INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(CASE NO. 21)

REQUEST FOR AN ADVISORY OPINION

SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC)

WRITTEN STATEMENT OF NEW ZEALAND

ON THE STATEMENTS MADE

AS PROVIDED UNDER ORDER 2013/5

13 MARCH 2014

CONTENTS

I. INTRODUCTION

1. By an Order dated 20 December 2013 in relation to the request for an advisory opinion submitted to it by the Sub-Regional Fisheries Commission (SRFC), the International Tribunal for the Law of the Sea (the Tribunal) invited the States Parties to the United Nations Convention on the Law of the Sea (the Convention) and relevant intergovernmental organizations who had presented written statements to present further written statements on the statements made.[1] In its Order, the Tribunal fixed 14 March 2014 as the time-limit within which those further written statements may be presented to the Tribunal.[2]

2. New Zealand recalls the observations made in its written statement of 27 November 2013 and invites the Tribunal to consider those observations in light of the written statements submitted. Further, this statement by New Zealand addresses certain additional points in relation to Questions One and Two of the request, which arise from written statements that have been presented to the Tribunal. New Zealand offers no further comments in relation to the issues of jurisdiction or admissibility at this time. However, New Zealand reserves its right to appear and address these, and any other issues in relation to the request, during the course of the oral hearing.[3]

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[1] International Tribunal on the Law of the Sea, Order 2013/5 (20 December 2013), at paragraph 4.
[2] *Ibid*, at paragraph 5.
[3] In accordance with Rule 133(4) of the Rules of the Tribunal and International Tribunal on the Law of the Sea, Order 2013/2 (24 May 2013), at paragraph 10.

II. FURTHER OBSERVATIONS

A. QUESTION ONE: OBLIGATIONS OF THE FLAG STATE

3. New Zealand notes the consistent view contained in the written statements presented to the Tribunal that a flag State is under a legal duty to exercise effective control over its vessels when they are fishing in the Exclusive Economic Zone (EEZ) of another State. [4] As set out in New Zealand's written statement of 27 November 2013, that duty is a direct obligation that forms the corollary of the right of a nation to sail ships on the high seas.[5] It takes on a special character in relation to the activities of fishing vessels within the EEZ of another State by virtue of a State's obligation under Article 58(3) of the Convention to "have due regard to the rights and duties of the coastal State and [...] comply with laws and regulations adopted by the coastal State in accordance with the provisions of this Convention".[6]

4. New Zealand notes that some written statements have characterized the duty to exercise effective control as a subsidiary "due diligence obligation" arising from Article 194 of the Convention or the general principles of law relating to the

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[4] See: *Written Statement of New Zealand* (27 November 2013), at paragraphs 26-31; *Written Statement of the Federal Republic of Somalia* (27 November 2013), at paragraphs II(1)-(11); *Written Statement of the Federated States of Micronesia* (29 November 2013), at paragraphs 37 & 46; *Written Statement of Japan* (29 November 2013), at paragraphs 30-34 & 37; *Written Statement of the Republic of Chile* (29 November 2013), at pages 7-13; *Written Statement of the European Commission on behalf of the European Union* (29 November 2013), at paragraphs 30-48; *Written Statement of the Democratic Socialist Republic of Sri Lanka* (18 December 2013), at paragraphs 10-17; *Written Statement of the International Union for Conservation of Nature and Natural Resources* (25 November 2013), at paragraphs 26-33; *Written Statement of the Caribbean Regional Fisheries Mechanism* (27 November 2013) at pages 32-59; *Written Statement of the Central American Fisheries and Aquaculture Organization* (16 December 2013), at paragraph 1; *Amicus Curiae brief from WWF International* (29 November 2013), at paragraphs 20-32.

[5] *Written Statement of New Zealand* (27 November 2013), at paragraph 27. See also the discussion in Palmer *Promoting Sustainable Fisheries* (Martinus Nijhoff, 2010), at pages 109-130.

