

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

WRITTEN STATEMENT BY THE REPUBLIC OF POLAND

16 JUNE 2023

I. INTRODUCTION

1. On 12 December 2022 the Commission of Small Island States on Climate Change and International Law (“Commission”) requested the International Tribunal for the Law of the Sea (“ITLOS”) to provide an advisory opinion on the following question:

“What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “UNCLOS”), including under Part XII:

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?”

2. The request for an advisory opinion was lodged on the basis of Article 21 of the Statute of the International Tribunal for the Law of the Sea (“Statute”) and Article 138 of the Rules of the International Tribunal for the Law of the Sea (“Rules”), in conjunction with Article 2, para. 2 of the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (“Agreement”).
3. The request for an advisory opinion was registered as no. 31 in the ITLOS List of Cases under the title “Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law” (“Request for an Advisory Opinion submitted to the Tribunal”).
4. By order no. 2022/4 of 16 December 2022, the President of the International Tribunal of the Law of the Sea fixed, in accordance with Article 133, para. 3 of the Rules, 16 May 2023 as the time limit for written statements to be presented to the Tribunal; this limit was later extended to 16 June 2023 by order no. 2023/1 of 15 February 2023.

II. JURISDICTION

5. As regards the Tribunal’s jurisdiction, in the present case the Government of the Republic of Poland recalls the reasoning elaborated by the Tribunal in the Advisory Opinion of 2 April 2015 regarding its jurisdiction over requests for advisory opinions

initiated by a request submitted by the Sub-regional Fisheries Commission (Case no. 21; §§37-69).

6. The Government of the Republic of Poland would like first to point out the Tribunal's arguments clarifying the relationship between the Convention and the Statute. Pursuant to Article 318 of the United Nations Convention on the Law of the Sea of 1982 ("Convention"), the Statute, Annex VI, constitutes an integral part of the Convention. Since Article 1, para. 1 of the Statute reads as follows: "*the International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute*", it may be concluded from the above that the Statute enjoys the same status as the Convention.
7. Consequently, Article 21 of the Statute, which reads as follows: "*The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*" applies, as explained by the Tribunal, not only to contentious cases but also to "*all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*".
8. The Tribunal reasoned that the phrase "*[a]ll matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*", which is the third element of Article 21 describing the material spectrum of Tribunal's jurisdiction, means something more than just "*disputes*" and may include advisory opinions, if specifically provided for in "*any other agreement which confers jurisdiction on the Tribunal*", despite the fact that neither the Convention nor the Statute makes explicit reference to the advisory jurisdiction of the Tribunal.
9. In its Advisory Opinion delivered in Case no. 21, the Tribunal clarified that the expression "*all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*" does not by itself establish the Tribunal's advisory jurisdiction. In terms of Article 21 of the Statute, it is the "*other agreement*" which confers such jurisdiction. When the "*other agreement*" confers advisory jurisdiction on the Tribunal, the Tribunal is then rendered competent to exercise such jurisdiction with regard to "*all matters*" specifically provided for in the "*other agreement*". Article 21 of the Statute and the "*other agreement*" conferring jurisdiction on the Tribunal are then interconnected and jointly constitute the substantive legal basis of Tribunal's advisory jurisdiction.

10. The conditions that need to be satisfied before the Tribunal can exercise its advisory jurisdiction are elaborated in Article 138 of the Rules. Firstly, an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion; secondly, the request must be transmitted to the Tribunal by a body authorized by or in accordance with the above-mentioned agreement; and finally, the Tribunal may give such an opinion on “*a legal question*”.
11. The Government of the Republic of Poland is of the view, in the present case, that *prima facie* the above-mentioned conditions of Article 138 of the Rules may be considered to be satisfied.
12. In the present case, the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law is an international agreement concluded by Antigua and Barbuda, along with Tuvalu, to which several other states subsequently acceded.
13. Article 2, para. 2 of the Agreement provides that: “*Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (“ITLOS”) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules*”. Acting on this basis, the state parties to the Agreement unanimously decided in accordance with Article 3, para. 5 of the Agreement to refer a question, constituting the subject of the case at hand, to the Tribunal for an advisory opinion to be delivered.
14. The question addressed by the Commission relates to the Convention as it concerns obligations of state parties to the Convention, including under Part XII of the Convention, respectively, to (a) prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere, and to (b) protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

15. Therefore, it should be noted that the question posed by the Commission directly concerns the Convention, including provisions framing the protection and preservation of the marine environment. What is more, the question concerns legal obligations of State Parties stemming from the Convention. The assumption behind the question is that such obligations exist and thus should be specified by the Tribunal in its advisory opinion. For that reason, the Tribunal may also be eager to recall other rules of the law of the sea that are codified outside the Convention or are of a customary nature. Hence, the Tribunal may conclude that they need be evoked only to give a comprehensive answer to the question in hand. Consequently, it is possible that the Tribunal will go beyond the Convention to determine jurisdiction *rationae materiae* for the case at stake.
16. In any case, the Government of the Republic of Poland believes that it would be beneficial – both in terms of foreseeability and a proper understanding of the Tribunal’s jurisdiction, as well as to elucidate under what conditions, how and when that jurisdiction is exercised – for the Tribunal to fully elaborate on its reasoning in this regard in the present case.

III. MATERIAL SCOPE OF THE QUESTION

17. The Government of the Republic of Poland observes that the question posed by the Commission concerns obligations stemming from the Convention, including from Part XII thereof.
18. At basic level, both parts a) and b) of the question at hand reflect the wording of Article 194, para. 1 and Article 192 of the Convention, respectively:

“Article 194 para. 1

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

Article 192

States have the obligation to protect and preserve the marine environment”.

19. Article 192 has a fundamental character, as it obliges State Parties in Part XII to protect and preserve the marine environment, whereas Article 194 develops the general principle enshrined in Article 192.
20. Even so, the Government of the Republic of Poland is of the opinion that the question asked by the Commission does not exclude the Tribunal from taking into account other relevant provisions of the Convention.
21. Furthermore, it is also possible that the Tribunal may come to an understanding that these two provisions do not exhaust the intention of the addressed question.
22. Article 237 of the Convention, entitled "*Obligations under other conventions on the protection and preservation of the marine environments*" states as follows:
- "Article 237*
- 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.*
- 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention".*
23. Article 237, read jointly with Article 31(3)(c) of the Vienna Convention on the Law of Treaties of 1969, allows us assume that the Tribunal may conclude that the Convention may be regarded as an umbrella instrument for other legal acts upholding or complementing its own provisions.
24. Consequently, the Tribunal may take into account other relevant rules of international law with the aim of giving a comprehensive answer to the questions posed. These rules may be taken to either inform the substantive obligations of States or provide interpretative context for how the Convention should be understood. At the same time, however, in view of the scope of the Tribunal's jurisdiction and the potential breadth and horizontal aspects of questions posed to it, care should be taken to provide fit-for-purpose answers.

IV. CONCLUSIONS

25. The Government of the Republic of Poland is of the opinion that, in view of the Tribunal's jurisdiction hitherto, there may be a sufficient legal basis for the Tribunal to positively consider its advisory jurisdiction in the present case.
26. Given the importance of the subject of the case at hand, the Government of the Republic of Poland considers it important to provide a detailed explanation of the conditions for exercising the Tribunal's jurisdiction, the Tribunal's jurisdiction *rationae materiae*, as well as the legal norms relating to obligations referred to in the question (if it finds itself competent to give an advisory opinion and to exercise this function in the present case).

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