

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 11 TO 25 SEPTEMBER 2023

*Request for an Advisory Opinion submitted by the Commission of
Small Island States on Climate Change and International Law
(Request for Advisory Opinion submitted to the Tribunal)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 11 AU 25 SEPTEMBRE 2023

*Demande d'avis consultatif soumise par la Commission des petits
États insulaires sur le changement climatique et le droit international
(Demande d'avis consultatif soumise au Tribunal)*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the corrected verbatim records.



En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux corrigés.

**Minutes of the Public Sitings
held from 11 to 25 September 2023**

**Procès-verbal des audiences publiques
tenues du 11 au 25 septembre 2023**

PUBLIC SITTING HELD ON 11 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

REQUESTING ORGANIZATION

Commission of Small Island States on Climate Change and International Law (COSIS)

Mr Gaston Browne, Prime Minister of Antigua and Barbuda, Co-Chair of COSIS
Mr Kausea Natano, Prime Minister of Tuvalu, Co-Chair of COSIS
Mr Arnold Kiel Loughman, Attorney General, Republic of Vanuatu
Mr Ronald Sanders, Ambassador to the United States of America and the Organization of American States and High Commissioner to Canada of Antigua and Barbuda
Mr Tufoua Panapa, Chief Advisor to the Prime Minister, Tuvalu
Mr Kevon Chand, Senior Legal Advisor, Permanent Mission of Vanuatu to the United Nations
Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario
Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law
Mr Conway Blake, Debevoise & Plimpton LLP; solicitor advocate of the senior courts of England and Wales; member, Bar of the Eastern Caribbean Supreme Court
Ms Jutta Brunnée, Dean, Faculty of Law, University of Toronto; University Professor; associate member, Institut de droit international
Mr Eden Charles, Special Representative of the Secretary-General, International Seabed Authority; Lecturer of Law, University of the West Indies; Chair, Advisory Board, One Ocean Hub, UK Research and Innovation
Ms Naima Te Maile Fifita, Founder, Moana Tasi Project; 2023 Sue Taei Ocean Fellow
Mr Vaughan Lowe KC, Emeritus Chichele Professor of International Law, University of Oxford; barrister, Essex Court Chambers; member, Institut de droit international; member, Bar of England and Wales
Mr Makane Moïse Mbengue, Professor of International Law, University of Geneva; member, Curatorium of the Hague Academy of International Law; associate member, Institut de droit international
Mr Brian McGarry, Assistant Professor of Public International Law, Grotius Centre for International Legal Studies, Leiden University; member, Bar of New York
Ms Phoebe Okowa, Professor of International Law, Queen Mary University, London; member, International Law Commission; advocate, High Court of Kenya
Ms Nilüfer Oral, Director, Center for International Law, National University of Singapore; member, International Law Commission; associate member, Institut de droit international

REQUEST FOR ADVISORY OPINION – COSIS

Mr Zachary Phillips, Crown Counsel, Attorney General’s Chambers, Ministry of Legal Affairs, Antigua and Barbuda; member, Bar of Antigua and Barbuda

Mr Jean-Marc Thouvenin, Professor, University Paris Nanterre; Secretary-General, The Hague Academy of International Law; associate member, Institut de droit international; member, Paris Bar; Sygna Partners

Ms Philippa Webb, Professor of Public International Law, King’s College, London; Barrister, Twenty Essex; member, Bar of England and Wales; member, Bar of New York; member, Bar of Belize

Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam; Adjunct Professor of Law, University of Fiji; member, Bar of Vanuatu; Blue Ocean Law

Ms Sarah Cooley, Director of Climate Science, Ocean Conservancy

Ms Shobha Maharaj, Science Director, Terraformation

Mr Falefou Tapugao, Private Secretary to the Prime Minister, Tuvalu

Mr Penivao Penete, Private Secretary to the Prime Minister, Tuvalu

Mr David Freestone, Adjunct Professor and Visiting Scholar, George Washington University School of Law; Co-Rapporteur of the International Law and Sea-Level Rise Committee, International Law Association; Executive Secretary, Sargasso Sea Commission

Ms Rozemarijn Roland-Holst, Assistant Professor in International Environmental Law, Durham Law School

Ms Jessica Joly Hébert, Ph.D. candidate, Université Paris Nanterre; member, Bar of Quebec

Ms Charlotte Ruzzica de la Chaussée, member, Bar of New York

Mr Jack McNally, Solicitor, Supreme Court, New South Wales; Research Fellow, University of New South Wales

Ms Melina Antoniadis, barrister and solicitor, Law Society of Ontario; transferring lawyer, Bar of England and Wales

Mr Romain Zamour, Debevoise & Plimpton LLP; member, Bar of New York; member, Paris Bar

Mr Duncan Pickard, Debevoise & Plimpton LLP; member, Bar of New York

Ms Perpétua B. Chéry, Debevoise & Plimpton LLP; member, Bar of New York

Ms Sara Kaufhardt, Debevoise & Plimpton LLP; member, Bar of New York

Ms Evelin Caro Gutierrez, Debevoise & Plimpton LLP; member, Bar of New York

Ms Alix Meardon, Debevoise & Plimpton LLP; member, Bar of New York

AUDIENCE PUBLIQUE TENUE LE 11 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ORGANISATION DEMANDERESSE

Commission des petits États insulaires sur le changement climatique et le droit international (COSIS)

M. Gaston Browne, Premier Ministre d'Antigua-et-Barbuda, Coprésident de la COSIS

M. Kausea Natano, Premier Ministre des Tuvalu, Coprésident de la COSIS

M. Arnold Kiel Loughman, *Attorney General* de la République de Vanuatu

M. Ronald Sanders, Ambassadeur aux États-Unis d'Amérique et auprès de l'Organisation des États américains et Haut-Commissaire d'Antigua-et-Barbuda au Canada

M. Tufoua Panapa, conseiller principal du Premier Ministre des Tuvalu

M. Kevon Chand, conseiller juridique principal, mission permanente de Vanuatu auprès de l'Organisation des Nations Unies

M. Payam Akhavan, SJD, OOnt, FRSC, professeur de droit international (chaire des droits de l'homme) et collaborateur émérite au Collège Massey de l'Université de Toronto ; membre de la Cour permanente d'arbitrage ; membre associé de l'Institut de droit international ; membre du barreau de New York ; membre du barreau de l'Ontario

Mme Catherine Amirfar, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York ; membre du barreau de la Cour suprême des États-Unis ; présidente sortante de la Société américaine de droit international

M. Conway Blake, cabinet Debevoise & Plimpton LLP ; *solicitor advocate* près les juridictions supérieures d'Angleterre et du pays de Galles ; membre du barreau de la Cour suprême des Caraïbes orientales

Mme Jutta Brunnée, doyenne de la faculté de droit de l'Université de Toronto ; professeure d'université ; membre associée de l'Institut de droit international

M. Eden Charles, représentant spécial du Secrétaire général de l'Autorité internationale des fonds marins ; maître de conférences en droit à l'Université des Indes occidentales ; président du conseil consultatif de One Ocean Hub, UK Research and Innovation

Mme Naima Te Maile Fifita, fondatrice du Moana Tasi Project ; boursière du programme Sue Tai Ocean en 2023

M. Vaughan Lowe KC, professeur émérite de droit international (chaire Chichele) à l'Université d'Oxford ; *barrister*, cabinet Essex Court Chambers ; membre de l'Institut de droit international ; membre du barreau d'Angleterre et du pays de Galles

M. Makane Moïse Mbengue, professeur de droit international à l'Université de Genève ; membre du Curatorium de l'Académie de droit international de La Haye ; membre associé de l'Institut de droit international

