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 (COSIS)

List of cases: No. 31

WRITTEN STATEMENT OF THE FEDERAL REPUBLIC OF GERMANY

14 June 2023

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CHAPTER I

INTRODUCTION

1. At its third meeting held virtually on 26 August 2022, the Commission of Small Island States on Climate Change and International Law ('Commission' or 'COSIS'), based on article 2, paragraph 2 and article 3, paragraph 5 of the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law,[1] adopted a decision to request an advisory opinion from the International Tribunal for the Law of the Sea ('Tribunal' or 'ITLOS') on obligations of the States Parties to the United Nations Convention on the Law of the Sea ('Convention' or 'UNCLOS')[2] concerning the protection and preservation of the marine environment in relation to the effects of climate change. The request was submitted to the Tribunal on 12 December 2022. The questions submitted to the Tribunal for an advisory opinion read as follows:

> *What are the specific obligations of State 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 acidification?*

2. By Note Verbale of 13 December 2022, the Registrar of the Tribunal gave notice of the request for an advisory opinion submitted to the Tribunal by the COSIS to the States Parties to the Convention.

3. By Order 2022/4 of 16 December 2022, the President of the Tribunal invited the States Parties to the Convention, the COSIS and other intergovernmental organizations listed in the annex to the Order to present written statements on the questions submitted to the Tribunal by

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[1] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, adopted and entered into force on 31 October 2021, United Nations Treaty Series ('UNTS') No. 56940.

[2] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

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

4. Following the request for an advisory opinion submitted to the Tribunal in 2015 by the Sub-regional Fisheries Commission ('SRFC'), the request submitted by the COSIS constitutes the second request to the full Tribunal to render an advisory opinion. Considering the fact that the two cases differ in terms of the conditions and framework under which the applications were made, this request provides the Tribunal with an opportunity to further develop its jurisprudence regarding the basis and scope of its advisory jurisdiction. Viewed from this perspective, the Federal Republic of Germany ('Germany') is convinced that the request submitted by the COSIS will contribute to a further strengthening of the Tribunal's central and comprehensive role in matters concerning the international law of the sea.

CHAPTER II

LEGAL ASPECTS

A. JURISDICTION

5. The Convention does not contain any explicit provision on the advisory jurisdiction of the Tribunal as a full court.[3] The only explicit reference to an advisory function of the Tribunal regards the Seabed Disputes Chamber in article 191 of the Convention. Nonetheless, the ITLOS has confirmed in Case No. 21 that it may, depending of the circumstances of the individual case, have advisory jurisdiction as a full court according to article 21 of Annex VI of the Convention.[4]

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[3] See ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015 ('*2015 ITLOS Advisory Opinion*'), ITLOS Reports 2015, p. 4, at para. 53.

[4] *2015 ITLOS Advisory Opinion*, at para. 69.

I. GENERAL BASIS OF ADVISORY JURISDICTION

6. The general basis of jurisdiction of the Tribunal is stipulated in article 21 of Annex VI of the Convention ('Statute of the Tribunal' or 'Statute'). Article 21 reads:

> *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.*

As has been clarified by the Tribunal in its *2015 ITLOS Advisory Opinion*, article 21 of the Statute, by referring to "matters", not only covers contentious cases but also advisory proceedings. In the words of the Tribunal:

> *The words all "matters" ("toutes les fois que cela" in French) should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it 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".*[5]

Accordingly, the term "matters" has a different meaning under article 21 of the Statute than under other statutes of international courts and tribunals, particularly article 36 of the Statute of the Permanent Court of International Justice[6] and article 36, paragraph 1 of the Statute of the International Court of Justice ('ICJ Statute')[7].[8]

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[5] *2015 ITLOS Advisory Opinion*, at para. 56.

[6] Statute of the Permanent Court of International Justice, adopted 16 December 1920, entered into force 8 October 1921, 6 League of Nations Treaty Series ('LNTS') 390.

[7] Statute of the International Court of Justice, adopted 26 June 1945, entered into force 24 October 1945, 33 UNTS 933.

[8] See *2015 ITLOS Advisory Opinion*, at para. 57.

