Written Statement of the Kingdom of Thailand

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

29 NOVEMBER 2013

I. INTRODUCTION

Thailand is a distant-fishing nation that takes international legal obligations binding on it very seriously. Since Thailand strongly supports international efforts to end illegal, unreported and unregulated (IUU) fishing activities, Thailand has a lot of sympathy for and shares solidarity with the Member States of the West African Sub-Regional Fisheries Commission, which have submitted the request for an advisory opinion from the International Tribunal for the Law of the Sea.

Nevertheless, as a matter of principle, Thailand respectfully submits that:

(1) the Tribunal has no jurisdiction to give an advisory opinion on any of the four questions raised by the SRFC, and that

(2) the request for the advisory opinion is not admissible.

II. JURISDICTION

All the four questions from the SRFC are framed in abstract terms and directly related to the questions of international legal obligations under general international law, including the law of State responsibility, as well as the relevant international legal instruments binding upon States. None of these questions is confined to the competence of the SRFC in relation to its Member States or in maritime areas under its jurisdiction.

It is true that the pertinent part of Article 138 of the Rules of the Tribunal stipulates:

> "*1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the [1982 United Nations 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.*
>
> [...]"

However, the Rules of the Tribunal, which are adopted by the learned judges of the Tribunal, cannot override the provisions of the 1982 Convention which bind all States Parties to the said Convention.

Part XV of the 1982 Convention provides for a comprehensive regime of dispute settlement under the Convention. If a State has a dispute with one or more Member States of the SRFC, the former or the latter State may resort to any of the dispute settlement mechanisms mentioned in the aforesaid Part XV, including the International Tribunal for the Law of the Sea.

Besides, Article 282 of the 1982 Convention entitled "*Obligations under general, regional or bilateral agreements*" provides:

> "*If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.*"

And Article 288 of the 1982 Convention entitled "*Jurisdiction*" 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.*
>
> [...]"

The questions submitted by the SRFC are so broad and abstract in nature and are in no way related to any particular international agreement related to the purposes of this 1982 Convention. What the SRFC could have done was to request the Tribunal to give an advisory opinion on the interpretation or application of one or more of the following international agreements transmitted by the Permanent Secretary of the SRFC by letter dated 9 April 2013:

- 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 (CRFC);
- Convention on sub-regional cooperation in the exercise of maritime hot pursuit;
- Protocol regarding the practical modalities for the co-ordination of surveillance activities in the member states of the SRFC;
- Agreement Establishing a Sub-Regional Fisheries Commission;
- Amendment to the Convention of 29th March 1985 Establishing the Sub-Regional Fisheries Commission.

In addition, an advisory opinion of the Tribunal on any of the four questions as currently posed by the SRFC would have an *erga omnes* character in the sense that it would decide on legal rights of third States which are not members of the SRFC. When a question submitted to an international court or tribunal may impact on rights of a third State, the third State must be a party to the dispute with the State or entity concerned. This is

made abundantly clear, for example, by the International Court of Justice in *Case Concerning East Timor (Portugal v. Australia)*[1]. Therefore, the questions posed by the SRFC involve issues more appropriate for settlement by means of a case under contentious jurisdiction of the Tribunal rather than the advisory proceedings being pursued by the SRFC.

In conclusion, it is hereby respectfully submitted that the Tribunal has no jurisdiction to entertain this request from the SRFC.

III. ADMISSIBILITY

It should be noted that while Article 191 of the 1982 United Nations Convention on the Law of the Sea expressly stipulates that the Seabed Disputes Chamber of the Tribunal "*shall give advisory opinions at the request of the Assembly* [of States Parties to the Convention] *or the Council* [of the International Seabed Authority] *on legal questions arising within the scope of their activities*", Article 138 of the Rules of the Tribunal merely provides that the Tribunal "*may give an advisory opinion*", thereby allowing the Tribunal to exercise discretion as to whether to give an advisory opinion in this latter instance.

The wording "*may*" as appeared in Article 138 of the Rules of the Tribunal also appears in Article 65, paragraph 1 of the Statute of the International Court of Justice, where it is stipulated that the Court "*may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request*". The similarity between Article 65 of the Statute of the Court and Article 138 of the Rules of the Tribunal reveals that the latter has been drafted using the former as a model. Therefore, jurisprudence of the Court in interpreting Article 65 of its Statute is of direct relevance to the interpretation by the Tribunal of its jurisdiction under Article 138 of its own Statute.

[1] *I.C.J. Reports* 1995, paras. 34-35.

The International Court of Justice always emphasizes that even where it has jurisdiction to render an advisory opinion, this does not mean that it is obliged to exercise it. The Court will have to consider the question of admissibility, *i.e.* judicial propriety of giving such an opinion, as in, *e.g.*, paras. 44-45 of the Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, and paras. 29-31 of the Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Declaration of Independence in respect of Kosovo*. There must be "*compelling reasons*" for the Court to refuse to give an advisory opinion (para. 44, Advisory Opinion of 9 July 2004).

As the Permanent Court of International Justice, the predecessor of the International Court of Justice, has stated in the *Status of Eastern Carelia* case, "*The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.*" ((1923) PCIJ Series B, No. 5, p. 29; cited with approval by the International Court of Justice in paragraph 29 of its Advisory Opinion of 22 July 2010.) The PCIJ in that same case refused to give the advisory opinion sought, as the International Court of Justice later explained, due to:

> "the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the State parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996 (I)*, pp. 235 – 236, para. 14).

Since the questions posed by the SRFC entail consideration of the rights and obligations of third parties which are not Member States of the SRFC, Thailand hereby respectfully submits that there are "*compelling reasons*" for the Tribunal to refuse to give the advisory opinion being sought.

IV. ADDITIONAL REMARKS

States become parties to the 1982 Convention because they accept the obligations provided for in the Convention.

Advisory opinion proceedings under the 1982 Convention must not be utilized as a substitute for contentious proceedings. Otherwise, advisory opinion proceedings could be used to bypass, for instance, the limitations and exceptions to compulsory dispute settlement procedures entailing binding decisions as stipulated in Section 3 of Part XV of the 1982 United Nations Convention on the Law of the Sea.

Assuming, *arguendo*, that the Tribunal decided to give an advisory opinion on the first two questions asked by the SRFC, the Tribunal would have to embark upon determining the international law of State responsibility, especially the scope of attribution of conduct to a State which would entail State responsibility – an issue which has already been exhaustively analyzed by the International Law Commission in its draft articles on Responsibility of States for Internationally Wrongful Acts (2001).

Again assuming, *arguendo*, that the Tribunal decided to give an advisory opinion on the last two questions asked by the SRFC, the Tribunal would have to construe the relevant provisions of the international agreement binding on the parties on the respective matters – but there is no specific agreement whose provisions the Tribunal is being called upon to construe.

In conclusion, Thailand wishes to reiterate, with due respect, that the Tribunal has no jurisdiction to give an advisory opinion on any of the questions posed by the SRFC, and that the request for the advisory opinion is not admissible.

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