- M. Brian McGarry, professeur adjoint de droit international public au Centre Grotius pour les études juridiques internationales de l'Université de Leyde ; membre du barreau de New York
- Mme Phoebe Okowa, professeure de droit international à l'Université Queen Mary de Londres ; membre de la Commission du droit international ; avocate à la Haute Cour du Kenya
- Mme Nilüfer Oral, directrice du Centre de droit international de l'Université de Singapour ; membre de la Commission du droit international ; membre associée de l'Institut de droit international
- M. Zachary Phillips, *Crown Counsel* au cabinet de l'*Attorney-General* du Ministère des affaires juridiques d'Antigua-et-Barbuda ; membre du barreau d'Antigua-et-Barbuda
- M. Jean-Marc Thouvenin, professeur à l'Université Paris Nanterre ; Secrétaire général de l'Académie de droit international de La Haye ; membre associé de l'Institut de droit international ; membre du barreau de Paris ; cabinet Sygna Partners
- Mme Philippa Webb, professeure de droit international public au King's College de Londres ; *barrister*, cabinet Twenty Essex ; membre du barreau d'Angleterre et du pays de Galles ; membre du barreau de New York ; membre du barreau du Belize
- Mme Margaretha Wewerinke-Singh, professeure agrégée de droit de la durabilité à l'Université d'Amsterdam ; professeure associée de droit à l'Université des Fidji ; membre du barreau de Vanuatu ; cabinet Blue Ocean Law
- Mme Sarah Cooley, directrice de la climatologie, Ocean Conservancy
- Mme Shobha Maharaj, directrice scientifique, Terraformation
- M. Falefou Tapugao, secrétaire particulier du Premier Ministre des Tuvalu
- M. Penivao Penete, secrétaire particulier du Premier Ministre des Tuvalu
- M. Alan Boyle, professeur émérite de droit international public, Edinburgh Law School
- M. David Freestone, professeur associé et universitaire invité de la faculté de droit de l'Université George Washington ; co-rapporteur du comité sur le droit international et l'élévation du niveau de la mer de l'Association de droit international ; secrétaire exécutif de la Commission de la mer des Sargasses
- Mme Rozemarijn Roland-Holst, professeure adjointe de droit international de l'environnement à la faculté de droit de l'Université de Durham
- Mme Jessica Joly Hébert, doctorante à l'Université Paris Nanterre ; membre du barreau du Québec
- Mme Charlotte Ruzzica de la Chaussée, membre du barreau de New York
- M. Jack McNally, *solicitor*, Cour suprême de Nouvelle-Galles du Sud ; chargé de recherche à l'Université de Nouvelle-Galles du Sud
- Mme Melina Antoniadis, *barrister* et *solicitor* du barreau de l'Ontario ; transfert demandé au barreau d'Angleterre et du pays de Galles
- M. Romain Zamour, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York ; membre du barreau de Paris
- M. Duncan Pickard, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York
- Mme Perpétua B. Chéry, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York
- Mme Sara Kaufhardt, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York
- Mme Evelin Caro Gutierrez, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York
- Mme Alix Meardon, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York

Opening of the Oral Proceedings

[ITLOS/PV.23/C31/1/Rev.1, p. 1–3; TIDM/PV.23/A31/1/Rev.1, p. 1–4]

THE PRESIDENT: Good morning.

I wish to welcome you to this hearing. Before we begin, may I kindly ask that everyone to ensure that their mobile phones are on silent, please. Thank you.

At its third meeting on 26 August 2022, the Commission of Small Island States on Climate Change and International Law decided to request an advisory opinion from the Tribunal.

This decision was adopted 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.

By letter dated 12 December 2022, the Co-Chairs of the Commission of Small Island States on Climate Change and International Law transmitted the request for an advisory opinion to the Tribunal. The letter was received by the Registry on the same day. By the same letter, the Co-Chairs of the Commission transmitted to the Tribunal documents likely to throw light upon the questions contained in the request for an advisory opinion, pursuant to article 131 of the Rules of the Tribunal. The request and the additional documents have been posted on the Tribunal's website.

The case which has been entered in the list of cases as Case No. 31, is named *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

I now call on the Registrar to summarize the procedure and to read out the questions on which the Tribunal is called to give an advisory opinion on the basis of the decision of the Commission of Small Island States on Climate Change and International Law. Madam Registrar.

THE REGISTRAR: Thank you, Mr President. The questions read as follows:

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 likely to result from the climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by the 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?

By Order dated 16 December 2022, the President decided that the intergovernmental organizations listed in the annex to that Order are likely to be able to furnish information on the questions submitted to the Tribunal for an advisory opinion.

By that same Order, the President invited the State Parties to the Convention, the Commission of Small Island States on Climate Change and International Law (COSIS) and the said intergovernmental organizations to present written statements on the questions submitted to the Tribunal for an advisory opinion.

This Order initially fixed 16 May 2023 as the time-limit for the submission of written statements.

This time-limit was subsequently extended to 16 June 2023 by Order of the President dated 15 February 2023.

Further to requests from the African Union, the International Seabed Authority and the Pacific Community, the President decided to consider all these intergovernmental

organizations as likely to be able to furnish information on the questions submitted to the Tribunal and, therefore, invited them to do so within the extended time-limit.

Within the time-limit of 16 June 2023, written statements were filed by 31 State Parties to the Convention. These are, in order of receipt: Democratic Republic of the Congo, Poland, New Zealand, Japan, Norway, Germany, Italy, China, European Union, Mozambique, Australia, Mauritius, Indonesia, Latvia, Singapore, Republic of Korea, Egypt, Brazil, France, Chile, Bangladesh, Nauru, Belize, Portugal, Canada, Guatemala, United Kingdom, Netherlands, Sierra Leone, Micronesia, Djibouti.

Within the same time-limit, written statements were also submitted by the following eight intergovernmental organizations, in the order of receipt: United Nations, International Union for the Conservation of Nature, International Maritime Organization, Commission of Small Island States on Climate Change and International Law, Pacific Community, United Nations Environment Programme, African Union, International Seabed Authority.

After the expiry of the time-limit, further written statements were received in the following order of receipt: Rwanda, the Food and Agricultural Organization of the United Nations, Viet Nam and India. Further to decisions of the President and the Tribunal, these statements were admitted and included in the case file.

In addition, statements were submitted to the Tribunal from the following: the United Nations Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights and Human Rights & the Environment, the High Seas Alliance, ClientEarth, Opportunity Green, the Center for International Environmental Law and Greenpeace International, the Advisory Committee on Protection of the Sea, the Worldwide Fund for Nature, the Our Children's Trust and Oxfam International, the Observatory for Marine and Coastal Governance and the One Ocean Hub.

Further to decisions of the President, these statements were not included in the case file since they were not submitted pursuant to articles 138, paragraph 3, and 133, paragraph 3, of the Rules.

All the statements have been posted on the website of the Tribunal. Special sections have been set up on the website for statements received after the expiry of the time-limit as well as for statements that were not included in the case file.

By order of the President of 30 June 2023, the date for the opening of the hearing was fixed as 11 September 2023, that is, today. Pursuant to the Order, oral statements may be made by the State Parties to the Convention, the Commission of Small Island States on Climate Change and International Law, the other intergovernmental organizations listed in the annex to the Order of 16 December 2022, as well as by the African Union, the International Seabed Authority and the Pacific Community. The State Parties and the said organizations were invited to indicate their intention to make oral statements not later than 4 August 2023.