7. By furthermore emphasizing that such "matters" must be "specifically provided for in any other agreement which confers jurisdiction on the Tribunal", article 21 of the Statute clarifies that it "does not by itself establish the advisory jurisdiction of the Tribunal".[9] Rather, "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."[10] Accordingly, "[w]hen the 'other agreement' confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regard to 'all matters' specifically provided for in the 'other agreement'".[11] In this respect, article 21 of the Statute recognizes, for the purposes of the Convention, the possibility that advisory jurisdiction is conferred on the Tribunal by an 'external' agreement.

8. In addition to article 21 of the Statute, article 138 of the Rules of the Tribunal ('Rules') "furnishes the prerequisites that must be satisfied before the Tribunal can exercise its advisory jurisdiction."[12] Article 138 of the Rules reads:

> 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.*

Any request for an advisory opinion by the Tribunal must, therefore, comply with the prerequisites set out by both article 21 of the Statute, the 'external' agreement conferring jurisdiction on the Tribunal, and article 138 of the Rules.

9. Applying this standard of jurisdiction to the present case, the Tribunal is entitled to exercise advisory jurisdiction over the questions submitted to it by the COSIS if: (1) the COSIS Agreement is an international agreement related to the purposes of the Convention; (2) the

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[9] *2015 ITLOS Advisory Opinion*, at para. 58.

[10] *Ibid.*

[11] *Ibid.*

[12] *2015 ITLOS Advisory Opinion*, at para. 59.

COSIS Agreement is an agreement conferring advisory jurisdiction on the Tribunal; (3) the request submitted by the COSIS concerns matters specifically provided for in the COSIS Agreement; (4) the questions submitted to the Tribunal are of a legal nature; and (5) the request of the COSIS has been transmitted to the Tribunal by a body authorized by or in accordance with the COSIS Agreement.

II. REQUEST OF COSIS IS COMPATIBLE WITH ARTICLE 21 OF THE STATUTE

10. Taking into account that article 21 of the Statute establishes, together with the 'external' agreement, the advisory jurisdiction of the Tribunal, whereas Article 138 of the Rules merely "furnishes the prerequisites that must be satisfied before the Tribunal can exercise its advisory jurisdiction",[13] the requirements of article 21 of the Statute will be examined first. This approach takes into account the fact that the Statute, being incorporated in Annex VI to the Convention and adopted together with it, reflects the consent of the Contracting Parties to the Convention and thus the fundamental principle that underpins the peaceful settlement of disputes. In contrast, the Rules were not established by the Contracting Parties, but by the Tribunal itself on the basis of the mandate given to it by article 16 of the Statute.

1. Agreement conferring advisory jurisdiction on the Tribunal

11. The COSIS Agreement is an international treaty[14] concluded between States[15] and, thus, an agreement in terms of article 21 of the Statute. The term 'agreement', when used in article 21 of the Statute, ought to be understood as "as a reference to the basic principle of consent."[16] Without the element of consent, an international treaty cannot come into existence.

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[13] *Ibid.*

[14] See the definition of the term 'treaty' in article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties ('VCLT'), adopted 22 May 1969, entered into force 27 January 1980, 1155 UNTS 331: "'Treaty' means an international agreement concluded between States in written form and governed by international law [...]."

[15] The COSIS Agreement was originally concluded by Antigua and Barbuda and Tuvalu. Meanwhile, four other States, namely Niue, Palau, St. Lucia and Vanuatu, have become parties to the Agreement.

[16] S-I Lekkas and C Staker, 'Article 21 Annex VI'. In: A Proelss (ed.), *United Nations Convention on the Law of the Sea – A Commentary* (München *et al.*: Beck, Hart and Nomos, 2017), p. 2374, at para. 13.

12. Moreover, Germany considers the COSIS Agreement to confer advisory jurisdiction on the Tribunal. In this respect, it is worth noting that the COSIS Agreement does not expressly "confer jurisdiction" on the Tribunal, but that it authorizes the Commission to "request advisory opinions from the International Tribunal for the Law of the Sea [...] on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea [...]."[17] The fact that the Commission is authorized to request advisory opinions from the Tribunal, and that article 2, paragraph 2 of the COSIS Agreement refers *verbatim* to article 21 of the Statute and article 138 of the Rules, make it clear that the COSIS Agreement (implicitly) confers jurisdiction on the Tribunal.