[6] *Ibid*, at paragraph 28.

prevention of trans-boundary harm.[7] In New Zealand's view, that characterization does not take full account of the duty's independent basis in customary international law and its subsequent reflection in the 1958 High Seas Convention, Article 94 of the Convention, the 1995 UN Fish Stocks Agreement, the 1993 FAO Compliance Agreement and other instruments.[8]

5. In New Zealand's view, the duty of effective control is a direct obligation, but compliance with that obligation requires "due diligence" on the part of the flag State.[9] As set out in New Zealand's written statement of 27 November 2013, the most

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[7] See: *Written Statement of the Federated States of Micronesia* (29 November 2013), at paragraph 46; *Written Statement of the International Union for Conservation of Nature and Natural Resources* (25 November 2013) at paragraph 30; *Written Statement of the Caribbean Regional Fisheries Mechanism* (27 November 2013) at paragraphs 40 & 41; *Amicus Curiae brief from WWF International* (29 November 2013) at paragraphs 5-10 and 35-38.

[8] See *Written Statement of New Zealand* (27 November 2013), at paragraph 27 (and references cited therein). There are also questions as to the relationship of general principles of international law on the prevention of trans-boundary harm to the specific context of the request, which primarily addresses issues surrounding the conservation and management of fisheries resources within the EEZ. As has been recognized by this Tribunal, the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August* 1999, at [70]). To that end, a significant body of international law regulating the conservation and management of fisheries has been developed under the framework provisions of Parts V, VII and XII of the Convention since its adoption in 1982. That body of law includes multi-lateral treaties, regional fisheries management agreements, and "soft-law" instruments adopted under the auspices of the FAO and other bodies. Together, those instruments articulate specific principles for the proper conservation and management of fisheries, including the precautionary approach and the ecosystem approach. They represent the implementation of the general principles of environmental protection contained in Articles 192 and 197 of the Convention in the specific context of fisheries management (see, for example, Hey "The Provisions of the UN Law of the Sea Convention on Fisheries Resources and Current International Fisheries Management Needs" in Hey ed. *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (FAO Legislative Study 47, 1991) at page 9). As such, this area of law has something of a specialised character and is generally addressed by respected commentators separately to the general rules regarding the protection and preservation of the marine environment and the prevention of trans-boundary harm (see, for example: Sands & Peel *Principles of International Environmental Law* (3rd ed, Cambridge University Press, 2012) at p. 403-423; and Birnie, Boyle & Redgwell *International Law and the Environment* (3rd ed, Oxford University Press, 2009) at Chapters 7 & 13).

[9] In this regard New Zealand agrees with the statements submitted to the Tribunal to the same effect: see: *Written Statement of the Federal Republic of Somalia* (27 November 2013), at paragraph II(2); *Written Statement of the Federated States of Micronesia* (29 November 2013), at paragraphs 46-50; *Written Statement of the Republic of Chile* (29 November 2013), at page 14; *Written Statement of the International Union for Conservation of Nature and Natural Resources* (25 November 2013), at paragraphs 34-37; *Written Statement of the Caribbean Regional Fisheries Mechanism* (27 November 2013) at paragraphs 83-39.

significant and accepted elements of the flag state duty to exercise effective control are to:[10]

- Authorize fishing activities;
- Ensure that flag vessels are authorized to fish in coastal State waters;
- Maintain records of fishing vessels;
- Ensure that flag vessels are properly marked;
- Monitor the activities of flag vessels;
- Monitor catches, and the collection and provision of data;
- Ensure effective jurisdiction and control;
- Ensure vessels flying its flag comply with coastal State laws;
- Investigate and prosecute violations; and
- Impose effective sanctions for violations, including denial of authorization to vessels with a history of non-compliance.