Within this time-limit, 34 State Parties, COSIS and three further intergovernmental organizations indicated such intention. Further to a request received from Belize after the date fixed in the Order of the President of 30 June 2023, the Tribunal decided that an oral statement may also be presented by Belize during the hearing.

THE PRESIDENT: Thank you, Madam Registrar.

As indicated, the Tribunal is meeting today to hear statements relating to the request for an advisory opinion. In this regard, the Tribunal has been informed that representatives of the following States and organizations, in addition to the Commission of Small Island States on Climate Change and International Law, wish to take the floor during the current oral proceedings. I will list them in alphabetical order:

Argentina, Australia, Bangladesh, Belize, Bolivia, Chile, China, Comoros, Democratic Republic of the Congo, Djibouti, European Union, France, Germany, Guatemala, India,

Indonesia, Italy, Latvia, Mauritius, Mexico, Federated States of Micronesia, Mozambique, Nauru, Netherlands, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Saudi Arabia, Sierra Leone, Singapore, Timor-Leste, United Kingdom, Viet Nam, African Union, International Union for Conservation of Nature and Natural Resources, and Pacific Community.

The specific arrangements for the meeting have been made known by the Registry to the participating delegations. The schedule of the hearing has also been made public by a press release and a revised schedule was issued last Friday, 8 September.

Today and tomorrow, both during the morning and afternoon sittings, the Tribunal will hear the Commission of Small Island States on Climate Change and International Law. And from Wednesday, 13 until Monday, 25 September, the other delegations I have mentioned will address the Tribunal.

This morning's sitting, in the course of which the Commission of Small Island States on Climate Change and International Law will present the first part of its statement, will last until one o'clock, and there will be a 30-minute break between 11:15 and 11:45, approximately.

I now give the floor to the first representative, Mr Gaston Alfonso Browne, Prime Minister of Antigua and Barbuda, to speak on behalf of the Commission of Small Island States on Climate Change and International Law. Your Excellency, you have the floor.

Statements of the Commission of Small Island States on Climate Change and International Law

STATEMENT OF MR BROWNE
CO-CHAIR OF COSIS
[ITLOS/PV.23/C31/1/Rev.1, p. 4–9]

Good morning. Mr President, members of the Tribunal, I am honoured to appear before you to open the oral pleadings of the Commission of Small Island States on Climate Change and International Law in these historic advisory proceedings.

As Prime Minister of Antigua and Barbuda, I serve as Co-Chair to the Commission, also referred to as COSIS, alongside by dear friend, the Honourable Kausea Natano, the Prime Minister of Tuvalu, who will be addressing you shortly.

Antigua and Barbuda and Tuvalu concluded the Agreement establishing COSIS on 31 October 2021 on the eve of the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change, or the UNFCCC, held in Glasgow, United Kingdom. On 5 November 2021, at COP26, the Republic of Palau became the first State to deposit its instrument of accession. This is followed, in chronological order, by Niue in September 2022, the Republic of Vanuatu and Saint Lucia in December 2022, and Saint Vincent in the Grenadines, Saint Christopher, that's Saint Kitts and Nevis, and the Commonwealth of The Bahamas in June 2023. The nine Member States of COSIS are scattered across the globe but are united by a deep connection to and dependence on the marine environment and its resources.

We also note with gratitude the supportive written statements in these proceedings by other members of Alliance of Small Island States to include: Belize, the Republic of Mauritius, the Federated States of Micronesia, the Republic of Nauru and the Republic of Singapore.

Mr President, COSIS is an unprecedented intergovernmental organization. Its purpose is to harness the potential of international law to protect the most climate vulnerable States against existential threats.

It is no exaggeration to speak of existential threats, when some of these nations may vanish in the foreseeable future because of rising sea levels. The scientific evidence leaves no doubt that this situation has arisen because of the failure of major polluters to effectively mitigate greenhouse gas emissions.

This inaction, this failure of political will, has brought humankind to a perilous juncture with catastrophic consequences. It is because of this reality that COSIS has brought this vital matter before you.

In view of this reality, one can scarcely imagine a more compelling reason to establish an intergovernmental organization. As the Preamble to the Agreement states, COSIS members are “alarmed by the catastrophic effects of climate change which threaten the survival of Small Island States, and in some cases, their very existence.”

It is for this purpose that the Commission's mandates is “to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change.”

These advisory proceedings before your Tribunal are the first, but certainly not the last, initiative of COSIS. The Commission has also been authorized to submit a written statement for the ICJ advisory opinion on climate change requested by the UN General Assembly on 29 March 2023; a historic resolution adopted by consensus under the leadership of Republic of Vanuatu, with the active support of numerous small island States, including Antigua and Barbuda.

COSIS will also submit a written statement for the advisory opinion proceedings before the Inter-American Court of Human Rights, requested by Chile and Colombia on 9 January 2023. And there will be yet more initiatives as small island States join forces to protect their rights and very existence by building a rule-oriented international order in which the major polluters are held accountable for the harm they have caused and continue to cause. It cannot be expected that our peoples will remain silent as their homes are irretrievably destroyed.

Despite these multiple initiatives, this initial request before ITLOS is particularly significant.

This is the opening chapter in the struggle to change the conduct of the international community by clarifying the obligation of States to protect the marine environment.

We are, after all, peoples of the ocean, whether in the Caribbean or the Pacific, in the Atlantic or Indian Oceans, surrounded by the vast expanses of water that have sustained us from time immemorial.

In this regard, the COSIS Agreement explicitly acknowledges the fundamental importance of oceans as sinks and reservoirs of greenhouse gases, and the direct relevance of the marine environment to the adverse effects of climate change on small island States.

The ocean is fundamental to the climate system of Earth, so it is befitting that the first in these series of proceedings should be before ITLOS, the guardian of the 1982 UN Convention on the Law of the Sea.

It is befitting no less, because in the past few weeks this summer we have witnessed the highest ocean temperatures on record.

Mr President, Members of the Tribunal, we are here today because over a century and a half of anthropogenic greenhouse gas emissions have polluted our precious oceans and devastated the marine environment.

Those emissions have fundamentally changed Earth's climate and are posing an existential threat to vulnerable communities worldwide.

My country is one of those communities, and we stand in solidarity with all small island and coastal States facing the devastating consequences of climate change.

Despite our negligible emissions of greenhouse gases, COSIS members have suffered and continue to suffer the overwhelming burden of climate change's adverse impacts.

Indeed, the catastrophic effects of climate change threaten the survival, and in some cases, the very existence of COSIS Members States.

Without rapid and ambitious remedial action, climate change may prevent my children and my grandchildren from living on the island of their ancestors, the island that we call home. We cannot remain silent in the face of such injustice. We cannot abandon our peoples to such a cruel fate.

We have come before this Tribunal in the belief that international law must play a central role in addressing the catastrophe that we witness unfolding before our eyes.

Your authoritative guidance on the specific obligations of States Parties to UNCLOS to protect the marine environment, is the much-needed corrective to a process that has manifestly failed to arrest climate change. We cannot simply continue with endless negotiations and empty promises. The political process must be informed by existing binding obligations under international law.

I emphasize existing obligations, Mr President. We have not come before to you create new law. All that we ask is for the Tribunal to clarify what UNCLOS requires of States Parties. Mr President, for decades, small island States have been stating these truths in international gatherings concerning climate change, including at successive Conferences of the Parties to the UNFCCC.

We have talked ourselves hoarse since the 1990s, pointing to the perilous circumstances into which our people and our countries are being plunged.

Year after year, we listened as promises to mitigate climate change were made, and year after year, we watched as those promises went unfulfilled.

We have patiently listened and waited. We have ardently urged and pleaded, but with little avail.