2. Matters specifically provided for in the COSIS Agreement

13. Article 21 of the Statute requires that the "matters" on which an advisory opinion is sought from the Tribunal must be "specifically provided for" in the agreement which confers jurisdiction on the Tribunal. The COSIS Agreement expressly authorizes the Commission to request advisory opinions from the Tribunal "on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea",[18] thus "specifically providing" the matters on which advisory opinions can be sought.[19]

14. In its *2015 Advisory Opinion*, the Tribunal derived from the element "all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal" codified in article 21 of the Statute the necessity to assess whether the questions submitted to it by the 'SRFC' were matters that fell within the framework of the agreement conferring jurisdiction on the ITLOS.[20] By way of reference to the jurisprudence of the International Court of Justice ('ICJ'), it held that this would not necessarily require the "questions [...] to be limited to the interpretation or application of any specific provision" of the agreement conferring jurisdiction

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[17] Article 2, paragraph 2 of the COSIS Agreement.

[18] Article 2, paragraph 2 of the COSIS Agreement.

[19] Whether the questions submitted to the Tribunal are framed in a sufficiently specific manner is a matter which concerns the admissibility of the request for an advisory opinion. See *infra* paras. 30–32.

[20] *2015 ITLOS Advisory Opinion*, at para. 67. It has been suggested by one commentator that ITLOS thereby "added a new prerequisite for its exercise of the advisory jurisdiction" (J Gao, 'The ITLOS Advisory Opinion for the SRFC', (2015) 14 *Chinese Journal of International Law*, p. 735, at para. 16).

on the Tribunal, but that it would rather be sufficient if the questions presented to it have "a 'sufficient connection' [...] with the purposes and principles" of the agreement concerned.[21] Accordingly, it must be observed in the present case whether the questions submitted to the Tribunal by the COSIS for an advisory opinion are sufficiently connected with the purposes and principles of the COSIS Agreement.[22]

15. The object and purpose of the COSIS Agreement is the establishment of the Commission and the determination of its mandate, activities and authority.[23] The Agreement further prescribes rules on membership to, and the structure of, the Commission,[24] and it regulates procedural requirements on signature, entry into force, depository, accession and reservations.[25]

16. Unlike in case no. 21, the Tribunal in the present case is not requested to interpret the provisions of the agreement conferring jurisdiction on it, *i.e.*, the COSIS Agreement. Rather, the questions submitted to it by the Commission refer to the specific obligations of the States Parties to the Convention concerning the protection and preservation of the marine environment in relation to the effects of climate change.

17. Based on the Tribunal's finding in the *2015 ITLOS Advisory Opinion* that the questions submitted to it "need not necessarily be limited to the interpretation or application of any specific provision of the [agreement conferring jurisdiction to it],"[26] Germany holds that the questions presented to the Tribunal by the COSIS are sufficiently connected with the purposes and principles of the COSIS Agreement. This conclusion can be based, in particular, on the preamble to the COSIS Agreement, the definition of the mandate of the Commission in article 1,

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[21] *2015 ITLOS Advisory Opinion*, at para. 68. See also *ibid.*: "In this respect, there is no reason why the words 'all matters specifically provided for in any other agreement' in article 21 of the Statute should be interpreted restrictively."

[22] It has been stated that this approach mirrors the limitations of the advisory jurisdiction of the ICJ resulting from Article 96 (b) UN Charter, according to which UN organs other than the General Assembly the Security Council, and – if authorized by the General Assembly – specialized agencies may only request advisory opinions of the ICJ "on legal questions arising within the scope of their activities" (Gao, *supra* note 20, at para. 16).

[23] See articles 1 and 2 of the COSIS Agreement.

[24] Article 3 of the COSIS Agreement.

[25] Article 4 of the COSIS Agreement.

[26] *2015 ITLOS Advisory Opinion*, at para. 68. See also *ibid.*: "In this respect, there is no reason why the words 'all matters specifically provided for in any other agreement' in article 21 of the Statute should be interpreted restrictively."

paragraph 3 of the COSIS Agreement, and the description of the activities of the Commission laid out in article 2, paragraph 1 of the COSIS Agreement.

