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From C-73/14 to ITLOS Case No. 31: Examining the EU's representation before International Courts and Tribunals, in light of the Principle of Sincere Cooperation under EU External Relations Law

By Thomas Yaw Voets

On 26 June 2023, [the International Tribunal for the Law of the Sea \(ITLOS\) announced that it had received written statements from 31 States Parties and eight intergovernmental organisations with regard to Case No. 31](#) (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*). As expected, this included European Union (EU) member states' submissions. More precisely, from [Poland](#), [Germany](#), [Italy](#), [Latvia](#), [France](#), [Portugal](#) and [the Netherlands](#).

However, perhaps somewhat surprisingly, [the European Commission \(EC\) also submitted a written statement on behalf of the EU to ITLOS](#), adding an intriguing dimension to the proceedings. After all, the decision by the EC to submit a written statement revives the discussion on the EU's representation before International Courts and Tribunals. For that reason, this blogpost aims to assess possible salient aspects regarding the statement submitted by the Commission on behalf of the EU. Does it contradict the views of the Member States that submitted their observations? What implications arise from the fact that the Member States themselves have submitted observations in this case? How does this align with the principle of sincere cooperation under EU external relations law, particularly considering the [C-246/07, European Commission v Kingdom of Sweden PFOS judgment](#)?

The EU's Representation Before International Courts and Tribunals

The issue of the EU's representation before International Courts and Tribunals was first raised in [Case 73/14, Council v. Commission](#). This case coincidentally also concerned the EC's intention to submit a written statement to ITLOS (with regard to [Case No. 21, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission](#)) on behalf of the EU (which is a Contracting Party to the United Nations Convention on the Law of the Sea (UNCLOS)).

More precisely, the EC claimed that the questions put forward to ITLOS raised important points of law that were of key interest to the EU (the liability of the flag State for illegal, unreported and unregulated fishing within the economic exclusive zone of States other than the flag State) and that, on the basis of article 335 of the Treaty on the Functioning of the European Union (TFEU) – according to which the Union is to be represented in legal proceedings by the Commission –, it was able to submit a statement on behalf of the EU without the need of the Council's approval. Nevertheless, the Council Working Parties on the Law of the Sea (COMAR) and on Fisheries Policy (FISH), as well as the Committee of Permanent Representatives (COREPER), contended that its prior approval was required on the basis of article 16 of the Treaty on European Union (TEU).

As the EC maintained that it was fully entitled to submit a written statement (on the condition that it would keep the Council fully informed, in line with the duty of sincere cooperation contained in article 13(2) TEU), the Council brought an application to the ECJ under article 263 TFEU for annulment of the decision of the EC to submit a written statement on behalf of the EU to ITLOS in Case No. 21. It hereby claimed that article 218 (9) TEU prescribes that the positions to be adopted on the EU's behalf in a body set up by an international agreement are decided on by the Council, on a proposal from the EC or the High Representative of the Union for Foreign Affairs and Security Policy.

Considering both sides' arguments, the ECJ ruled that article 335 TFEU provided a basis for the EC to represent the EU before ITLOS in Case No. 21. The Court came to this conclusion by firstly explaining that the EU was invited to express, as a party, a position 'before' an international Court, and not 'in' it. After all, the final decision in Case No. 21 would fall solely on ITLOS, acting, to that end, wholly independently of the parties (and thus wholly independently of the EU). Secondly, the ECJ referred to its decision in [Case 131/03 P, R.J. Reynolds Tobacco Holdings et al. v. Commission](#), in particular paragraph 94. In this paragraph, the ECJ mentioned that: "Article [335 TFEU], although restricted to Member States on its wording, is the expression of a general principle and states that the Community has legal capacity and is, to that end, to be represented by the Commission." In other words: while the wording of article 335 TFEU appears to limit its scope to Member State courts, it should be understood as also including international Courts and Tribunals.

Hence, the EC was permitted to submit a written statement on behalf of the EU to ITLOS in Case No. 21 without this involving a breach of EU Law.

Nevertheless, the ECJ also emphasised that – to be in line with EU Law – the EC has to respect the principle of sincere cooperation laid down in article 13(2) TEU. The ECJ clarified that this principle required the EC to consult the Council beforehand if it intends to express positions on behalf of the EU before an international court or Tribunal. According to the ECJ, the EC had fully complied with the obligations under this principle by allowing the COMAR and FISH working parties to express their views on the basis of which a working document was revised that underpinned the EC's final written submission to ITLOS.

