

**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 OF THE REPUBLIC OF LATVIA**

16 JUNE 2023

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## A. Introduction

1. The International Tribunal for the Law of the Sea (hereinafter “The Tribunal”) in its order of 16 December 2022 invited States Parties to the United Nations Convention on the Law of the Sea, adopted 10 December 1982 (hereinafter “the Convention”) to present written statements upon the request of the Commission of Small Island States on Climate Change and International Law (hereinafter “the Commission”) for an advisory opinion on two questions which seek to specify the obligations of States Parties to the Convention in the relation between the Convention and climate change.
  
2. At its third meeting held virtually on 26 August 2022, the Commission in accordance with Article 3(5) of the 31 October 2021 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (hereinafter “the Agreement”) adopted a decision requesting an advisory opinion of 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?*
  
3. The request for advisory opinion was submitted in accordance with Article 21 of the Statute of the Tribunal and Article 138 of the Rules of the Tribunal in conjunction with Article 2(2) of the Agreement. In its order of 15 February 2023, the Tribunal decided to extend the time-limit until 16 June 2023 to submit written statements, which may be presented to the Tribunal pursuant to Article 133, paragraph 3, of the Rules of the Tribunal. As the Republic of Latvia is a State Party to the Convention, it wishes to avail itself of the opportunity afforded by the Tribunal by providing a written statement on the legal aspect of jurisdiction and admissibility, as well as by expressing its views on the interpretation and the scope of Articles 192 and 194 of the Convention.

## B. Jurisdiction and admissibility

4. In order for the Tribunal to address the substance of the request of the Commission, the jurisdiction of the Tribunal and the admissibility of the request must be determined. Latvia will therefore first consider whether the Tribunal has competence to give an advisory opinion on questions raised by the Commission.
5. The jurisdiction of the Tribunal is defined in Article 21 of the Statute of the International Tribunal for the Law of the Sea (hereinafter “The Statute”). While this provision does not *expressis verbis* provide advisory jurisdiction to the Tribunal, in the advisory opinion concerning *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* the Tribunal concluded that the interconnected Article 21 of the Statute and ‘any other agreement’ conferring jurisdiction on the Tribunal constitute the substantive legal basis of its advisory jurisdiction.<sup>1</sup>
6. Further, Article 138 of the Rules of the Tribunal (hereinafter “The Rules”) establishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction. These prerequisites are: 1) 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; 2) the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; 3) and such an opinion may be given on “a legal question”.<sup>2</sup> There is no dispute that the second prerequisite has been satisfied, therefore Latvia will focus on the first and the third prerequisites.
7. The first prerequisite contains two cumulative elements. First, an international agreement must specifically provide for the submission of a request for an advisory opinion to the Tribunal. The Agreement does contain such a provision, namely, Article 2(2) of the Agreement that authorizes the Commission to request advisory opinion from the Tribunal on any legal question within the scope of the Convention. Second, the agreement must be related to the purposes of the Convention. Latvia considers that the Agreement is related to the purposes of the Convention, as reflected, *inter alia*, in the Preamble of the Agreement that contains references to the framework provided in the Convention in the fifth and tenth recitals and the mandate of the Commission expressed in Article 1(3) of the Agreement. Textual elements are, however, only some of the relevant considerations for Latvia to reach that conclusion, and in other instances it may be important to address concerns about whether excessive formalism may lead to abuse of procedure.

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<sup>1</sup> *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion), 2 April 2015, ITLOS Reports 2015, p. 4, para. 58.

<sup>2</sup> *Ibid*, para 60.

8. The third prerequisite has also been satisfied. In the advisory opinion concerning *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, the Tribunal noted that '[t]hese questions have been framed in terms of law. To respond to these questions, the Tribunal will be called upon to interpret the relevant provisions of the Convention ... and to identify other relevant rules of international law'.<sup>3</sup> Latvia considers that for the same reasons the questions posed by the Commission are of a legal nature. The questions aim to clarify the interpretation of Articles 192 and 194 of the Convention in connection with threat posed by climate change to the marine environment as they mirror the language used in those articles.
9. To conclude, Latvia takes the view that in the present case all three prerequisites are satisfied and, thus, the Tribunal has jurisdiction to give advisory opinion on legal questions raised by the Commission. The establishment of jurisdiction in the present case, however, is without prejudice to possible future cases before the Tribunal where legal and factual considerations may lead to different conclusions regarding jurisdiction of the Tribunal and admissibility of requests for advisory opinions.

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<sup>3</sup> Ibid, para 65.

## C. Substance of the questions submitted

10. The questions submitted by the Commission mirror the language used in Article 192 and 194 of the Convention. Question (a) reflects the wording of Article 194(1) of the Convention, while question (b) reflects the wording of Article 192 of the Convention. Since Article 192 of the Convention is a general obligation of Part XII as opposed to the subsequent provisions of the Part XII of the Convention, the Written Statement of the Republic of Latvia will consider question (b) first and then turn to question (a).