18. The preamble to the COSIS Agreement contains, *inter alia*, the following recital:

> Having regard *to the obligations of States under the 1992 United Nations Framework Convention on Climate Change and related instruments, the 1982 United Nations Convention on the Law of the Sea, and other conventions and principles of international law applicable to the protection and preservation of the climate system and marine environment*

Article 1, paragraph 3 of the COSIS Agreement reads as follows:

> *The mandate of the Commission shall be to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.*

The activities of the Commission are described in article 2, paragraph 1 of the COSIS Agreement in the following way:

> *The activities of the Commission shall include inter alia assisting Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals.*

19. Both article 1, paragraph 3 and article 2, paragraph 1 of the COSIS Agreement expressly refer to the promotion of, and contribution to, the "definition, implementation, and progressive development of rules and principles of international law concerning climate change" in specific regard to the "protection and preservation of the marine environment". The 10th recital of the preamble to the COSIS Agreement interlinks the pertinent global agreements and international legal principles applicable to the protection and preservation of the climate system on the one hand and the marine environment on the other. It will be recalled that the questions presented to the Tribunal by the COSIS for an advisory opinion refer to the specific obligations of the Contracting Parties to the Convention, including under its Part XII on the protection and preser-

vation of the marine environment, "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", and "to protect and preserve the marine environment in relation to climate change impacts". Therefore, the content of the COSIS Agreement and the questions presented to the Tribunal both concern the relationship between the regime for the protection and preservation of the marine environment and the climate change regime, thus demonstrating the existence of a sufficiently close connection required according to the Tribunal.

III. REQUEST OF COSIS IS COMPATIBLE WITH ARTICLE 138 OF THE RULES

20. Pursuant to article 138, paragraph 1 of the Rules, "[t]he 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." Furthermore, according to article 138, paragraph 2 of the Rules, "[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."

1. Legal questions

21. Regarding the legal character of the questions presented to the Tribunal, the ITLOS considered it sufficient in its *2015 Advisory Opinion* that the questions submitted to it "have been framed in terms of law", and that "[t]o respond to these questions, the Tribunal will be called upon to interpret the relevant provisions of the Convention and of the MCA Convention and to identify other relevant rules of international law".[27]

22. Measured against this standard, the COSIS has submitted "legal questions" to the Tribunal in its request for an advisory opinion. As in case no. 21, these questions are framed in terms of law ("specific obligations of State Parties to the [LOSC]"), and they will require the Tribunal

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[27] *2015 ITLOS Advisory Opinion*, at para. 65.

to interpret the relevant provisions codified in Part XII of the Convention, in particular in relation to their applicability and effects concerning climate change.

2. International agreement related to the purposes of the Convention

23. The COSIS Agreement is a treaty concluded between States and, thus, an international agreement.[28] Article 2, paragraph 2 of this agreement authorizes the Commission to "request advisory opinions from the [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." Thus, article 2, paragraph 2 of the COSIS Agreement "specifically provides" for the submission to the Tribunal of a request for advisory opinions.[29]

24. With respect to the relationship between the Convention and the international agreement conferring jurisdiction, in its *2015 Advisory Opinion* the Tribunal referred to the objective of the latter agreement to assess whether that agreement was related to the purposes of the Convention.[30] In contrast to the situation under article 21 of the Statute, the "related to" element included in article 138, paragraph 1 of the Rules does not concern the existence of a sufficiently close nexus between the questions submitted to the Tribunal for an advisory opinion and the agreement conferring jurisdiction on it. Rather, the question relevant here is whether the international agreement conferring jurisdiction on the Tribunal, *i.e.*, the COSIS Agreement, is sufficiently related to the purposes of the Convention.