6. Each of the responsibilities outlined above can be characterized as an obligation of conduct rather than result.[11] In the words of the Seabed Disputes Chamber of this Tribunal, they require the flag State to "deploy adequate means, to exercise best possible efforts, to do the utmost"[12] to prevent its vessels from engaging in IUU fishing activities. As such, the duty of effective control cannot be discharged simply by the adoption of a legislative requirement by a flag State that vessels flying its flag must obtain the necessary authorizations before fishing in the

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[10] *Written Statement of New Zealand* (27 November 2013), at paragraph 31 (and references cited therein). Although several of the instruments cited articulate flag State responsibilities in the context of fisheries on the high seas, in doing so they elaborate the content of the general duty of effective flag State control, and as such can apply equally in the context of fisheries within the EEZ of another State.

[11] International Tribunal for the Law of the Sea (Seabed Disputes Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion of 1 February 2011* at [110] citing *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010*, p 14 at [181].

[12] International Tribunal for the Law of the Sea (Seabed Disputes Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion of 1 February 2011* at [110].

EEZ of another State.[13] Rather, as the International Court of Justice has pointed out, it 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.[14]

7. New Zealand concurs with the due diligence standard put forward by the Federated States of Micronesia, which "requires, at a minimum, that reasonable and appropriate steps are taken, in a vigilant manner, to ensure compliance with relevant requirements and restrictions."[15] It is not necessary for there to be a consistent pattern of infractions by vessels of a flag State for the standard to be engaged.[16] Further, New Zealand agrees that increased vigilance would be expected by the flag State where the relevant coastal State lacks technical capacity to enforce its laws and regulations.[17]

8. The material submitted to the Tribunal by the SFRC in support of its request sets out a number of examples that assist in illustrating the application of that standard.[18] For example, that material describes an incident in March 2011 where:

> [An SFRC] Member State received information on alleged illegal activities carried out in the waters under its national jurisdiction by two foreign vessels. These vessels committed offenses by undertaking illegal transhipment outside the permitted areas, fled when the patrol arrived. Noticing that the vessels went away, the Member State

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[13] See, for example, the implication to this effect in *Written Statement of Japan* (29 November 2013), at paragraphs 34 & 37.
[14] *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010*, p 14 at [197].
[15] *Written Statement of the Federated States of Micronesia* (29 November 2013), at paragraph 50.
[16] As appears to be argued by Yoshinobu Takei, in "Assessing Flag State Performance in Legal Terms: Clarifying the Margin of Discretion", *International Journal of Marine and Coastal Law* 28 (2013), 97-133 (at p. 131).
[17] See *Written Statement of the Federal Republic of Somalia* (27 November 2013), at paragraph II(5).
[18] *Written Statement of the Sub-Regional Fisheries Commission* (November 2013).

> reported the offenses to the flag States. No reaction from these flag States was recorded yet.[19]

New Zealand considers that such an example, on its face, falls short of the standard of effective control to be expected of a flag State. The proper discharge of the flag State's duty of effective control in such circumstances would, in contrast, require the flag State to co-operate with the coastal State in taking appropriate enforcement action by: investigating the allegations made by the coastal State in a thorough and timely fashion; exchanging information, including evidentiary material, relating to the activities of the vessel with the coastal State; instituting its own enforcement proceedings against the vessel if appropriate; imposing appropriate sanctions on the vessel and its operators in the event that wrong-doing is established; and informing the coastal State of the steps taken and the progress of proceedings on a regular basis.

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[19] *Ibid*, at page 11.

B. QUESTION TWO: FLAG STATE LIABILITY

9. New Zealand notes the broad level of concurrence among the statements presented to the Tribunal with the principle that a flag State is responsible under international law if it fails to discharge its duty of effective control over fishing vessels flying its flag.[20] Such responsibility necessarily incurs liability in accordance with the general rules of international law.[21] The appropriate consequences that may flow from such liability are also governed by those principles.[22]

10. In that context, New Zealand notes with some caution the suggestion presented to the Tribunal that "the liability of flag States mainly consists in the identification and listing of such State as a non-cooperating country when systemic failures to comply with their international obligations in the fight against IUU fishing are demonstrated" and the application of associated trade sanctions.[23]

