are to improve the coordination mechanism and procedures among inter-agency departments in Thailand involved in port control actions, to

strengthen staff capacity to implement the PSM, and to promote awareness, understanding and cooperation among stakeholders.[1]

More details of Thailand's contributions to combat IUU fishing can be found in the **Annex** to this Written Statement.

3. After carefully considering all the Written Statements presented to ITLOS within the time limit of 19 December 2013 set by ITLOS' Order 2013/4, Thailand continues to doubt whether ITLOS is an appropriate forum with competence to give an advisory opinion in Case No. 21.

The following additional Written Statement of Thailand will summarize the legal positions elaborated in the various Written Statements submitted to ITLOS by 19 December 2013 with which Thailand concur. It will also endeavour to explain that the crux of the SRFC's request in this Case No. 21 touches upon crucial issues of treaty law as well as those of customary international law.

II. JURISDICTION

4. Although the 1982 United Nations Convention on the Law of the Sea (UNCLOS) contains no provision expressly excluding advisory jurisdiction of the full bench of ITLOS,[2] the gist of the matter is whether ITLOS does have such jurisdiction at all.[3]

5. It has been argued that Article 138 of the Rules of ITLOS[4] is based on Article 21 of the ITLOS Statute,[5] which appears as Annex VI of UNCLOS, and that both UNCLOS and the

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[1] The information in this para. 2 derives from the *Proceedings* of the Expert Consultation on Thailand's Implementation of UNCLOS & Its Related Instruments held on 6 Sept. 2013 (*Proceedings of Pacem In Maribus XXXIV—International Forum on Sustainable Governance of the Ocean*, held on 3-8 Sept. 2013, Bangkok, Thailand).

[2] As pointed out by New Zealand in its Written Statement of 27 Nov. 2013 at para. 8, and by the Federal Rep. of Germany in its Written Statement dated 18 Nov. 2013 at para. 8.

[3] As highlighted, e.g., in the arguments in the Written Statement of the United Kingdom, paras. 11-14.

[4] Art. 138 of the Rules, under "Section H. Advisory proceedings", provides:

> "1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the [1982 UN Convention on the Law of the Sea] specifically provides for the submission to the Tribunal of a request for such an opinion.
>
> 2. A request for an advisory opinion shall be transmitted by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
>
> ..."

[5] Art. 21 of the Statute is under the heading "*Jurisdiction*". It stipulates:

Statute are "living instruments".[6] Thailand begs to differ. Thailand submits that Article 138 of the Rules of ITLOS must be read in conjunction with Article 16 of the Statute of ITLOS under the heading "*Rules of the Tribunal*". Thailand shares the opinion that Article 16 of the Statute, which authorizes ITLOS to "frame rules for carrying out its functions[, in particular ... rules of procedure] ", cannot be an independent source of power to create any jurisdiction ITLOS does not otherwise possess.[7] In other words, Article 16 of the Statute cannot authorize ITLOS to confer upon itself a substantive jurisdiction not already conferred on it by UNCLOS.[8]

6. The Written Statements submitted to ITLOS by the time limit of 19 December 2013 show that there are divergent views as to whether the full bench of ITLOS has advisory jurisdiction. These different opinions evince that they disagree on "the ordinary meaning to be given to the terms of [the relevant provisions of UNCLOS] in their context and in light of its object and purpose", pursuant to customary international law's general rule of treaty interpretation, as codified in Article 31 (1) of the 1969 Vienna Convention of Treaties.[9] Recourse must be had to supplementary means of treaty interpretation, including the *travaux préparatoires*, as provided in Article 32 of the 1969 Vienna Convention.[10] Thus, Articles 16 and 21 of the Statute and Article 138 of the Rule must be construed in accordance with the *travaux préparatoires* of the provisions of UNCLOS concerning ITLOS' competence as well as the practice concerning the advisory competence of international courts and tribunals.[11] Besides, as partly explained in Thailand's Written Statement of 29 November 2013, these provisions cannot be interpreted so as

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"The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal".

[6] Written Statement of the Federal Rep. of Germany, para. 8.

[7] See the Written Statement of Australia dated 28 Nov. 2013, paras. 11, 33, 34-39.

[8] See also the Written Statement of the United Kingdom, para. 17 and paras. 31-33.

[9] The International Court of Justice has held that "customary international law found expression in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969". See *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045 at 1059, para. 18.