25. The object and purpose of the COSIS Agreement is to establish the Commission, whose mandate it is, again, "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and their responsibilities for injuries arising from internationally wrongful acts in respect of the breach of such obligations".[31] Furthermore, the Commission has

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[28] See *supra* para. 11. Unlike article 21 of the Statute, both article 288, paragraph 2 of the Convention and article 138, paragraph 1 of the Rules require the conclusion of an "international" agreement. The term "international agreement" has been "understood as encompassing only those agreements concluded between entities having the capacity to enter into treaty relationships: states, the Authority and, arguably, international organisations" (Lekkas and Staker, *supra* note 16, at para. 14).

[29] See *supra* paras. 13–19.

[30] *2015 ITLOS Advisory Opinion*, at para. 63.

[31] Article 1, paragraph 3 of the COSIS Agreement.

been allocated the authority to request advisory opinions from the Tribunal on "any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea". In this respect, the COSIS Agreement seeks to enable the Commission to obtain guidance on how to interpret and apply the Convention. While the COSIS Agreement's main objective is "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change" (Art. 1 paragraph 3 and 2 paragraph 1), its preamble and Art. 1 and 2 also contain broad references to the Convention, to its zonal approach, and to the need to take immediate action to protect and preserve the marine environment. An examination of its objective thus reveals that the COSIS Agreement is partly, but not exclusively, related to the purposes of the Convention.[32]

26. Germany takes the view that no legal reason exists why the words "related to the purposes of the Convention" in article 138, paragraph 1 of the Rules should be interpreted in such a way that it would mean that the agreement conferring advisory jurisdiction on the Tribunal must be entirely and exclusively related to the purposes of the Convention. At the same time, taking into account that article 138, paragraph 1 of the Rules "furnishes the prerequisites that must be satisfied before the Tribunal can exercise its advisory jurisdiction",[33] it is submitted that the "related to" element should be understood to imply that the agreement concerned cannot expand the advisory jurisdiction of the Tribunal to international instruments that are outside of the scope, and thus unrelated to the purposes, of the Convention.[34] In the present case, the questions presented to the Tribunal refer to specific obligations of the Contracting Parties to the Convention, including under its Part XII. As the legal basis for requesting an advisory opinion on these questions, the COSIS Agreement is therefore sufficiently related to the purposes of the Convention in the present legal context.

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[32] According to article 1, paragraph 3 of the COSIS Agreement, the mandate of the Commission refers to the "rules and principles of international law concerning climate change, *including, but not limited to*, the obligations of States relating to the protection and preservation of the marine environment" (italics added).

[33] *2015 ITLOS Advisory Opinion*, at para. 59.

[34] Note that where 'external' instruments are integrated into the regime of the Convention by explicit order or *renvoi*, those instruments cannot be considered outside of the scope of the Convention. See *infra* para. 40.

3. Transmission of request for advisory opinion by authorized body

27. The COSIS is an international organization which has been awarded international legal personality by its member States.[35] Furthermore, the Commission is authorized by article 2, paragraph 2 of the agreement to request advisory opinions from the Tribunal. Thus, notwithstanding the existing debate on the exact meaning of the term "whatever body" codified in article 138, paragraph 2 of the Rules,[36] the COSIS is, according to all views, a sufficiently permanent institution and, as such, entitled to transmit a request for an advisory opinion in terms of article 138, paragraph 2 of the Rules.

B. ADMISSIBILITY

28. Referring to the Advisory Opinion of the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, the Tribunal confirmed in its *2015 Advisory Opinion* that "a request for an advisory opinion should not in principle be refused except for 'compelling reasons'".[37] Germany holds that no such "compelling reasons" exist in the present case, and that the Tribunal should not exercise its discretionary powers ("may give") pursuant to article 138, paragraph 1 of the Rules in such a manner as to refuse the request for an advisory opinion submitted by the COSIS.

29. In case no. 21, three different grounds for "compelling reasons" were invoked by States on why the Tribunal should refuse to give the requested an advisory opinion: (1) the allegedly vague, general and unclear (even though legal) nature of the questions raised by the SRFC; (2) the alleged *lex ferenda* nature of the answers sought by the SRFC; and (3) the assertion that the

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[35] *Cf.* article 1, paragraph 2 of the COSIS Agreement.