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[20] See: *Written Statement of New Zealand* (27 November 2013), at paragraphs 42-49; *Written Statement of the Federal Republic of Somalia* (27 November 2013), at paragraphs II(15 & 16); *Written Statement of the Federated States of Micronesia* (29 November 2013), at paragraphs 46, 51, & 52; *Written Statement of the Republic of Chile* (29 November 2013), at pages 15-20; *Written Statement by the European Commission on behalf of the European Union* (29 November 2013), at paragraphs 53-59; *Written Statement by the Democratic Socialist Republic of Sri Lanka* (18 December 2013), at paragraph 17; *Written Statement of the International Union for Conservation of Nature and Natural Resources* (25 November 2013), at 48 & 63; *Written Statement of Caribbean Regional Fisheries Mechanism* (27 November 2013), at paragraphs 223 & 228; *Written Statement of the Central American Fisheries and Aquaculture Organization* (16 December 2013), at paragraph 2; *Amicus Curiae brief from WWF International* (29 November 2013), at paragraphs 63 & 64.

[21] *Ibid.*

[22] See: *Written Statement of New Zealand* (27 November 2013), at paragraphs 47-48. *Written Statement of the Federal Republic of Somalia* (27 November 2013), at paragraph II(18); *Written Statement of the Republic of Chile* (29 November 2013), at page 20; *Written Statement of the International Union for Conservation of Nature and Natural Resources* (25 November 2013), at paragraphs 49-62; *Written Statement of the Caribbean Regional Fisheries Mechanism* (27 November 2013), at paragraphs 235-239; *Amicus Curiae brief from WWF International* (29 November 2013), at paragraphs 65-73.

[23] *Written Statement of the European Commission on behalf of the European Union* (29 November 2013), at paragraph 81.

11. New Zealand certainly agrees that registers of non-complying vessels provide a valuable sanction against IUU fishing.[24] New Zealand supports and actively participates in the systems of listing IUU vessels adopted by regional fisheries management organizations, including the Commission for the Conservation of Antarctic Marine Living Resources[25], the Western and Central Pacific Fisheries Commission, [26] and the South Pacific Regional Fisheries Management Organisation.[27] New Zealand has also been a founding participant in the Forum Fishery Agency's Regional Register of Foreign Fishing Vessels, which limits access to vessels "in good standing", and which has formed a central tool to combat IUU fishing in the South Pacific region for over 30 years.[28]

12. However, in New Zealand's view the unilateral adoption of "black-lists" outside the framework of a regional fisheries management organization and accompanying trade sanctions by individual States is of a significantly different character to that of a collectively managed non-complying vessel register under a regional fisheries management organization. Such measures raise issues that lie significantly beyond the ambit of the question presented to the Tribunal by the SFRC in its request. New Zealand therefore considers that it is not necessary for the Tribunal to address the specific example of such a "black-list" that has been presented to it[29] in order to respond to the issues before it in the present request.

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[24] See: *Written Statement by the Federated States of Micronesia* (29 November 2013), at paragraph 45; *Written Statement by the European Commission on behalf of the European Union* (29 November 2013), at paragraphs 60-62 (and references cited therein).

[25] CCAMLR CM 10-06 & 10-07 at www.ccamlr.org/en/conservation-and-management/conservation-measures (accessed 13 March 2014).

[26] WCPFC CMM 2010-06 at http://www.wcpfc.int/doc/cmm-2010-06/conservation-and-management-measure-establish-list-vessels-presumed-have-carried-out (accessed 13 March 2014).

[27] CMM 1.04 at https://www.southpacificrfmo.org/conservation-measures/ (accessed 13 March 2014).

[28] See www.ffa.int/vessel_registration (accessed 13 March 2014).

[29] *Written statement of the European Commission on behalf of the European Union* (29 November 2013), at paragraphs 65-82.

III. CONCLUSION

13. In conclusion, should the Tribunal determine that it is in a position to respond to the request, New Zealand requests that the Tribunal consider also the further observations set out in paragraphs 3 to 12 above.

Dr Penelope Ridings
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