[10] The International Court of Justice has held that as a supplementary measure to treaty interpretation recourse may be had to means of interpretation such as the preparatory work of the treaty. *Ibid.*, at 1060, para. 20, quoting *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 at 21-22, para. 41.

The Court has consistently resorted to *travaux préparatoires* as an aid to treaty interpretation where the ordinary meaning of the treaty is unhelpful. See, e.g., *Rights of Nationals of the United States of America in Morocco (France v. USA)* [1952] ICJ Rep 176 at 209-212; *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 3 at 26-27; and *Border and Transborder Armed Actions (Nicaragua v. Honduras)* [1988] ICJ Rep 69 at 85-88.

[11] See a detailed and convincing analysis in the People's Rep. of China's Written Statement dated 26 Nov. 2013, paras. 6-55. Cf. also the Written Statement of Australia, paras. 6-11, 16-19; that of the Portuguese Rep. dated 29 Nov. 2013, paras. 6-12; that of the United Kingdom, paras. 7-8, 24; and that of the United States of America dated 27 Nov. 2013, para. 26.

to circumvent the requirements for compulsory dispute settlement procedures entailing binding decisions as stipulated in Section 2 of Part XV of UNCLOS.

7. As regards the possibility that ITLOS may have "inherent advisory jurisdiction", Thailand is convinced that any inherent jurisdiction must be ancillary in nature and incidental to the primary jurisdiction of ITLOS over the merits of a pending case, that such primary jurisdiction must derive from the constituent instrument of ITLOS, and that neither UNCLOS nor the ITLOS Statute bestows such advisory opinion competence on the full bench of ITLOS.[12]

8. Concerning the meaning of "matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" stipulated in Article 21 of its Statute,[13] Thailand respectfully submits that the wording of Article 21 of the Statute cannot have been intended by its drafters to confer a broader jurisdiction than stipulated in Article 288, paragraph 2, of UNCLOS.[14] In any event, assuming *arguendo*, that in this Case No. 21 the full bench of ITLOS had advisory jurisdiction under UNCLOS, the "matters" referred to in Article 21 of the Statute would be confined to the rights and obligations of the SRFC and its Member States *inter se*[15] or,

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[12] Thailand shares the views expressed in the People's Rep. of China's Written Statement, paras. 56-63 and 94 (c); the Written Statement of the Portuguese Rep., paras. 13-14; and that of Spain dated 29 Nov. 2013, paras. 5-6.

[13] As relied on by Somalia in its Written Statement dated 27 Nov. 2013, para. 3.

[14] Article 288 of UNCLOS is under the heading "*Jurisdiction*" and appears in Part XV, Section 2 entitled "Compulsory Procedures Entailing Binding Decisions". The Article provides in its pertinent part:

> "1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
>
> 2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
>
> ..."

Thailand thus concurs with para. 26 of the Written Statement of Australia, and para. 27 of the Written Statement of the United Kingdom.

[15] As argued in the Written Statement of Ireland dated 28 Nov. 2013, para. 2.11; that of Australia, paras. 27-32, 50, that of the Argentine Rep. dated 28 Nov. 2013, paras. 17-18;, that of the United Kingdom, para. 46; that of the Netherlands, paras. 2 and 3; and that of the European Union dated 29 Nov. 2013, para. 16.

Cf. also the Written Statement of Japan dated 29 Nov. 2013, para. 18. While Japan contends that ITLOS has advisory jurisdiction and should exercise such jurisdiction in Case No. 21, it cautions as follows.

> "On the other hand, it is to be noted that, in parallel with the SRFC itself, the [2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of the Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission – MCA Convention] bears a regional character, since its application is limited to 'the maritime area under the jurisdiction of the SRFC Member States' (paragraph 2 of Article 1), while all the four questions brought before the Tribunal by the SRFC are formulated very generally. Japan therefore suggests that the Tribunal

at most, between the SRFC and its Member States *vis-à-vis* third States under the relevant international conventions binding on each of them as *res inter alios acta* or under the applicable rule or rules customary international law.[16] Of course, such matters must be related to the law of the sea.[17]