[36] Germany has taken the view that not only international organizations may request advisory opinions, but also groups of two or more States that want to make use of the Tribunal's expertise in law of the sea matters; see *2015 Statement of Germany*, para. 9. Other commentators have argued that a 'body' under article 138, paragraph 2 of the Rules should be limited to international organizations *sensu stricto*. See TM Ndiaye, 'The Advisory Function of the International Tribunal for the Law of the Sea' (2010) 9 *Chinese Journal of International Law*, p. 565, at para. 70; TR Treves, 'Advisory Opinion under the Law of the Sea Convention'. In JN Moore and MH Nordquist (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (The Hague: Brill, 2001), p. 81, at 92; Y Tanaka, *International Law of the Sea* (Cambridge: Cambridge University Press, ^{3}2019), p. 530.

[37] *2015 ITLOS Advisory Opinion*, at para. 71.

questions presented to the Tribunal allegedly involve a pronunciation on the rights and obligations of States not members to the SRFC without their consent.[38] None of these grounds is relevant in the present case.

I. VAGUE, GENERAL AND UNCLEAR NATURE OF THE QUESTIONS?

30. According to article 131, paragraph 1 of the Rules, which is applicable *mutatis mutandis* to advisory proceedings pursuant to article 138, paragraph 3 of the Rules, "[a] request for an advisory opinion on a legal question [...] shall contain a precise statement of the question [...] and shall be accompanied by all documents likely to throw light upon the question."[39] In the present case, the questions referred to the Tribunal are abstractly worded, in that they refer only to "specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), *including* under Part XII", and to broad scientific concepts such as ocean warming, sea level rise, ocean acidification, and emission of anthropogenic greenhouse gas into the atmosphere, which may not be easy to define in an unambiguous way. Notwithstanding this, Germany holds that the questions are still "clear enough to enable [the Tribunal] to deliver an advisory opinion".[40]

31. First, the obligations to be assessed by the Tribunal are specified in the questions submitted by the COSIS by reference to prevention, reduction and control of pollution of the marine environment, and its protection and preservation respectively, thus invoking terminology frequently used in provisions of Part XII of the Convention.[41] Even if the questions presented to the Tribunal were to be considered abstract, it is worth recalling the ICJ's jurisprudence regarding its advisory competence, according to which it "may give an advisory opinion on any legal question, abstract or otherwise."[42]

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[38] *Cf. 2015 ITLOS Advisory Opinion*, at paras. 72, 73 and 75.

[39] According to one commentator, this requirement is closely related to the third category of alleged compelling reason, as giving "an advisory opinion to highly abstract questions may entail the risk of affecting the rights and obligations of third States, without their consent" (Tanaka, *supra* note 36, p. 529).

[40] *2015 ITLOS Advisory Opinion*, at para. 72.

[41] See, *e.g.*, articles 192, 194 to 196, 207 to 212 of the Convention.

[42] ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports 1947-1948, p. 57, at 61; *Legal Consequences of the Construction of a*

32. Secondly, as far as the concepts of ocean warming, sea level rise and ocean acidification are concerned, general consensus, influenced in particular by the reports published by the Intergovernmental Panel on Climate Change ('IPCC'),[43] has developed over time on their meaning and relevance. The fact that the Tribunal may be required to consult reports published by expert bodies such as the IPCC, the United Nations Environment Program ('UNEP'), or the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection ('GESAMP'), as well as other scientific studies and reports, does not, for all that, change the legal nature of the issues focused on obligations of States.

II. LEX FERENDA *NATURE OF THE ANSWERS SOUGHT?*

33. The second category of "compelling reasons" is based on the understanding that the Tribunal is a judicial body charged with judicial functions, and that it is not empowered as a lawmaker.[44] Hence, it is limited to answering questions posed to it based on *lex lata* and not on *lex ferenda.*

34. Germany wishes to recall that the questions presented to the Tribunal by the COSIS refer to "specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), 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, [and] to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification". With these questions, the Commission seeks answers regarding the status of current international law, not future international law. There is nothing in the present request for an advisory opinion that would suggest that the Tribunal is called upon to accept the role of a lawmaker. In particular, the fact that the Tribunal will have to interpret the provisions of the Convention, in particular those of its Part XII, does not imply any lawmaking activities. Treaty interpretation is not only a generally recognized method of disclosing the state of the applicable law, but also

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Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 40.

