

**Request for an Advisory Opinion submitted by the Commission of Small
Island States on Climate Change and International Law
(Case No. 31)**

Written Statement of the Republic of Guatemala

16 June 2023

1. The Republic of Guatemala hereby submits its Written Statement on Case No. 31 - *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)* - pursuant to the Tribunal's Order 2022/4 dated 16 December 2022, supplemented by Order 2023/1 dated 15 February 2023.
2. The present Written Statement addresses the Tribunal's jurisdiction to render an advisory opinion and provides a few remarks of a general nature. The Republic of Guatemala reserves its right to make further submissions on other aspects of the questions on which an opinion is sought at a later stage of the proceedings.

Introduction

3. By letter of 12 December 2022, the Commission of Small Island States on Climate Change and International Law ('the Commission' or 'COSIS') submitted a request for an advisory opinion from the Tribunal pursuant to a unanimous decision of its Members under Article 3(5) of the Agreement for the Establishment of the Commission. The Commission requests an opinion from the Tribunal on the following questions:

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?*

4. By letter Ref. ae/2022/C31/e dated 13 December 2020, and pursuant to Article 133(1) of the Rules of the Tribunal, the Registry communicated to the States Parties to the United Nations Convention on the Law of the Sea ('UNCLOS') about the request, indicating that the latter was filed with the Registry on 12 December 2022 and was entered into the list of cases as Case No. 31. Furthermore, the letter indicated that States Parties would be informed in due course of the details of the procedure to be followed.
5. By Order 2022/4 of 16 December 2020, the President of the Tribunal invited, under Article 133(3) of the Rules of the Tribunal, the States Parties to the Convention, the Commission and other organisations to present written statements on the questions submitted to the Tribunal for an advisory opinion. The Tribunal fixed 16 May 2023 as the time limit within which such written statements may be presented and decided that oral proceedings will be held, whilst reserving the subsequent procedure for further decision.
6. By Order 2023/1 dated 15 February 2023, the President of the Tribunal extended the time limit within which written statements may be presented to 16 June 2023.
7. The Republic of Guatemala, as a State Party of the Convention, welcomes the invitation to participate in the proceedings of Case No. 31 and wishes to avail itself of that opportunity.

The Advisory Jurisdiction of the Tribunal

8. The Tribunal was established by Annex VI of UNCLOS, which contains the Tribunal's Statute. Its jurisdiction is laid out especially by Section 2 of Part XV of the Convention and, for specific purposes, by Section 5 of Part VI of that instrument.
9. With regard to the Tribunal's advisory jurisdiction, it seems appropriate to review the relevant rules as they merit further discussion, which follows below.
10. The general statement of jurisdiction for the choices given to States Parties by Article 287 appears in Article 288, paragraphs 1 and 2, of UNCLOS:

Article 288
Jurisdiction

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.

3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

11. The jurisdiction of the Tribunal is set out in Article 21 of the Statute, which reads:

Article 21
Jurisdiction

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.

12. With respect to advisory opinions specifically, the Rules of the Tribunal, in Article 138, provide the following:

Article 138

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention 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 to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

3. The Tribunal shall apply mutatis mutandis articles 130 to 137.

13. Guatemala wishes to expressly acknowledge the Tribunal's Advisory Opinion of 2 April 2015 in Case No. 21 - *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*. Whilst reaffirming its utmost respect and consideration for the Tribunal and its decisions and opinions, Guatemala is of the view that the Tribunal could benefit from the opportunity afforded by Case No. 31 to revisit its reasoning on the basis of its advisory jurisdiction and its discretionary power as relayed in the above-mentioned Advisory Opinion.

By doing so, the Tribunal could provide enhanced guidance on its advisory jurisdiction and related procedural framework, as well as clarify the scope and limits thereof.

14. The Tribunal indicated in the *SRFC* Advisory Opinion that, based on Article 318 of the Convention, Annexes form an integral part of the Convention, and therefore the Statute enjoys the same status as the Convention. Following the Tribunal's reasoning, this results in a non-subordinated relationship between Article 21 of the Statute and Article 288 of the Convention, whereby Article 21 of the Statute "stands on its own footing and should not be read as being subject to article 288 of the Convention".¹
15. The Tribunal further noted that there is no provision in the Convention or the Statute expressly granting it an advisory jurisdiction. However, it indicated that Article 21, and more specifically the phrase "*all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*", was critical to the issue. The Tribunal explained that the word "matters" necessarily has a distinct meaning from the words "disputes" and "applications" and that "[c]onsequently, it ['matters'] must mean something more than only 'disputes'. That something more must include advisory opinions if specifically provided for in 'any other agreement which confers jurisdiction on the Tribunal'".²
16. The Tribunal went on to clarify that the expression "*all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*" did not in itself establish its advisory jurisdiction; rather, it is the "other agreement" which could confer such jurisdiction: "When the 'other agreement' confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regards to 'all matters' specifically provided for in the 'other agreement'. Article 21 and the 'other agreement' conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal".³

¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 20, para. 52.