As I told the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change in Sharm el-Sheikh, Egypt, last year, the soliloquy in William Shakespeare's *Macbeth* resonates with a hammering significance for us small island States. And I quote:

Tomorrow, and tomorrow, and tomorrow,
creeps in this petty pace from day to day,
to the last syllable of recorded time;
and all our yesterdays have lighted fools the way to dusty death.

But we were not willing to resign our peoples to this death sentence, occasioned by the continuing failure to take effective action against climate change.

On 26 August 2022, the then three members of COSIS, Prime Minister Natano of Tuvalu and President Whipps of Palau, and myself, adopted a historic decision authorizing the Commission to request an advisory opinion from ITLOS.

On 12 December 2022, the Commission requested the advisory opinion from this Tribunal, referring the two legal questions that are at issue in these proceedings.

We did so based on the advice of a distinguished Committee of Legal Experts; dedicated men and women from across the world who have worked diligently and voluntarily to assist small island States in the pursuit of climate justice.

I will leave it to our esteemed counsel team to take you to the precise wording of those questions, but the essence is as follows:

Given climate change's harmful effects on the ocean and the ocean's vital role in Earth's climate system what does the constitution of the law of the sea have to say about the climate crisis?

What are the specific obligations of States Parties?

Mr President, members of the Tribunal, we are in dire, urgent need of an answer; an answer that is based on science rather than abstract principles; an answer that will provide meaningful guidance to States Parties to UNCLOS. And we must hope that States Parties will act in good faith to ensure that, moving forward, their conduct is consistent with the content of their obligations, as set out in your advisory opinion.

Mr President, members of the Tribunal, I will turn now to speak not only as the Co-Chair of COSIS, but also as Prime Minister of Antigua and Barbuda.

Specifically, I will address in more detail the devastating consequences that my country has suffered and will continue to suffer in the absence of swift and dramatic reductions in greenhouse gas emissions and robust, comprehensive adaptation efforts.

In 2017 alone, three major hurricanes – Irma, Harvey and Maria – battered the Caribbean, displacing over 3 million people in a single month.¹

Our sister island, Barbuda, was the first island hit by Hurricane Irma, a Category 5 storm, which damaged an estimated 90 per cent of all properties on the island. The damage required the evacuation of all residents from Barbuda to Antigua.² It further required the central

¹ Ama Francis, FREE MOVEMENT AGREEMENTS & CLIMATE-INDUCED MIGRATION: A CARIBBEAN CASE STUDY, SABIN CENTER FOR CLIMATE CHANGE LAW (September 2019).

² *The night Barbuda died: how Hurricane Irma created a Caribbean ghost town*, THE GUARDIAN (20 November 2017).

government to provide accommodation and sustenance to the population of Barbuda for three years on Antigua, while Barbuda was painstakingly rebuilt.

Had Antigua and Barbuda not been a unitary state, the inhabitants of Barbuda would have become climate migrants, or perhaps refugees, dependent on the voluntary generosity of several countries among whom they would have had to be scattered with no obligations for their safety or well-being.

Many previous storms have persistently destroyed Antigua and Barbuda's economy, infrastructure, utilities, public services and cultural heritage sites.³

After Hurricane Irma alone, our recovery needs totalled 222.2 million US dollars, or roughly one sixth of our entire gross domestic product.⁴ The government incurred heavy debts to borrow the proceeds needed to cover these costs. However, repayment of those debts has placed a heavy toll on public finances. The government now has extremely limited funds to pay for social services, let alone climate adaptation and mitigation measures.

The dangers of sea-level rise are also acute. Current projections show that by the end of this century, the Caribbean Sea could rise almost half a metre over levels from the early 1990s.⁵

This sea-level rise and storms are likely to salinate our remaining freshwater resources and much of our agricultural land. This would exacerbate an already dire crisis in the availability of ground and surface water and food insecurity.⁶

Increases in sea levels will also damage coastal infrastructure, as well as the critical habitats of marine turtles, shorebirds and many other species dependent on coastal ecosystems.

Sea-level rise has already damaged priceless cultural and natural landmarks, including the Antigua Naval Dockyard, a UNESCO World Heritage site.⁷

Beyond sea-level rise, ocean warming and acidification cause coral bleaching and degrade mangroves and seagrass.

These ecosystems are critical to Antigua and Barbuda's coastal livelihoods and marine biodiversity.⁸ Reduction of mangroves, reefs and seagrasses also makes it harder for our islands to resist storm surges.⁹

Antigua and Barbuda is a world-renowned tourism destination because of its tropical climate, beautiful beaches, pristine coastline and ocean-based recreation.

But the consequences of climate change jeopardize Antigua and Barbuda's tourism economy, which accounts for 60 per cent of our gross domestic product. Increased natural hazards, sea-level rise and ocean acidification and warming, all risk coastal destruction and the collapse of marine ecosystems that support tourism attractions and recreation.

We are far from alone in this. The Caribbean region ranks first globally in terms of the relative contribution of tourism to gross domestic product.¹⁰

It is no exaggeration to say that its island States cannot sustain themselves if this sector continues to be compromised by the effects of climate change.

³ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2069–2071.

⁴ World Health Organization, *Health & Climate Change: Antigua and Barbuda Country Profile 2020*.

⁵ *Id.*

⁶ Kevin Headley and Maureen Valmond, *Agriculture in the Caribbean facing destructive climate impacts*, CLIMATE TRACKER (2023).

⁷ *Antigua Naval Dockyard and Related Archaeological Sites*, UNESCO, <https://whc.unesco.org/en/list/1499>.

⁸ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2056–2057.

⁹ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2046.

¹⁰ Davina Layne, *Impacts of Climate Change on Tourism in the Coastal and Marine Environments of Caribbean Small Island Developing States (SIDS)*, SCIENCE REVIEW (2017), p. 174.

In summary, the impacts of climate change on Antigua and Barbuda are nothing short of catastrophic. We are working desperately to adapt to these changes but we cannot keep up with the frequency, the ferociousness and the extent of the harm that they create. To have any chance of survival, Antigua and Barbuda and all other small island States need the world to mitigate greenhouse gas emissions while simultaneously helping them to cope with the effects of climate change.

We firmly believe that international law is an important part of the equation and that the time has come to speak in terms of legally binding obligations rather than empty promises that go unfulfilled, abandoning peoples to suffering and destruction.

Mr President, members of the Tribunal, as I hope my remarks have made clear, the impacts of climate change on the members of COSIS are ongoing, devastating and will continue to worsen in the near future.

Small island States may be the first to fall – through no fault of our own – but we will not be the last, for no country on Earth can escape the deadly grasp of climate change. The world is teetering dangerously on the precipice of a climate catastrophe. We need your help. We need your guidance.

I respectfully request that the honourable members of this Tribunal consider the significance of the advisory opinion, not only for COSIS, but for the protection of our planet and of human civilization.

I thank you very much for your kind attention and I now have the honour to hand the podium to my esteemed Co-Chair, the Honourable Kausea Natano, the Prime Minister of Tuvalu. Thank you.

THE PRESIDENT: Thank you, Mr Browne.

I now give the floor to Mr Kausea Natano, Prime Minister of Tuvalu to make his statement. Excellency, you have the floor.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR NATANO
CO-CHAIR OF COSIS
[ITLOS/PV.23/C31/1/Rev.1, p. 9–14]

Good morning. Mr President, members of the Tribunal. It is my great privilege to address you today in these historic advisory proceedings. As Prime Minister of Tuvalu, I serve as Co-Chair of the Commission of Small Island States on Climate Change and International Law, or COSIS, alongside my honourable friend, Gaston Alfonso Browne, Prime Minister of Antigua and Barbuda, who has just addressed the Tribunal.