[43] For the most recent report see IPCC, *Synthesis Report of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2023), available at: https://www.ipcc.ch/report/ar6/syr/.

[44] *Cf. 2015 ITLOS Advisory Opinion*, at para. 74.

one of the core tasks of the dispute settlement bodies adjudicating under Part XV of the Convention, as embodied in the jurisdiction *ratione materiae* of these bodies.[45] The Tribunal itself made clear in its *2015 Advisory Opinion* that it "does not take a position on issues beyond the scope of its judicial functions".[46]

III. RIGHTS AND OBLIGATIONS OF THIRD STATES AFFECTED?

35. As far as the third category of "compelling reasons" is concerned, the present case is similar to case no. 21 in that there is as yet no legal dispute between the member States of the COSIS in their relation to other States, but only "the abstract possibility of the advisory opinion's answers to the legal questions submitted of being relevant for future disputes between members and non-members".[47] However, the two cases differ in that the Commission does not, at least not primarily, seek guidance "in respect of its own actions",[48] but rather a clarification of obligations of a much larger group of States, namely of the Contracting Parties to the Convention in their entirety.

36. Germany holds that this situation should not be regarded as a reason to refuse the Commission's request for an advisory opinion. Both the Tribunal and the ICJ have confirmed in their jurisprudence that the consent of States not members of a body requesting an advisory opinion is not a requirement for the admissibility of a request of an advisory opinion.[49] At the same time, Germany encourages the Tribunal to be particularly mindful of the effects of its advisory opinions. While the issue relevant here must be distinguished from the issue of jurisdiction, potential future requests for advisory opinions from the Tribunal in other cases could ultimately result in a situation where States that cannot become parties to the relevant agree-

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[45] See article 288, paragraph 1 of the Convention: "jurisdiction over any dispute concerning the interpretation or application of this Convention".

[46] See also *2015 ITLOS Advisory Opinion*, at para. 74.

[47] *2015 Statement of Germany*, para. 12.3.2.

[48] *2015 ITLOS Advisory Opinion*, at para. 76.

[49] ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion of 3 March 1950, ICJ Reports 1950, p. 65, at 71; *2015 ITLOS Advisory Opinion*, at para. 76.

ment conferring jurisdiction are being placed in a disadvantageous situation specifically affecting their legal positions. In this respect, Germany wishes to recall the following statement made by Judge COT in his Declaration to the *2015 Advisory Opinion*:[50]

> *The dangers of abuse and manipulation, if the Tribunal does not provide a procedural framework by exercising its discretionary power, are evident. States could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position.*

For the sake of legal certainty, Germany thus invites the Tribunal to specify how those dangers could be taken into account in the future in the Tribunal's exercise of its discretion under article 138, paragraph 1 of the Rules.

C. APPLICABLE LAW

37. In this final section Germany wishes to address the issue of applicable law. Pursuant to article 23 of the Statute, the Tribunal "shall decide all disputes and applications in accordance with article 293", which provision requires it to "apply [the] Convention and and other rules of international law not incompatible with [the] Convention." As far as the specific case of advisory opinions is concerned, article 138, paragraph 3 of the Rules requires the Tribunal to apply *mutatis mutandis* article 130, paragraph 1 of the Rules. According to this provision, the ITLOS shall "be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases."

38. Based on these provisions, and in accordance with the questions submitted to the Tribunal by the COSIS, the Convention in general, and its Part XII on the protection and preservation of the marine environment in particular, constitute the applicable law in this case. This should not be understood, however, as implying that the Tribunal were prohibited from taking into

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[50] *2015 ITLOS Advisory Opinion*, Declaration of Judge Cot, ITLOS Reports 2015, p. 73, at para. 9.

account or referring to other ('external') international agreements such as the United Framework Convention on Climate Change (UNFCCC)[51] or the Paris Agreement,[52] as well as other documents, to the extent that such recourse is covered by its advisory jurisdiction *ratione materiae*.[53]