The EU's written submission in ITLOS Case No. 31

10 years after ITLOS Case No. 21, the EC's written submission to ITLOS in Case No. 31 provides a good occasion to further examine the EU's representation before International Courts and Tribunals. After all, the EC has so far, in the follow-up to case 73/14, not had another chance to wield its power to represent the EU before an International Court or Tribunal. The subject matter of ITLOS Case No. 31 - the effects of climate change on the marine environment caused by *i.a.* anthropogenic greenhouse gas emissions - moreover is a matter where that the EC, with its European Green Deal, has greatly tried to influence the EU's member states. For that reason, one would expect that there would be a certain consistency between the EC's submission in ITLOS Case No. 31 and the Member States' submissions. But is that the case?

As a reminder, next to the EC, also Poland, Germany, Italy, Latvia, France, Portugal and the Netherlands provided written submissions. These countries are not only spread across the EU, their views on the EU and their dealings with the EC are also different - in particular when it comes to addressing climate change and the fight against greenhouse gas emissions. Accordingly, France - which within the EU has been a strong supporter of incorporating the Paris Agreement into EU policy - can be expected to be more aligned with the EU on climate related policies than a country such as Poland (with its continued strong dependence on coal).

Nevertheless, there is also the 'principle of sincere cooperation' under EU external relations law. This follows from article 4(3) TEU, and has been interpreted in *i.a.* the C-246/07 PFOS judgment as entailing that member states should endeavour to find a common position and refrain from compromising the principle of unity in the EU's international representation. For that reason, it is sometimes referred to by some as the '[duty to remain silent](#)', as Member States are restricted in expressing their own position when this could jeopardise the attainment of the EU's objectives.

Bearing the above in mind, it is interesting to start from the EU's submission and then look at how it compares with that of the member states, to see whether the member states effectively subscribe to this principle of unity in such a sensitive policy area.

The EU's written submission in ITLOS Case No. 31 considers that ITLOS should take an evolutionary interpretation of UNCLOS, thereby taking into account also other international legal instruments when interpreting what obligations there are for State Parties to UNCLOS in protecting the marine environment against anthropogenic greenhouse gas emissions. It further mentions that the Paris agreement is the most relevant instrument to interpret the relevant articles on protecting the marine environment (*i.e.* articles 192, 194, 207, 212, 213 and 222 of UNCLOS). Lastly, it stresses that no more stringent obligations can be imposed when interpreting UNCLOS than those under the Paris Agreement. In furtherance of the foregoing, reference is also made to all legislation adopted by the EU to fulfil its obligations under the Paris agreement (*i.a.* the EU Climate Law and the Regulation establishing a carbon border adjustment mechanism).

As for the Member States' written submissions, it is first to be noted that the Polish submission is - as expected - the shortest, whereas the French submission is the longest. Nevertheless, the substance of their submissions is obviously what is most interesting, as this will show whether the Member States have complied with the principle of sincere cooperation under EU external relations law.

In this regard, it is interesting to note that all member states have, in their own way, adhered to the principle of sincere cooperation under EU external relations law. Germany even goes so far as solely mentioning that "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". The other States use their written submission to draw attention to certain elements of the EC submission (e.g. Italy's submission focuses solely on the evolutionary interpretation of UNCLOS, where Poland's submission merely adds to this that the evolutionary interpretation of UNCLOS should apply to the articles relevant to this case - articles 192 and 194 UNCLOS), or to complement it further (*e.g.* in addition to the Paris Agreement, the Netherlands and Portugal list other conventions such as OSPAR and BBNJ; conversely, France's submission is mostly oriented towards embedding the concept of 'marine environment' in the articles listed by the EC).

Conclusion

As is evident from the above, both the issue of having the EC represent the EU before International Courts and Tribunals as the principle of sincere cooperation under EU external relations law seem to be rigorously anchored in the interplay between the Council, member states and the EC. This can be considered as a triumph for the EC, since it gives it

a lot of say in the external relations of the EU member states. After all, the EC does not need the Council's approval to establish the EU's position before international Tribunals or Courts and due to the principle of sincere cooperation under EU external relations law the EU member states have to refrain from compromising this EU position. In ITLOS Case No. 31, this can clearly be seen as all member states that intervened in their national capacity did so to draw attention to certain elements of the EC's submission or to complement it further.

Looking ahead, it can be expected that the EC will try to adopt a more assertive stance by seeking to intervene more regularly before International Courts and Tribunals. In this regard, reference can already be made to the EC's decision to request the International Court of Justice (ICJ) for the EU to participate in the advisory proceedings on the Obligations of States in respect of Climate Change ([which the ICJ authorised on 23 June of this year](#)) and its decision [to furnish information to the ICJ in the 'Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide \(Ukraine v. Russian Federation\) case](#).