



**Ministry of Foreign Affairs
and International Cooperation**

*Service for Legal Affairs,
Diplomatic Disputes and Treaties*

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REQUEST FOR AN ADVISORY OPINION

SUBMITTED BY THE COMMISSION OF SMALL ISLANDS STATES

ON CLIMATE CHANGE AND INTERNATIONAL LAW

(CASE NO. 31)

WRITTEN STATEMENT OF ITALY

Written Statement of Italy

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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15 June 2023

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CHAPTER I

Introduction*

1. At its third meeting on 26 August 2022 the Commission (“the Commission”) of Small Island States on Climate Change and International Law (COSIS), in accordance with Article 2, paragraph 2 of the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law of 31 October 2021, adopted a decision aimed at requesting an advisory opinion from the Tribunal on the following questions:

What are the specific obligations of States parties to the United Nations Convention on the Law of the Sea (“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 acidifications?

2. In its order 2002/4 of 16 December 2022, the President of the International Tribunal for the Law of the Sea (“the Tribunal” or ITLOS) invited the Commission, some intergovernmental organizations, and the States Parties to the United Nations Convention on the Law of the Sea (“the Convention” or UNCLOS) to present written statements on the questions submitted by the Commission to the Tribunal for an advisory opinion. The President fixed a time-limit of 16 May 2023.

3. By order 2023/1 of 15 February 2023 the President of the Tribunal extended to 16 June 2023 the time-limit within which written statements may be presented to the Tribunal.

4. In this context, Italy finds opportune to present a written statement, which, in **Section I**, addresses the jurisdiction of the Tribunal and expresses the view that it is now established that, in terms of article 21 of its Statute, the Tribunal may give advisory opinions based on “other international agreements” related to the the purposes of the Convention.

Italy also considers it appropriate to focus on Article 237 UNCLOS and on the interpretative method of systemic integration. Italy believes that the provisions of UNCLOS concerning the protection of the marine environment should be interpreted in the light of the general obligations under international environmental law that have emerged since 1982 and whose content has often been specified in subsequent multilateral agreements. Consequently, in **Section II**, Italy intends to dwell on this hermeneutic criterion and emphasise the importance of its use in the present case where the correlation between international environmental law and UNCLOS comes into play.

* Professor Roberto Virzo of the University of Messina, with the assistance of Professor Gabriele Asta of the Ca’ Foscari University of Venice, contributed to the drafting of this written statement.

CHAPTER II

LEGAL ASPECTS

1. Jurisdiction

5. In Italy's view, it is now established that the Tribunal may also exercise an advisory jurisdiction. In its 2015 advisory opinion, the Tribunal qualified article 21 of its Statute as a kind of enabling *renvoi* clause. More specifically, the Tribunal held that:

“In terms of article 21 of the Statute, it is the ‘other agreement’ which confers [advisory] jurisdiction on the Tribunal. When the ‘other agreement’ confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to the interpretative method of systemic integration. Italy believes that the provisions of UNCLOS concerning the protection of the marine environment should be interpreted in the light of the general obligations under international environmental law that have emerged since 1982 and whose content has often been specified in subsequent multilateral agreements. 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”¹.

Therefore, the Tribunal based its advisory jurisdiction on the combined provisions of article 21 of the Statute and the ones contained in the pertinent “other agreement”, expressly conferring such jurisdiction.

The Tribunal also pointed out that article 138 of its Rules “only furnishes the prerequisites that need to be satisfied”² before giving an advisory opinion on a legal question on the basis of an international agreement related to the purposes of the Convention which confers advisory jurisdiction to it.

6. While considering that there is no need of a *revirement* of jurisprudence, in a spirit of sincere cooperation, Italy respectfully shares some observations that might be useful to corroborate the Tribunal's findings.

7. With reference to article 138 of the Rules, it is true that in this provision the Tribunal itself prefigured the existence of an advisory jurisdiction on the basis of other international agreements and regulated the prerequisites of its exercise. However, it can be noted that the Conference of the Parties to the UNCLOS approved without objection the Report with which the Tribunal notified the adoption of such Rules of Procedure.³ Thus, in this approval it is possible to identify an implicit manifestation of consent of the then States parties to the UNCLOS with respect to the exercise of an advisory jurisdiction by the full Tribunal.

¹ ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 22, para. 58.

² ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 22, para. 59.

³ “The Meeting took note with appreciation of the Report of the Tribunal” (see *Report of the eighth Meeting of State Parties* (Doc. SPLOS/31), 4 June 1998, paras. 10 and 14.

8. An implicit acceptance of the existence of the Tribunal's advisory jurisdiction also seems to be inferred from the reactions of the UNCLOS States Parties to the relevant paragraphs of the advisory opinion of 2 April 2015. Indeed, at the Meeting of States Parties to the Convention held after said advisory opinion, only one delegation suggested that "the Tribunal should have declined having jurisdiction"⁴.