² *Ibid.*, p. 21, para. 56. This position was advanced despite the fact that Article 21 mirrors Article 36(1) of the Statute of the International Court of Justice, following the reasoning utilised in the *MOX Plant* case. See *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 106, para. 51.

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 22, para. 58.

17. Regarding Article 138 of the Rules of the Tribunal, the same Advisory Opinion indicates that it “does not establish the advisory jurisdiction of the Tribunal” as it only “furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction”.⁴
18. Having established the above, the Tribunal determined that said prerequisites for the exercise of its advisory jurisdiction are the following:
- (a) An international agreement related to the purposes of the Convention that specifically provides for the submission to the Tribunal of a request for an advisory opinion;
 - (b) The request must be transmitted to the Tribunal by a body authorised by or in accordance with the said agreement; and
 - (c) Such an opinion may be given on a “legal question”.⁵
19. From the outset, the request for an advisory opinion submitted by COSIS appears, *prima facie*, to fulfil these prerequisites that Article 138 of the Rules of the Tribunal and the *SRFC* Advisory Opinion demand:
- (a) The Agreement for the Establishment of the Commission appears in principle to be related to the purposes of the Convention, and its Article 2(2) incorporates an express authorisation for the Commission to request advisory opinions from the Tribunal “on any legal question within the scope of” UNCLOS;
 - (b) The request for an advisory opinion was transmitted to the Tribunal by the Co-Chairs of the Commission in accordance with Article 3 of the Agreement;
 - (c) The two questions that have been transmitted to the Tribunal are framed in legal terms and are of a legal nature.

⁴ *Ibid.*, p. 22, para. 59.

⁵ *Ibid.*, p. 22, para. 60.

20. In light of the above, Guatemala preliminarily contends that the Tribunal has jurisdiction to entertain the present request for an advisory opinion.

Additional Observations

21. Notwithstanding its expectation to expound its arguments and reasoning at a later stage of the procedure, Guatemala wishes to state that, when dealing with the questions on which an opinion has been sought, caution is warranted, given their wide and general nature. The answers to the questions must remain within the remit of *lex lata* and avoid the temptations of diverting towards the realm of *lex ferenda*. It is Guatemala's understanding that an advisory opinion ought to be a statement of the law and not a legislative exercise.
22. Attention should be given to the fact that the COSIS is formed by a discreet number of States and its membership is limited to the members of the Alliance of Small Island States. In other words, the Commission does not enjoy the universality or quasi-universality that the organs and organisations authorised to request advisory opinions normally enjoy, together with the ensuing procedure that brings about the request for an advisory opinion.
23. Care must be shown in protecting the rights of third States who were not consulted when the questions were drafted or submitted to the Tribunal. This necessity is especially acute as concerns have been expressed about the manner in which the advisory jurisdiction of the Tribunal has been triggered in this case - by virtue of an international agreement arguably concluded for the sole purpose of submitting the request for an advisory opinion at hand - and its potential effect in encouraging further similar requests which may distort the object and purpose for which the Tribunal was established.
24. Guatemala trusts the Tribunal will zealously protect its judicial function and use its inherent power to determine the real scope and meaning of the question(s) object of the request: "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, [the Tribunal] must ascertain what are the legal questions really in issue in questions formulated in a request"⁶.

⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para 35.

25. Finally, and in view of the two Orders that the Tribunal has issued in these proceedings, Guatemala wishes to encourage the Tribunal to authorise a second round of written statements. The responses and comments to the written statements will allow the participating States and organizations to further develop their positions on the complex matters raised by the request for an advisory opinion and will surely prove useful for the Tribunal's deliberations.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above the typed name.

Lesther Antonio Ortega Lemus
Chargé d'Affaires
Embassy of the Republic of Guatemala
in The Kingdom of The Netherlands
Representative of the Republic of Guatemala