### **C.1. What are the specific obligations of State Parties to the Convention, including under Part XII, to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?**

11. In the advisory opinion concerning *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the Tribunal accepted that Article 192 imposes on all States Parties an obligation to protect and preserve the marine environment.<sup>4</sup> Further, as the arbitral tribunal noted in the *South China Sea* award, ‘[t]he content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention’.<sup>5</sup> In particular:

The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.” Thus States have a positive “‘duty to prevent, or at least mitigate’ significant harm to the environment when pursuing large-scale construction activities.” The Tribunal considers this duty informs the scope of the general obligation in Article 192.<sup>6</sup>

12. Article 192 of the Convention does not specify the harm from which the marine environment must be protected and preserved. In Latvia’s opinion, States Parties are required to take measures to protect and preserve the marine environment from any kind of harm, including harm caused by climate change which occurs from anthropogenic greenhouse gas (GHG) emissions into the atmosphere. The corpus of international law

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<sup>4</sup> *Request for Advisory Opinion submitted by Council of the International Seabed Authority* (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, p. 10, para. 97.

<sup>5</sup> *South China Sea Arbitration (Philippines v. China)* (Award) (2016) 33 RIAA 153 para. 942.

<sup>6</sup> *Ibid* para. 941 (internal footnotes omitted).

relating to the environment also includes such instruments as the Paris Agreement and UNFCCC.

**C.2. What are the specific obligations of State Parties to the Convention, including under Part XII, 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?**

13. The answer to this question requires interpretation of Article 194 of the Convention since the question (a) partly reflects language used in the particular provision.
14. Article 194 of the Convention contains a duty to ensure that activities under states' jurisdiction or control are so conducted as to not cause harm to the marine environment. The arbitral tribunal in the *South China Sea* award noted that 'that the obligation to 'ensure' is an obligation of conduct. It requires "due diligence"'.<sup>7</sup>
15. The term "pollution of the marine environment" is defined in Article 1(1)(4) as "*the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities*".
16. General rule of interpretation set out in Article 31(1) of the Vienna Convention on the Law of the Treaties is applicable to the interpretation of the above-mentioned provision. The purpose of the conclusion of the Convention suggest that "*the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.*"<sup>8</sup> International Court of Justice has also stated, "*the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.*"<sup>9</sup> Therefore, "*in such instances it is indeed in order to respect the parties' common intention at the time the treaty*

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<sup>7</sup> Ibid para. 944.

<sup>8</sup> Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213, para. 64.

<sup>9</sup> Ibid para. 66.

*was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.”<sup>10</sup>*

17. There is scientific evidence that oceanic uptake of carbon dioxide (CO<sub>2</sub>) which makes up the vast majority of GHG emissions alters oceans chemistry, leading inter alia to acidification and deoxygenation.<sup>11</sup> GHG emissions furthermore add “energy” into the marine environment which leads to ocean warming, thermal expansion and, combined with the melting of the cryosphere, exacerbates sea level rise as an indirect effect.<sup>12</sup> Therefore, GHG emissions can be considered as a pollution of the marine environment under Article 1(1)(4) of the Convention.
18. In light of the above, Latvia suggests that the answer to question (a) should be to interpret Article 194 of the Convention so as to apply the “due diligence” obligation to prevent, reduce, and control pollution of the marine environment in relation to the deleterious effects of GHG emissions.
19. General obligations expressed in Articles 192 and 194 of the Convention are specified under Section 5 of Part XII. GHG emissions that reach the marine environment are produced on land and reach the atmosphere first. In this context, the legal relevance Articles 207, 211, and 212 of the Convention has to be considered. In order to comply with the obligations under the Convention when adopting national laws and regulations for the protection of the marine environment, States Parties must appropriately “take into account” internationally agreed rules, standards, and recommended practices and procedures, in particular, the Paris Agreement, UNFCCC, and relevant regulations adopted by International Maritime Organisation, as required by the customary principles of treaty interpretation reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties.

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<sup>10</sup> Ibid para. 64.

<sup>11</sup> Portner et al., “IPCC Special Report on the Ocean and Cryosphere in a Changing Climate”, Summary for Policy Makers, para. A2

<sup>12</sup> Ibid. para. A3



## D. Conclusions

20. Latvia takes the view that in the present case all three prerequisites are satisfied and, thus, the Tribunal has jurisdiction to give advisory opinion on legal questions raised by the Commission. The establishment of jurisdiction in the present case, however, is without prejudice to possible future cases before the Tribunal where legal and factual considerations may lead to different conclusions regarding jurisdiction of the Tribunal and admissibility of requests for advisory opinions.
  
21. Articles 192 of the Convention must be interpreted and applied as informed by the corpus of international law relating to the environment, which includes such instruments as the Paris Agreement and UNFCCC. Article 194 is a “due diligence” obligation that must be interpreted and applied by appropriately taking into account internationally agreed rules, standards, and recommended practices and procedures, as required by the customary principles of treaty interpretation.

Respectfully,



**Kristine LICE**

Director General of the Legal Directorate  
Ministry of Foreign Affairs of the Republic of Latvia