Mr President, members of the Tribunal, the climate crisis currently threatens the very existence and habitability of small island States. We are peoples of the ocean and particularly vulnerable to changes in the marine environment. For us, the 1982 UN Convention on the Law of the Sea is especially important. Sea levels are rising rapidly, threatening to sink our lands below the ocean. Extreme weather events, which grow in number and intensity with each passing year, are killing our people and destroys our infrastructure. Entire marine and coastal ecosystems are dying in waters that are becoming warmer and more acidic.

The science is clear and undisputed: these impacts are the result of climate change brought on by greenhouse gas emissions. Some of them are irreversible.

Small island States are not the only States to feel the wrath of climate change. No State on Earth is immune to its relentless advance or its destructive impacts, but we bear a disproportionate and overwhelming burden of the adverse effects of greenhouse gas emissions despite contributing negligibly to such emissions.

We, along with other small island States, are on the frontlines of the battle against climate change, exhausted and without reinforcements. This reality, Mr President, is profoundly unfair, and it leaves small island States with no choice. We must unite and join forces to defend our very survival and existence. Remaining silent is not an option.

This is why Tuvalu co-founded COSIS with Antigua and Barbuda at COP 26. We are very pleased that we are now nine small island States and no doubt our numbers will increase further as the urgency of climate justice becomes increasingly apparent.

My friend, Prime Minister Browne of Antigua and Barbuda, has already spoken to you about the founding, aims and activities of COSIS as well as the significance of these advisory proceedings, and I echo his remarks and will add a few of my own.

Small island States, Mr President, have been at the forefront of climate action for decades. Even before COSIS, small island States came together in 1990 to lead international climate discussions as part of the Alliance of Small Island States, or the AOSIS. Through that organization, we advocated for the rights of small island States during the negotiation of key treaties including the UN Framework Convention of Climate Change and the Paris Agreement. We kept international climate talks on track and focused on the monumental threat that climate change poses.

We pushed for recognition of the fact that climate action by every State is an absolute necessity. But, despite those efforts, we saw no real change in international commitment to combating the climate crisis. We did not see the far-reaching measures that are necessary if we are to avert catastrophe. This lack of political will endangers all of humankind and it is unacceptable for small island States like my own, which are already teetering on the brink of extinction.

So, on 31 October 2021, Tuvalu formed COSIS with Antigua and Barbuda to achieve meaningful change. “Recalling the urgent actions” of AOSIS which “called repeatedly to

address the urgency and fundamental injustice” of climate change, we sought to further amplify the voice of small island States.¹

COSIS’s mission is grounded in the recognition of the “fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the devastating impact for Small Island States of related change in the marine environment.”²

Ocean environments are crucial to the climate's system of Earth and are the life blood that sustains small island States. This is why we must protect them as fiercely as we do our own lives. To that end, COSIS is mandated to “promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including as they relate to the marine environment.”³

The work of this Tribunal is essential to accomplishing this objective. COSIS’s advisory request represents the first opportunity for a definitive, incontrovertible statement clarifying the specific obligations of States to protect the marine environment.

As the custodian of the 1982 UN Convention on the Law of the Sea, this Tribunal is uniquely positioned to provide such a statement, which would be an invaluable resource to revive a failing political process that is mired in uncertainty and that has left small island States stranded.

Here I wish to be absolutely clear, Mr President. We are not asking the honourable members of this Tribunal to impose new strictures on the States Parties to UNCLOS. We ask only that you make plain the contents of the legal obligations that the States Parties have already agreed to uphold.

Mr President, members of the Tribunal, I will now turn to speak not only as Co-Chair of COSIS, but also as Prime Minister of Tuvalu. Tuvalu’s fate is fused with that of the marine environment. Tuvalu's is a small island that comprises nine coral atolls in the South Pacific Ocean, about halfway between Hawaii and Australia. Tuvalu’s capital, Funafuti, is one of these atolls and is the most populous area of Tuvalu.

Together, the islands of Tuvalu encompass 26 square kilometres of land and 24 kilometres of coastline. It is a country rich in culture and tradition. However, as the years go by, we see the shoreline getting closer to our homes. We watch as the ocean washes away our livelihoods, infrastructures and traditions that have been cultivated across centuries. Tuvalu has been devastated by climate change.

Like with many of the other COSIS Member States, Tuvalu is low lying, with populations concentrated close to the shorelines. In fact, Tuvaluan homes sit, on average, about 100 metres away from the shore. Sea-level rise is, therefore, an omnipresent threat.

During this century, several small island States will become mostly uninhabitable as a result of sea-level rise, if not fully submerged.

With an average land elevation of 1.9 metres above sea level, Tuvalu is expected to be one of the first countries in the world to be completely lost to sea-level induced climate change. This could happen in the next two to three decades.

All of the more than 10,000 residents of Tuvalu would be forced to leave the country, but Tuvalu will likely become uninhabitable long before complete submergence. All of Tuvalu’s human settlements, industry and vital infrastructure lies close to the shoreline. Already around 40 per cent of Tuvalu’s capital, Funafuti, is underwater at high tide. Even at the current pace of climate change, in a matter of years, Funafuti will be inundated along with the rest of Tuvalu’s inhabited regions.⁴

¹ COSIS Agreement, Preamble.

² COSIS Agreement, Preamble.

³ COSIS Agreement, Preamble.

⁴ UNFCCC, CLIMATE CHANGE, SMALL ISLAND DEVELOPING STATES (2005), p. 21.

Just a few years. That's all we have before the ocean consumes everything my people built across centuries. Tuvalu is pressing forward efforts towards protecting its statehood, preserving its sovereignty and safeguarding the rights and cultural heritage of its peoples despite impacts of climate change and sea-level rise.

Nevertheless, displaced Tuvaluans and the generations who follow them will suffer a loss of place, property, identity, culture, lifestyle and tradition tied to the islands. Critically low quantities of potable water, already a scarce resource on Tuvalu, are already making it difficult to live there. Rising sea levels have already caused saltwater to permeate into our limited fresh water aquifers. As a result, my country is now entirely dependent on rainwater catchment, but this too is vulnerable to climate-driven droughts which have already caused critical water shortages in many COSIS Member States.⁵

Sea-level rise also threatens our food security, it destroys our agriculture, as salt from the ocean salinizes our soils and reduces crop yields. We now have to import many foods like taro or cassava that we once, in what feels like a lifetime ago, grew locally.⁶ Given Tuvalu's geographical location, surrounded by water in an intemperate climate, we are also susceptible to extreme weather events. We are facing tropical cyclones with increasing frequency and intensity. The South Pacific alone has experienced a fourfold increase in high-intensity cyclones in recent years.⁷ These tropical cyclones have devastating impacts on peoples and economies.

In 2015, widespread flooding occurred in Tuvalu due to the strong swells generated by Tropical Cyclone Pam and the exceptionally high sea levels surrounding our country.⁸ This Category 5 cyclone displaced my people and destroyed my country's infrastructure. It demolished public utilities and agricultural infrastructure and cut Tuvaluans off from power, Internet, water and food.⁹ It also destroyed the country's community health centres, leaving many Tuvaluans on the outer islands without access to vital healthcare.¹⁰ Over half of the residents of the island of Nui and Nukufetau had to flee.¹¹

Estimates place the cost to rebuild in Tuvalu after Cyclone Pam at over 30 per cent of Tuvalu's gross domestic product.¹² This is money that we cannot afford to keep spending. To make matters worse, like in other small island States, ocean acidification and warming caused by climate change are stressing, bleaching, calcifying and killing Tuvalu's coral reefs. Around Tuvalu, up to 70 per cent of reef species are dying off. Such a substantial decline will have catastrophic effects on my people.