9. Therefore, if ITLOS determined that it had advisory jurisdiction in Case No. 21, Thailand respectfully submits that the answers by ITLOS would have to be confined to the *ratione materiae* of the regional legal instruments to fight IUU fishing in the SRFC maritime area as listed in the SRFC's Written Statement of November 2013; namely, the 1993 Convention on Sub-regional Cooperation in the Exercise of Maritime Hot Pursuit; the 1993 Protocol on the practical arrangements for the coordination of surveillance in SRFC Member States; the 2012 Convention on the Determination of Minimum Conditions of Access and Exploitation of Fisheries Resources within the Seas under Jurisdiction of Members of the SRFC; and the 2001 Nouakchott Declaration to Prevent, Deter and Eliminate IUU fishing.[18] With regard to the instruments developed under the auspices of other regional organizations but applicable in the SRFC maritime areas,[19] Thailand respectfully submits that ITLOS would have advisory jurisdiction concerning such instruments only if the instruments in question authorize ITLOS to do so.

III. ADMISSIBILITY/JUDICIAL PROPRIETY

10. Thailand respectfully submits that ITLOS is to exercise its jurisdiction in a responsible manner, particularly where a request for an advisory opinion has been made under an agreement other than UNCLOS and raises questions of general international law beyond the specific ambit of application of that agreement, and the questions at issue are framed "at a high level of abstraction and generality".[20]

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may interpret or further reformulate the question put to it in light of the regional character of the SRFC and the MCA Convention, if it considers it necessary."

[16] It will be argued in Part III of this Written Statement of Thailand that the existence of such rule or rules of customary international law is subject to stringent tests.

[17] Otherwise, it would lead to absurd results as explained in the Written Statement of the USA, para. 25.

[18] Written Statement of the SRFC of Nov. 2013, pp. 63-65 and 81. See also *ibid.*, pp. 74-75 on the general nature of the international fisheries agreements concluded by the SRFC Member States with the EU and with other partners.

[19] Referred to in *ibid.*, pp. 65-68.

[20] As pointed out in the Written Statement of New Zealand, paras. 19, 20 Cf. also Ireland's Written Statement, para. 2.10.

11. This part of the Written Statement will focus on the substances of the questions raised by the SRFC.

12. Thailand hereby submits that, should ITLOS find advisory jurisdiction in this Case No. 21, there are additional compelling reasons related to the propriety of the exercise of ITLOS' judicial functions—besides what have already been stated in Thailand's previous Written Statement—for ITLOS to decline to exercise such jurisdiction in this particular case.

13. The questions posed by the SRFC raise an issue of the ***applicable law***.

14. Article 293 of UNCLOS under the heading "*Applicable law*" stipulates:

> "1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
>
> 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree."

15. Article 23 of the ITLOS Statute, under the heading "*Applicable law*", simply provides:

> "The Tribunal shall decide all disputes and applications in accordance with article 293 [of UNCLOS]".

16. As the European Union has rightly pointed out, the questions posed by the SRFC create a problem since they do not relate to any specific international convention or agreement or part of it, and State participation in international agreements differs from one agreement to another.[21]

17. In its Written Statement transmitted to ITLOS in November 2013, the SRFC appears to try to remedy the shortcomings just mentioned. In Section 3 (Presentation of the Questions) of its Written Statement,[22] the SRFC specifically refers to the following provisions. In relation to Question 1, it refers to Articles 56 (1) (a), 58 (3), 62, 73 (1), 91 (1), and 94 of UNCLOS. Regarding Question 2, it refers to the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement); the 1995 FAO Code of Conduct for Responsible Fisheries; and the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement). However, it does not refer to any specific instrument in relation to Question 3, contending

[21] Written Statement of the European Union, para. 6 and see also paras. 104-105.

[22] Written Statement of the SRFC dated Nov. 2013, pp. 10-17.

instead that "[i]nternational law is silent on the issue".[23] Finally, it refers to Articles 63 (1) and 64 of UNCLOS in respect of Question 4.

18. Only UNCLOS binds all the Member States of the SRFC. It has been argued that the combination of Article 94, paragraphs 1 and 6, and Article 58, paragraphs 2 and 3 of UNCLOS entail a duty of due diligence by the flag State in both the high seas and the EEZ of another State in the sense that the flag State must enact appropriate legislation and enforce it as required by the aforesaid provisions of UNCLOS.[24] However, the proponent of this line of argument also concedes that UNCLOS is relatively silent on flag State duties in regard to fisheries, and that this lacuna has to be addressed by subsequent international instruments.[25] This is affirmed by the Secretary General of the United Nations.[26]