39. First, taking account of the rules of interpretation codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties ('VCLT') which the Tribunal is bound to apply as part of the "other rules" in terms of article 293, paragraph 1 of the Convention,[54] "other rules of international law" should be referred to by the Tribunal, where necessary, in order to substantiate, or inform respectively, the meaning of the terms of the Convention. As stated by the Annex VII Tribunal in the *Arctic Sunrise Case*, article 293, paragraph 1 of the Convention "ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention."[55] As far as the protection and preservation of the marine environment is concerned, the award rendered by the Annex VII Tribunal in the *South China Sea Arbitration* can be referred to as an illustrative example of such an integrated reading of the Convention.[56]

40. Secondly, where the Convention refers to, or incorporates the content of, 'external' instruments, *i.e.*, rules and principles that have been accepted within the framework of other

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[51] United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107.

[52] Paris Agreement, adopted 12 December 2015, entered into force 4 November 2016, UNTS No. 54113.

[53] See Arbitral Tribunal constituted under Annex VII of the UNCLOS, *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, at para. 192, stating that article 293, paragraph 1 of the Convention is "not [...] a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention."

[54] *Cf.* ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10, at para. 57; see also Arbitral Tribunal constituted under Annex VII of the UNCLOS, *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015, at para. 282.

[55] Arbitral Tribunal constituted under Annex VII of the UNCLOS, *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, at para. 188.

[56] Arbitral Tribunal constituted under Annex VII of the UNCLOS, *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, at paras. 945, 956 and 959.

international agreements, instruments or organizations,[57] it appears that these instruments are part of the applicable law within the meaning of article 293, paragraph 1 of the Convention. In particular, where the Convention requires domestic laws and regulations enacted by the Contracting Parties to be no less effective, or to give effect to, external rules, it is the task of the Tribunal to determine the standards that are established by these rules. It should be recalled that "other rules of international law not inconsistent with the Convention" in terms of article 293, paragraph 1 of the Convention may be applied only to the extent that the Tribunal has jurisdiction to render an advisory opinion. Germany therefore considers that, with regard to the application and interpretation of Part XII of the Convention, the scope of applicable law under article 293, paragraph 1 of the Convention extends to all international legal rules dedicated to the protection and conservation of the marine environment – including "special conventions and agreements" in terms of article 237 of the Convention – and any rules and regulations that shape the specific source of pollution governed by the relevant *renvoi* provisions in the Convention.

D. SUBSTANCE OF THE QUESTIONS SUBMITTED

41. With respect to the substance of the questions submitted to the Tribunal, Germany refers to the written statement submitted by the European Commission on behalf of the European Union.

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[57] Part XII of the UNCLOS contains numerous *renvois* to external rules and instruments. See, *e.g.*, articles 207, paragraph 1 and article 212, paragraph 1 of the Convention. Depending on how the reference clauses codified in the Convention, which provide *renvois* to external rules, are framed, the external rules could indirectly become binding under the Convention, regardless of whether they are legally binding in themselves, and whether they have been agreed to by the Contracting Parties to the Convention.

CHAPTER III

CONCLUSION

42. In conclusion, Germany takes the view that:

- The Tribunal has jurisdiction under article 21 of the Statute in conjunction with the COSIS Agreement, applied together with article 138 of the Rules, to render an advisory opinion on the questions presented to it by the COSIS.

- The Tribunal should not exercise its discretionary powers pursuant to article 138, paragraph 1 of the Rules in such a manner as to refuse the request for an advisory opinion submitted by the COSIS.

- The law to be applied by the Tribunal is contained in the provisions of the Convention and in particular in its Part XII on the protection and preservation of the marine environment. Where necessary in order to substantiate the terms of the Convention, the Tribunal is called upon to interpret the provisions of the Convention in line with other international agreements, in particular the UNFCCC and the Paris Agreement. Where the Convention contains *renvoi* provisions with references to external rules, these rules will usually become part of the applicable law within the meaning of article 293, paragraph 1 of the Convention. In the context of Part XII of the Convention, the Tribunal's jurisdiction *ratione materiae* – and thus the scope of the applicable law under article 293, paragraph 1 of the Convention – extends to all international legal rules dedicated to the protection and conservation of the marine environment.

T. v. Uslar-Gleichen

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