9. It is also interesting to note that a specific provision has been included in the recent Draft agreement under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) with the aim of allowing the Conference of the parties to request the Tribunal to give an advisory opinion⁵. This inclusion can be seen as a confirmation of the aforementioned generalised consent of States as well as of their willingness to provide for the conferral of an advisory jurisdiction to the Tribunal in new international agreements related to the purposes of the Convention.

10. That being said, Italy considers that the advisory jurisdiction of the Tribunal could exist also in the present case since the request complies with the relevant prerequisites established by article 138 of its Rules of Procedure, as interpreted in the 2015 advisory opinion. Namely, the COSIS Agreement explicitly provides for the advisory jurisdiction of the Tribunal (article 2, paragraph 2), and the request has been filed by the Co-Chairs of the COSIS, on behalf of the Commission pursuant to article 3, paragraph 3, of the COSIS Agreement.

11. Nor do significant doubts appear to arise as to whether the Tribunal has jurisdiction in this case in consideration of the object of the questions asked by the Commission. The circumstance that they relate to the interpretation of the UNCLOS and not of the COSIS Agreement, should not preclude the Tribunal from answering them. In the 2015 advisory opinion, the Tribunal seems to have excluded the need to confine its competence to questions related to the interpretation and application of the international agreement conferring jurisdiction to it, recognizing the possibility to rule on legal issues that have a "sufficient connection" with the purposes and principles of the agreement.⁶ Nevertheless, it could be appropriate for the Tribunal to seize the opportunity and further clarify the requirement of the "sufficient connection", in particular with respect to the degree of connection required.

⁴ See *Report of the twenty-fifth Meeting of State Parties* (Doc. SPLOS/287), 13 July 2015, para. 23.

⁵ Namely, article 48, paragraph 6, of the BBNJ reads as follows: "The Conference of the Parties may decide to request the International Tribunal for the Law of the Sea to give an advisory opinion on a legal question on the conformity with this Agreement of a proposal before the Conference of the Parties on any matter within its competence. A request for an advisory opinion shall not be sought on a matter within the competence of other global, regional, subregional or sectoral bodies, or on a matter that necessarily involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto, or the legal status of an area as within national jurisdiction. The request shall indicate the scope of the legal question on which the advisory opinion is sought. The Conference of the Parties may request that such opinion be given as a matter of urgency".

⁶ ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 24, para. 68.

2. Article 237 of the Convention and Interpretative Criterion of Systemic integration.

12. This section focuses primarily on article 237 UNCLOS, which could possibly be taken into account by the Tribunal if it intends to render its advisory opinion on the merit of the legal questions asked by the Commission. Some considerations will also be devoted to the interpretative criterion of systemic integration.

13. Article 237 contains a “treaty coordination clause” to be regarded as special with respect to the one in article 311, paragraph 2 UNCLOS, since the former confines its scope to the relationship between Part XII of the Convention and certain categories of international treaties. Specifically, it establishes a double relationship of compatibility: the provisions of Part XII are without prejudice to those treaties, but the latter are to be applied in a manner consistent with UNCLOS.

Article 237 also has clear distinguishing features with respect to the subordination and compatibility clauses laid down in article 30, paragraph 2 of the Vienna Convention on the Law of Treaties of 1969 (VCLT). On the one hand, the latter provision states: “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”.

On the other hand, article 237, rather than stating that other treaties “which relate to the protection and preservation of marine environment” always and in all cases prevail, regulates the possible modalities of their application. Indeed, with specific reference to subsequent agreements, article 237, paragraph 1 requires that they be “concluded in furtherance of the general principles set forth” in UNCLOS. Moreover, both for subsequent agreements and for special conventions and agreements concluded previously, the effect flowing from the “without prejudice” clause in their favor, referred to in paragraph 1, is to allow, pursuant to paragraph 2, the implementation of the specific obligations contained therein, “in a manner consistent with the general principles and objectives of the Convention”.

In light of this delineation of its content, it is to be assumed that article 237 allows a constant opening of UNCLOS to any special convention and agreement that is likely to better protect and preserve the marine environment.

14. In Italy’s view, for the purpose of the concrete application of Part XII UNCLOS “without prejudice” of specific obligations assumed under such conventions and agreements, the additional interpretative method of systemic integration may be relevant. This method, enshrined in article 31, paragraph 3 (c) VCLT, makes it possible to coordinate each provision of Part XII with the specific obligations of other agreements referred to in article 237 UNCLOS.

The coordination of treaties through systemic integration does not determine the prevalence of one rule over another, but the application of both, which is precisely what the “without prejudice” clause aims at. In other words, the provisions of Part XII shall be interpreted, for the purpose of their application, also taking into account any relevant rules of international law, including therefore the specific obligations referred to in article 237 and the principles of the Convention, with which these specific obligations “should be carried out in a manner consistent”.