19. The oft-cited international instruments in this matter which are concluded subsequent to UNCLOS are the 1993 FAO Compliance Agreement, the 1995 FAO Code of Conduct for Responsible Fisheries, the 1995 UN Fish Stocks Agreement, the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement), and the 2013 FAO Voluntary Guidelines for Flag State Performance.[27] The 1995, 2001 and 2013 instruments are voluntary in nature. While UNCLOS binds all the Member States of the SRFC, the 1993 FAO Compliance Agreement has been ratified by only two SRFC Member States (Cape Verde and Senegal). The 1995 UN Fish Stocks Agreement has been ratified also by only two SRFC Member States (Guinea and Senegal). The 2009 Port State Measures Agreement has not yet been ratified by any Member State of the SRFC although Sierra Leone is in the process of such ratification.[28]

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[23] *Ibid.*, p. 16.

[24] Written Statement of Somalia, paras. 1-5.

[25] *Ibid.*, para. 6. See also the Written Statement of the Federated States of Micronesia dated 29 Nov. 2013, paras. 28-34. Cf. the Written Statement of Japan, paras. 29-38.

[26] Written statement submitted to the International Tribunal for the Law of the Sea by the Secretary-General of the United Nations, para. 12.

[27] The FAO clarifies that these Guidelines are not yet finalized, as they are still subject to editorial and linguistic changes before their submission to the consideration of the 31st Session of the FAO Committee on Fisheries in June 2014 (Written Statement of the FAO, para. 9).

[28] Written Statement of the SRFC, p. 78.

UNCLOS has 166 States Parties, whereas the 1993 Agreement has 39 States Parties, the 1995 Agreement has 81 States Parties, and the 2009 Agreement has received merely 8 out of the requisite 25 instruments of ratification for it to enter into force.[29]

20. The multilateral conventions mentioned above contain their own dispute settlement mechanisms which do not confer advisory jurisdiction on ITLOS, and, in any case, States Parties to these conventions which are not also Member States of the SRFC have not consented to the conferral of an advisory jurisdiction on ITLOS concerning the interpretation and application of the provisions contained in these conventions.[30] Likewise, non-States Parties to a multilateral convention cannot seek judicial clarification of the rights and obligations of States Parties to that convention.[31]

21. The SRFC contends that the 2001 FAO International Plan of Action and the 2009 Port State Measures Agreement "bring major innovations to classic international law, notably in the area of the flag State's obligations in respect of vessels engaged in IUU fishing not only in its own EEZ but also in those of other countries".[32] The SRFC specifically asks ITLOS for an advisory opinion to support the SRFC Member States "to derive the maximum benefit from the effective implementation of international and sub-regional legal instruments, and to ensure better management in the context of widespread IUU fishing" in light of "the shortcomings of traditional international law and the new economic and scientific uses of coastal and marine resources".[33] Interestingly, the international instruments cited by the SRFC are UNCLOS (which binds all the Member States of the SRFC), the 2001 FAO Code of Conduct (which is a voluntary instrument), and the 2009 Port State Measures Agreement (which has not been ratified by any Member State of the SRFC and is not yet in force).[34]

22. Some argue that the instruments mentioned in paragraph 19 above are "so widely accepted that they can be considered as constituting generally accepted international regulations, procedures and practices".[35] A better view is that international instruments in this field bind

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[29] Written Statement of the FAO, para. 44.

[30] See also the Written Statement by Australia, paras. 44, 50 and the Written Statement of the USA, paras. 35-36.

[31] Thailand concurs with the Written Statement of Australia at para. 47 and the Written Statement of the USA at paras. 37-38.

[32] *Technical Note* prepared by the Permanent Secretariat of the SRFC dated March 2013, p. 6.

[33] Written Statement of the SRFC, p. 69, footnotes omitted. Cf. also *ibid.*, pp. 70-77.

[34] *Ibid.*, at footnote 18. The "sub-regional legal instruments" cited by the SRFC are the 2012 MCA Convention, the 1993 Convention on the Exercise of Hot Pursuit, and other regional instruments previously referred to at pp. 63-67 of its Written Statement of Nov. 2013 (*ibid.*, at footnote 19).

[35] Written Statement of Somalia, para. 7. Cf. also the Written Statement of the Rep. of Chile dated 21 Nov. 2013, at the paragraph preceding its analysis of QUESTION No. 1.