The collapse of coral reefs will devastate marine biodiversity and fish stocks, which will jeopardize my people's food security. At present, Tuvalu is on track to experience a more than 50 per cent decline in maximum catch potential by the end of the century – an especially high number among a population that consumes most of its animal protein from fish.¹³

Declines in coral reefs will also ruin our economy. Fishing accounts for nearly all of Tuvalu's exports and most Tuvaluans engage in subsistence fishing as their source of livelihood. Coral reefs also support sea-related tourism, the largest driver of Tuvalu's economy.

⁵ *'One day we'll disappear': Tuvalu's sinking islands*, THE GUARDIAN (16 May 2019).

⁶ *'One day we'll disappear': Tuvalu's sinking islands*, THE GUARDIAN (16 May 2019).

⁷ See, e.g., Julio T. Bacmeister *et al.*, *Projected changes in tropical cyclone activity under future warming scenarios using a high-resolution climate model*, 146 CLIMATE CHANGE 547 (2018); see also COSIS Written Statement, Annex 5, Maharaj Report, paras. 66, 77.

⁸ COSIS Written Statement, Annex 5, Maharaj Report, para. 32.

⁹ *Tuvalu: Tropical Cyclone Pam Situation Report No. 1*, RELIEFWEB (22 March 2015).

¹⁰ *A story from Tuvalu: 1.5 to stay alive*, WHO (10 December 2015).

¹¹ *Tuvalu: Tropical Cyclone Pam Situation Report No. 1*, RELIEFWEB (22 March 2015).

¹² *Tuvalu Gets Continued Support for Cyclone Pam Recovery*, WORLD BANK (15 September 2015).

¹³ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT—CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2066.

Without healthy coral reefs, tourism and fishing will decline and many Tuvaluans will lose their jobs. The impacts of climate change are wide-ranging and calamitous. My people will starve. My people will die. As things stand, we cannot survive this catastrophe. Worrying about the future of our children and future generations takes a severe psychological toll on all Tuvaluans.

We come here seeking urgent help, in the strong belief that international law is an essential mechanism for correcting the manifest injustice that our people are suffering as a result of climate change. We are confident that international courts and tribunals will not allow this injustice to continue unchecked.

We are confident that this Tribunal will issue a strong advisory opinion that will spell out in detail the obligations of States in preventing further catastrophic harm to marine environment. My people will rightfully ask, if international law has nothing to say about an entire country going under the water as a result of harmful conduct, then what purpose does it serve?

Mr President, members of the Tribunal, the preamble to the UN Convention on the Law of the Sea makes clear that it was established to “facilitate international communication” and “promote the peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of marine environment” “for all people of the world.” And we are also people of the world and seek the equity that is the fundamental purpose of international law.

We persist in the belief that a well-reasoned advisory opinion will facilitate international cooperation between UNCLOS States Parties and encourage a broader discussion amongst world leaders about State obligations and climate change. It will help clarify the existing obligations that States, major polluters in particular, should have complied with all these years, and which remain both legally binding and an immediate imperative to prevent calamity.

At the most recent COP27 meeting in Sharmel-Sheikh, Egypt, I reiterated the same request that I and my forebearers have made repeatedly for decades. As I said there and I quote: “Today’s climate emergency can be reduced to two basic concepts: time and temperature. It’s getting too hot, and there is barely time to slow and reverse the increasing temperature. Therefore, it is essential to prioritize fast-acting strategies that avoid the most warming.”

I urge all world leaders to recognize the critical urgency of the climate change crisis and act rather than equivocate. Make headway rather than fail to deliver. Still, nothing has changed.

All signs point towards warming almost twice above 1.5°C Paris Agreement limit, and climate change remains the single greatest existential threat that Small Island Developing States face.

Members of the Tribunal, you have a key role to play. We need clarity and specificity on the obligations under UNCLOS to take all measures necessary to prevent, reduce and control pollution of the marine environment by greenhouse gas emissions. You are in a position to be part of the solution to the climate crisis and make real differences for small island States and our people.

I have every faith that you will take full advantage of this historic opportunity. Thank you for your time and attention, and I now have the pleasure to hand the podium over to the Honourable Arnold Kiel Loughman, Attorney General of the Republic of Vanuatu. And I thank you, Mr President, members of the Tribunal. God bless you all.

THE PRESIDENT: Thank you, Mr Natano.

I now give the floor to Mr Arnold Kiel Loughman, Attorney General of the Republic of Vanuatu, to make your statement. Your Excellency, you have the floor.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR LOUGHMAN
[ITLOS/PV.23/C31/1/Rev.1, p. 14–19]

Good morning. Good morning, Mr President, members of the Tribunal. It is my great honour and privilege to address you today on behalf of the Republic of Vanuatu, a proud Member State of the Commission of Small Island States on Climate Change and International Law, and a State that has played a leadership role in seeking climate justice.

Our government and our people look to this Tribunal with expectant eyes because, for us, time is running out. The ocean is our mother, the source of life. Yet it is being destroyed by the failure of major greenhouse gas emitters to take seriously their obligation to protect and preserve the marine environment. Catastrophic climate change cannot be averted by empty promises. The peoples of small island States cannot be expected to sit silently as the homes of both their children and ancestors are being destroyed. The natural world is out of balance and a great injustice is being committed against us. We look to you, the distinguished Judges of this Tribunal, to render an advisory opinion that will persuade UNCLOS State Parties to transform their behaviour, because continuing business as usual is no longer an option. States must immediately comply with their binding obligations before it is too late, and it is for this Tribunal to say with specificity what those obligations are.

Mr President, I will begin by explaining why Vanuatu joined COSIS.

Vanuatu has participated for decades in multilateral climate negotiations with good faith, ambition and the hope that nations would be able to work together to address the single greatest obstacle to the security and well-being of humankind. We have participated vigorously in deliberations of the UNFCCC and at each and every COP. We have raised the alarm at the United Nations and its specialized agencies, and at a wide range of other regional and international fora and institutions. We have listened time and again as major polluters have pledged to address our concerns to do what is necessary to put an end to the nightmare that is unfolding before our eyes, as our islands and our homes are battered by extreme weather events, rising sea levels and myriad of other disasters that are slowly and surely bringing about our demise.

We have been patient, but to little avail. We now feel that our good faith has been exploited. Our ambition has been sidelined. Our voices have been ignored and our hope is now hanging by a thread.

Time and time again, we have been disappointed by the absence of concrete action at the international level. The debilitating consequences of the climate crisis are worsening with every second of every day. The spirit of international collaboration has not translated into real and necessary benefits for our nation and its citizens.

Already, we are measuring climate change not in degrees or in tons of carbon, but in human lives. Action is required now, and the call for action is not just a matter of lofty ideals; it is a matter of legally binding obligations. Had States taken seriously their obligations, we would not be here today.

Mr President, Vanuatu joined COSIS on 2 December 2022 because climate change is the plague of humankind, and small island nations must either join forces or perish.

Climate change is both our legacy and our doom unless we act together in pursuit of climate justice. We believe that working in solidarity with our fellow small island States is the best path towards our end goal of a safe planet for all of humanity.

A question that you may find yourselves asking is: why? Why would a handful of small, developing islands that barely contribute to greenhouse gas emissions place themselves at the spearhead of this global problem? The answer is simple: we cannot afford to be anywhere else.

Climate change is an existential threat for the people of Vanuatu and for all of our small island brethren. We can leave no words left unsaid, no stone unturned and no road left untaken in the search for solutions to the climate crisis.

