

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

## ***REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW (CASE NO. 31)***

### **Comments of the Republic of Latvia on the Written Responses by COSIS and IUCN**

#### **A. Introduction**

1. On 25 September 2023, the Registrar of International Tribunal for the Law of the Sea (hereinafter “The Tribunal”) invited Latvia to submit comments on the responses of the Commission of Small Island States on Climate Change and International Law (hereinafter “COSIS”) and the International Union for Conservation of Nature to questions by Judge Kriangsak Kittichaisaree in *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. Latvia is grateful for this opportunity, and after a careful examination of both responses has decided to provide its comments on the written responses of COSIS.

#### **B. COSIS’ Response to Judge Kittichaisaree’s Question**

2. Judge Kittichaisaree asks COSIS to “clarify further which specific obligations mentioned by [COSIS] insofar as they are relevant to the Request for an Advisory Opinion are, in [COSIS’] view, obligations of conduct and which ones are obligations of result, and why”.
3. There is much in the COSIS’ response that is in line with Latvia’s position explained in the next paragraphs, perhaps even most of it.<sup>1</sup> To the extent that the response differs somewhat from the position that Latvia has taken in the written and oral proceedings,<sup>2</sup> that may be due to terminological rather than substantive preferences, which, in any event, are

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<sup>1</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (COSIS’ Response to Judge Kittichaisaree’s Question of 24 September 2023) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/2023-09-24\\_COSIS\\_Response\\_to\\_Judge\\_s\\_Question.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/2023-09-24_COSIS_Response_to_Judge_s_Question.pdf)>.

<sup>2</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (written statement of Latvia of 16 June 2023) <[https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/1/C31-WS-1-14-Latvia\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-14-Latvia_01.pdf)>; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Verbatim Record ITLOS/PV.23/C31/9) 8-14.

not obviously likely to lead to significant variances in the application of the rules of UNCLOS under determination in these proceedings.

4. COSIS makes three points in its response.
5. First, COSIS says that the distinction between obligations of conduct and obligations of result has a limited pedigree in international law, explaining the reasons why the International Law Commission (hereafter “the ILC”) elected to abandon it for purposes of its work on State responsibility.<sup>3</sup> Latvia agrees with the overall description of the ILC’s work.<sup>4</sup>
6. Secondly, COSIS says that UNCLOS obligations are not susceptible to a precise categorization into obligations of conduct or result.<sup>5</sup> Latvia agrees with what it takes to be the thrust of COSIS’ argument, namely the caution about “inappropriate and abstract characterizations of UNCLOS provisions foreclosing future arguments that might be raised in contentious cases” and the strong preference for determination of their meaning by “interpreting the relevant provision in the circumstances in which it is applicable”.<sup>6</sup> The description in Latvia’s oral submissions of “the key rules contained in Part XII [as] obligations of conduct and not result”<sup>7</sup> introduced this distinction not to replace but to provide further texture to the thoroughness and care of the usual principles and processes of determination and application of international law.
7. Thirdly, COSIS says that UNCLOS Part XII entails but also goes beyond due diligence obligations.<sup>8</sup> Latvia agrees both that these provisions entail due diligence obligations and regarding the relevant parameters for their application, as explained by COSIS<sup>9</sup> (on both points *inter alia* by reference to Latvia’s written statement,<sup>10</sup> which was then further elaborated in the oral submissions).<sup>11</sup> As to whether Part XII goes beyond due diligence obligations, Latvia notes its preference expressed in the previous paragraph for the

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<sup>3</sup> COSIS’ Response (n 1) Section I.

<sup>4</sup> For avoidance of doubt, this is without prejudice to the point made by Latvia’s Agent, not contradicted by COSIS in its response, that “the questions posed relate exclusively to primary obligations and not secondary obligations [because] COSIS has not used . . . terms [to refer to the law of State responsibility] in drafting the questions posed”, Verbatim Record ITLOS/PV.23/C31/9 (n 2) 10 (Līce).

<sup>5</sup> COSIS’ Response (n 1) Section II.

<sup>6</sup> Ibid [18], [20].

<sup>7</sup> Verbatim Record ITLOS/PV.23/C31/9 (n 2) 13 (Paparinskis).

<sup>8</sup> COSIS’ Response (n 1) Section III.

<sup>9</sup> Ibid [21]-[22].

<sup>10</sup> Ibid fns 36, 44.

<sup>11</sup> Verbatim Record ITLOS/PV.23/C31/9 (n 2) 13-14 (Paparinskis).

thorough determination of international law, which requires taking into account the relevant rules of climate change law. The rules thus determined have to be then applied by reference to the relevant parameters and facts within the appropriate institutional settings.<sup>12</sup> It is not obvious that much turns, in practice, on whether one describes the approach in these terms or those by COSIS in its response.<sup>13</sup>

8. To summarise Latvia's comments on COSIS' response:

- *first*, Latvia agrees with the overall description of the ILC's work on obligations of conduct and obligations of result (Section I of the response);
- *secondly*, Latvia agrees with the thrust of the argument for determination of relevant rules by the usual principles and processes of international law, not abstract *a priori* characterizations (Section II of the response);
- *thirdly*, Latvia agrees that UNCLOS Part XII entails due diligence obligations, but is not certain that much turns in practice on whether UNCLOS Part XII is viewed as also going beyond due diligence obligations *or* as determined by taking into account climate change law and applied by reference to the relevant parameters (Section III of the response).

Respectfully,



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<sup>12</sup> Ibid 10-14 (Paparinskis).

<sup>13</sup> COSIS' Response (n 1) [23]-[27].