States Parties thereto *qua* treaty law or *qua* customary international law.[36] It is also correct to posit that "[a] voluntary instrument or a treaty not yet in force cannot be construed as establishing new rules, or '*new developments*' or—even less—bringing '*major innovations to classic international law*' ...",[37] and that it is not for ITLOS to legislate or create new law.[38]

23. In order to prove the existence of a rule of customary international law on the responsibility of the flag State (or the State of nationality of the beneficial owners/operators of fishing vessels)[39] engaged in IUU fishing, it is submitted that guidance is to be sought from the well-established jurisprudence of the International Court of Justice (ICJ) in this matter.

24. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, the ICJ explains that in order to determine, in accordance with Article 38 (1) (*b*) of its Statute, the existence of "international custom, as evidence of a general practice accepted as law",

> "it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris* (*North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969*, p. 44, para. 77). Moreover, as the Court has also observed,
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> > '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in

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[36] The position of the FAO that the Code of Conduct and the International Plan of Action both of which are voluntary in nature are "not ... completely devoid of any legal effect" since they are to be interpreted in conformity with the relevant rules of international law, including UNCLOS, the UN Fish Stocks Agreement, "and other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party" (Written Statement of the FAO, para. 8 and accompanying footnote 6) must be understood in this context.

Cf. also the Written Statement of the Federated States of Micronesia dated 29 Nov. 2013, paras. 23-24. Micronesia acknowledges that international instruments such as the 1995 UN Fish Stocks Agreement do not have the same customary international law normative status as "the major provisions of UNCLOS" (*ibid.*, para. 42).

[37] Written Statement of the Argentine Rep., para. 21. Emphasis original.

[38] *Ibid.*, para. 22; also the Written Statement of the People's Rep. of China, para. 91.

In this context, Thailand begs to differ from the European Union's Written Statement at para. 21 where the EU contends that while not all the provisions of the various instruments, including those which are not binding, are automatically applicable to all States, "such instruments can provide useful guidance when interpreting the relevant provisions of the [1982 UN Convention on the Law of the Sea]".

[39] Such possibility is alluded to by New Zealand in its Written Statement, paras. 33-35, 43-46, 49.

> developing them' (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27).
>
> ...."[40]

25. However, as the ICJ in the *North Sea Continental Shelf* cases has pointed out:

> "The essential point in this connection—and it seems necessary to stress it—is that even if [instances of action along the line of the relevant provision of a multilateral convention] by non-party to [that particular multilateral convention] were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[41]

26. The Chamber of the ICJ in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)* has explained that the presence of customary rules in the *opinio juris* of States must be supported by "a sufficiently extensive and convincing practice".[42]

27. IUU fishing by fishing vessels are not *per se* attributable to their flag State as these vessels are usually privately-owned vessels and their operators are not State agents.[43] In any case, the flag State bears international responsibility for IUU fishing activities by vessels flying its flag only to the extent that the flag State is in breach of the relevant international obligations under customary international law and/or international instruments legally binding upon it.[44] This same rationale applies *mutatis mutandis to* the State of nationality of beneficial owners/operators

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[40] [2012] ICJ Rep 99 at 122-123, para. 55.

[41] [1969] ICJ Rep 3 at 44, para. 77.

[42] [1984] ICJ Rep 246 at 299, para. 111.

[43] See, e.g., the Written Statement of Somalia, para. 14; that of the European Union, paras. 56-57.

[44] Cf. also the Written Statement of Japan, paras. 36-39, 47 (iii) and (iv); that of Saudi Arabia dated 8 Nov. 2013.

of the fishing vessels engaged in IUU fishing. The principle *sic utere tuo ut alienum non laedas*[45] is too vague to be of direct applicability in the present context of Case No. 21, and must be understood in light of the applicable rules international law, be it customary or conventional, binding on the States concerned.

IV. CONCLUSIONS

28. In conclusion, SRFC Member States should become parties to all the relevant international conventions concerning IUU fishing activities and avail themselves of the measures and mechanisms, including enforcement and dispute settlement, under these conventions in order to pursue the responsibility of the flag State and other States in the matter of IUU fishing activities.

29. Thailand stands ready to assist the SRFC Member States and the international community in the fight against IUU fishing activities under the applicable international legal obligations binding on Thailand and pursuant to the relevant Thai domestic law as well as within Thailand's national capacity.

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[45] Alluded to in Somalia's Written Statement, para. 28. Cf. also the *Amicus Curiae* brief from WWF International dated 29 Nov. 2013, paras. 34-36.