And it should not be imagined that, just because we are among the smallest of nations, we cannot rise to the greatest of challenges. We are determined, we are united and we will not abandon our peoples to a tragic fate without doing everything we can to persuade the major polluters to change course. We persist in the belief that the fundamental principles of international law, including the 1982 UN Convention on the Law of the Sea, were intended exactly for such circumstances, when the very survival of humankind is at stake.

The small island States are leading the way, not only for themselves and their particularly vulnerable populations, but for all States and peoples who prefer a peaceful and prosperous future rather than a dystopian world ravaged by unimaginable disasters and widespread suffering.

This Tribunal could provide a road map or perhaps a navigation chart, since it is the law of the sea, so that States Parties could find a way out of the current gloom simply by respecting their existing obligations to protect and preserve the marine environment.

Mr President, to give you a sense of why climate action and this request for an advisory opinion are so important, I want to briefly tell you about my country. Vanuatu is breathtakingly beautiful. It is vibrant, rich in life and culture, with strong communal bonds and a deep sense of belonging. It is an enchanting home to myself and approximately 320,000 others. Our territory comprises over 83 islands, more than 60 of which are inhabited. The islands are spread over an ocean territory of approximately 680,000 square kilometres. Most of our people practise subsistence agriculture and reside in coastal areas.¹ Our diverse tropical ecosystems, both terrestrial and offshore, provide habitats for myriad of flora and fauna, including hundreds of endemic species. Crucially, our very existence depends on the health of these ecosystems, and climate change is destroying them.

Climate change already impacts nearly every facet of Vanuatu life. Rising sea levels, increasing frequency and severity of storm surges, changing weather patterns, and ocean warming and acidification are causing widespread losses and damage to our nation.

Sea-level rise in Vanuatu averaged 6 millimetres per year between 1990 and 2010, which is nearly double the global average of 3.4 millimetres per year over the same period.² This has profound and far-reaching effects.

Ocean encroachment will destroy essential habitats for many of Vanuatu's plant and animal species, including species endemic to the islands. And, in doing so, it will decimate the biodiversity that has historically thrived in the region.³

Rising sea levels also steal lands from indigenous "ni-Vanuatu" peoples, eviscerate cultural resources and inundate spiritual sites. Inundation of coastal areas in Vanuatu has already necessitated relocation of entire communities and threatens to forcibly displace many more from their homes and ancestral lands.⁴

¹ *Vanuatu Country Profile*, BBC, <https://www.bbc.com/news/world-asia-16426193>.

² WORLD BANK, CLIMATE RISK COUNTRY PROFILE: VANUATU (2021), p. 12; *Seas are now rising faster than they have in 2,800 years, scientists say*, WASH. POST (22 February 2016).

³ WORLD BANK, CLIMATE RISK COUNTRY PROFILE: VANUATU (2021), p. 14.

⁴ IPCC, Working Group II, *Chapter 29: Small Islands*, FIFTH ASSESSMENT REPORT — CLIMATE CHANGE 2014: IMPACTS, ADAPTATION AND VULNERABILITY, p. 1620; WORLD BANK, CLIMATE RISK COUNTRY PROFILE: VANUATU (2021), p. 17.

Climate change has also brought more intense tropical storms. The South Pacific region has experienced a fourfold increase in high-intensity cyclones in recent years,⁵ and Vanuatu has been ravaged by two Category 5 cyclones (the highest there is) in the past eight years. These include Category 5 Cyclone Pam, one of the worst and most powerful natural disasters in history, which devastated our country in 2015. It killed 16 people, damaged 50 to 90 per cent of our infrastructure, left 166,000 in need of immediate food aid and destroyed the homes of a further 75,000 of our people.⁶ The storm also contaminated many of our water sources and wiped out the agricultural plots that our peoples depend on for food.⁷

In 2020, we were hit by another Category 5 cyclone, Cyclone Harold, causing similar damage. And the attacks continue. In the first three months of 2021, we experienced three Category 4 cyclones. Two Category 4 cyclones hit our country within 72 hours earlier this year.

These climate disasters not only imperil the lives of our citizens, they also impede sustainable development and destroy critical coastal infrastructure, costing an average estimated 6 per cent of GDP per year.⁸

Ocean acidification and warming further damage ecosystems and resources of immense environmental and economic value, causing rapid declines in fish stocks that are a mainstay of Vanuatu's food supply.

Scientists predict that our coral reefs will be completely eviscerated by the end of the century.⁹ This collapse of coral reef ecosystems will not only eliminate our ocean biodiversity altogether, but it will also create widespread food insecurity, with 66 per cent of our people engaged in subsistence fishing.¹⁰

Along with other climate impacts, ocean warming and acidification threaten to destroy our beaches and rainforests; our most important tourism assets that supply roughly 65 per cent of our gross domestic product.

Mr President, our people seek to live in harmony with nature because we understand in our culture that we are part of the universe, not on top of it. We know from ancient wisdom that if we respect the Earth, then the Earth will respect us. Science has long confirmed these realities, and it must inform the content of international obligations.

Mr President, climate change not only threatens to destroy my country; it is coming for us all. But we will not go down without fighting. We will continue to stand up against the conduct that has caused climate change and is now leading us all towards catastrophe.

We will keep fighting for the survival of our invaluable ecosystem and its more-than-human inhabitants, and for the health, livelihoods and very survival of us, as peoples.

We will not shy away from asking for the help and guidance that we and so many others very much need. This is why my country recently spearheaded the adoption by the United Nations General Assembly of an historic resolution requesting an advisory opinion from the

⁵ See, e.g., Julio T. Bacmeister *et al.*, *Projected changes in tropical cyclone activity under future warming scenarios using a high-resolution climate model*, 146 *CLIMATE CHANGE* 547 (2018); Henderson-Sellers *et al.*, *Tropical Cyclones and Global Climate Change: A Post-IPCC Assessment*, 79 *BULLETIN OF THE AMERICAN METEOROLOGICAL SOCIETY* 19 (1998).

⁶ *Cyclone Pam*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Cyclone-Pam>; *Vanuatu: Tropical Cyclone Pam Situation Report No. 9 (as of 23 March 2015)*, RELIEFWEB (23 March 2015).

⁷ *Cyclone Pam*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Cyclone-Pam>.

⁸ WORLD BANK, *CLIMATE RISK COUNTRY PROFILE: VANUATU* (2021), p. 3.

⁹ See, e.g., Van der Zande RM *et al.*, *Paradise lost: End-of-century warming and acidification under business-as-usual emissions have severe consequences for symbiotic corals*, 26 *GLOB CHANGE BIOL.* (2020), pp. 2203–2219.

¹⁰ See, e.g., Van der Zande RM *et al.*, *Paradise lost: End-of-century warming and acidification under business-as-usual emissions have severe consequences for symbiotic corals*, 26 *GLOB CHANGE BIOL.* (2020), pp. 2203–2219.

International Court of Justice that will clarify States' obligations and responsibility for climate change. We did so in solidarity with COSIS and numerous other climate-vulnerable States.

This request for an advisory opinion from the ICJ is separate from the request that this Tribunal must now consider. But it is also complementary. This specialized tribunal is focused on the marine environment, while the ICJ will address climate change under general international law. But since ITLOS will go first, it will establish the precedent that will shape what will follow.

Our respectful message to this Tribunal, and the ICJ, is that to be meaningful, the advisory opinion must go beyond abstract principles. To be meaningful, it must be based on the irrefutable scientific knowledge and it must provide specific content so that all UNCLOS States Parties have clarity as to their precise obligations. The time for vacillation has passed. We ask you respectfully to see the reality of climate catastrophe and to say what needs to be said, because time is running out. We ask you to give us hope and guidance, to help humankind out of the abyss.