15. It is worth noting that an implicit reference to the interpretative method of systemic integration can also be found in article 293 of the Convention, that “provides for the possibility

to have recourse to other rules of international law”⁷. It is not, of course, a question of extending the jurisdiction of UNCLOS courts and tribunals⁸. Rather, each of them, in interpreting and applying the specific UNCLOS provisions over which it has jurisdiction in a given case, “is not precluded from applying other provisions of the Convention or other rules of international law not incompatible with the Convention”⁹.

16. Italy respectfully recalls that ITLOS and some arbitral tribunals constituted under Annex VII have often made extensive and appropriate use of the systemic integration method.

17. For example, in its Advisory Opinion of 1 February 2011, the Seabed Disputes Chamber – taking into account other treaties, non-binding declarations, binding regulations of the International Seabed Authority and the decision of the International Court of Justice in *Pulp Mills on the River Uruguay* – observed that

“the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the “standard clause” contained in Annex 4” section 5 of the Sulphides Regulations. So does the following statement in paragraph 64 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (i.e. the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31” paragraph 3(c) of the Vienna Convention” according to which the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”¹⁰.

18. As another example, the Annex VII Arbitral Tribunal in the *South China Sea Arbitration* stated in its award on jurisdiction and admissibility that articles 293, paragraph 1 UNCLOS and 31 paragraph 3 VCLT enabled it to take into account the Convention on Biological Diversity of 5 June 1992 (CBD) for the purpose of interpreting the UNCLOS provisions at stake in the case¹¹. In its subsequent award of 2016 on the merits, the Tribunal relied on the CBD to determine the meaning of the term “ecosystem” in Article 194, paragraph 5 UNCLOS:

An ‘ecosystem’ is not defined in the Convention, but internationally accepted definitions include that in Article 2 of the CBD, which defines ecosystem to mean ‘a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit’¹².

⁷ ITLOS, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, ITLOS Reports 2012, p. 150, para. 555.

⁸ ITLOS, *M/V “Norstar” (Panama v. Italy)*, Judgment, 10 April 2019, ITLOS Reports 2018-2019, p. 47, para. 136.

⁹ ITLOS, *M/V “Norstar” (Panama v. Italy)*, Judgment, 10 April 2019, ITLOS Reports 2018-2019, p. 47, para. 137.

¹⁰ ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 47, para. 135.

¹¹ Arbitral Tribunal constituted under Annex VII UNCLOS, *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 176.

¹² Arbitral Tribunal constituted under Annex VII UNCLOS, *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 945.

19. The abovementioned paragraphs of the 2011 advisory opinion and the 2016 arbitral award highlight that the method of systemic integration is useful for the interpretation of UNCLOS provisions relating to the protection and preservation of the marine environment. More generally, it is functional to coordinate the growing number of international rules relevant to the protection of the environment and its preservation from all forms of pollution including those impacting climate change and sea level rise.

20. The International Law Commission (ILC) has also recently expressed this view. In particular, Guideline 9 on the 2021 Draft Guidelines on the Protection of Atmosphere appears to be a genuine endorsement by the ILC in favor of the method (referred to as a “principle”) of systemic integration.

“The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, inter alia, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.”

20. Ultimately, Italy would greatly hope that the Tribunal will consolidate its line of jurisprudence concerning the systemic interpretation of the Convention. Indeed, even using this interpretive technique, and if it so deems, invoking article 237, the Tribunal would assist COSIS Member States and, more generally, all other States Parties to UNCLOS, to correctly identify which are, to date, the obligations under both the Convention and other agreements, whose stringent applications could help to prevent, reduce and control the deleterious effects on marine environment of climate change.

CHAPTER III

Conclusion

21. To summarize, is the view of Italy that:

- It is now established that, by virtue of the “enabling *renvoi* clause” in article 21 of its Statute, the Tribunal may exercise an advisory jurisdiction.
- In the present case, there seems to be no compelling reasons for the Tribunal to decline to give the advisory opinion requested by the Commission of Small Island States on Climate Change and International Law.
- With reference to the connection between UNCLOS and COSIS Agreement, the Tribunal might consider it appropriate to further clarify what in general should be a “sufficient” degree of connection for this prerequisite of article 138 of the Rules to be satisfied.
- If it intends to render the advisory opinion on the merit, the Tribunal could possibly take into account the “treaty coordination clause” contained in article 237 UNCLOS.
- The Tribunal could possibly make use of the interpretative method of systemic integration. In this way, the Tribunal could assist COSIS Member States and, more generally, all other States Parties to UNCLOS to correctly interpret and implement Part XII provisions also in the light of other existing obligations under international environmental law emerged since 1982.



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