Mr President, both the ITLOS and ICJ requests reflect our resolve to ensure compliance with States' legal obligations under a range of international laws to protect the rights of present and future generations.

We are confident that the international courts and tribunals established to dispense global justice will not fall short of doing what is necessary, commensurate with the gravity of the challenge before us.

Mr President, the need for clear advice as to the contours and substance of these specific obligations has never been so urgent. More than three decades have passed since the international community began discussing the process of stabilizing greenhouse gas emissions to prevent climate change. More than three decades have passed and yet, still today, my people are watching as their futures slip away from them like grains of sand through an hourglass. This cannot continue. The fate of our small island nations is in your hands.

We recognize that this is a monumental challenge and responsibility, and we ardently hope that you will rise to the occasion.

Mr President, members of the Tribunal, that concludes my statement. Thank you for your attention. I would ask that you please call Professor Akhavan, the representative of the Commission in this proceeding, to the floor to introduce the legal pleadings after the break, which I understand will start now. Thank you.

THE PRESIDENT: Thank you, Mr Loughman.

We have now reached 11.15. At this stage, the Tribunal will withdraw for a break of 30 minutes, and we will continue our hearing at 11.45 when I will call on Mr Akhavan.

(Short break)

THE PRESIDENT: I now give the floor to Mr Akhavan to make his statement. You have the floor, sir.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR AKHAVAN
REPRESENTATIVE OF COSIS
[ITLOS/PV.23/C31/1/Rev.1, p. 19–28]

Mr President, distinguished members of the Tribunal, good morning. I am honoured to appear before this Tribunal once again, and I am especially privileged to do so in this historic proceeding, on behalf of the Commission of Small Island States on Climate Change and International Law. Its nine members are, in order of signature and accession, Antigua and Barbuda, Tuvalu, the Republic of Palau, Niue, the Republic of Vanuatu, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, and the Commonwealth of The Bahamas.

My task today is: first, to address the circumstances that have given rise to the Commission’s request for an advisory opinion; second, to identify the principal issues arising from the written statements submitted to the Tribunal; and, third, to introduce the pleadings of our legal team over the course of the next two days.

Mr President, the ocean is the cradle of life on Earth. Evidence demonstrates that the first organic molecules emerged in the ocean some 3.5 billion years ago. It then took hundreds of millions of years for enough oxygen to build up in the atmosphere and ocean to support more complex and diverse forms of life. Today, the ocean, which covers three quarters of the Earth’s surface, remains vital to sustaining human life on Earth. It is home to myriad ecosystems and it is the foundation of the global climate system upon which the existence and continuation of human civilization depends.

Ocean currents are a critical element of the ocean’s life-sustaining function. They act like a conveyor belt, carrying warm water from the tropics towards the poles and cold water from the poles back to the tropics. They thus regulate the global climate through a complex and delicate distribution of solar radiation across the planet. They also circulate nutrients throughout the marine environment.

The animation shows that conveyor belt in what oceanographers call the “global thermohaline circulation”, an enormous current that moves water throughout the world.

The ocean is also home to a breathtaking array of biodiversity. It contains some 250,000 known species, and many more have yet to be discovered. The ocean, and the flora and fauna within it, especially plankton, supply half of the oxygen that we breathe.

These facts are a stark reminder that all humankind shares a single home; a single planet that has sustained life against overwhelming odds in an inhospitable universe. These facts are a stark reminder that our existence depends upon a miraculous balance reflecting the inscrutable perfection of nature. Yet, now, for the first time in history, this delicate balance has been imperilled by the excesses of humankind. Global warming, caused by anthropogenic greenhouse gas emissions, have brought us to the brink of an unprecedented catastrophe. The ocean has absorbed not just one quarter of the carbon dioxide that we emit into the atmosphere, but also a staggering 90 per cent of the excess heat that has been trapped in the climate system since the pre-industrial era. The ocean is by far the largest carbon and heat sink on Earth.

Mr President, to put matters in perspective, the ocean absorbs the energy equivalent of seven Hiroshima bombs every second.¹ It has fallen victim to an alarming deterioration that

¹ John Abraham, “[We Study Ocean Temperatures. The Earth Just Broke a Heat Increase Record](#)”, THE GUARDIAN (11 January 2022).

has only intensified in recent years. This past July was the hottest month in recorded history, for both the ocean and the climate system as a whole.

This chart shows the dramatic increase in average ocean surface temperature through early August of this year. Just last month we hit record temperatures in what has been by far the hottest year for the ocean. And we are seeing alarming levels of ocean warming worldwide. This warming results in marine heatwaves that are longer, more frequent and more intense.

As seen in the map here, this is a global phenomenon and it is the cause of extensive, interrelated and potentially irreversible harms. For example, this July, the water temperature around The Bahamas was above 38 degrees Celsius – 38 degrees Celsius – for several consecutive days, up from a monthly average of around 30 degrees Celsius. This has had a devastating effect on corals, bleaching and killing them, on such an extensive scale that these fragile ecosystems may be wiped out entirely.

Pacific islands, too, have experienced similarly catastrophic phenomena over sustained periods. Palau, for example, which consists of around 340 islands along a barrier reef, has experienced extensive coral bleaching and death in recent years.

The time-lapse video on the screen illustrates this process. It was taken in 2019 over the course of two months in Hawaii. It is the first time that scientists have captured such images of corals bleaching and dying in real time. You can see here in vivid detail the devastating effect of ocean warming on corals and the diverse ecosystems that they support. The Intergovernmental Panel on Climate Change, the source of the best available science, projects that, at a temperature rise of just 1.5 degrees Celsius above pre-industrial levels, 70 to 90 per cent of coral reefs will disappear.²

Mr President, the bleaching and eventual death of coral reefs cause significant harm to nearby islands. They result in the loss of biodiversity, the destruction of entire ecosystems and the disintegration of important barriers against storm surges. But marine heatwaves also jeopardize, with similar effects, other species fundamental to marine ecosystems, such as kelp, seagrass and mangroves. They play an important role in absorbing carbon dioxide.

The destruction of marine flora thus creates a devastating feedback loop, a vicious cycle that compounds the harmful effects of global warming on the marine environment.³

Marine heatwaves also generate more intense tropical cyclones with devastating consequences for small island States. As Prime Minister Browne mentioned, in 2017 Hurricane Irma destroyed almost all infrastructure in Barbuda. It became a ghost town as the entire population was forced to evacuate.⁴ It took two years for them to return. Similarly, Cyclone Heta destroyed Niue’s capital of Alofi in 2004, leaving much of its population homeless. Elsewhere, in 2015 Cyclone Pam devastated Vanuatu, leaving people without water, homes and livelihoods. The loss and damage amounted to over 64 per cent of the gross domestic product.⁵

As Attorney-General Loughman noted earlier, Vanuatu was hit by yet another Category 5 cyclone, Harold, in 2020. In Tuvalu as well, nearly half the population – half the population – was displaced as a result of cyclones, and several islets of the capital Funafuti became completely submerged.⁶

² IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2048.

³ IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (2021), pp. 743–46.

⁴ [The Night Barbuda Died: How Hurricane Irma Created a Caribbean Ghost Town](#), THE GUARDIAN (20 November 2017).

⁵ Vanuatu, *Third National Communication of Vanuatu*, UNFCCC (December 2020), pp. 122, 125–127, 129.

⁶ Tuvalu, *Second National Communication of Vanuatu*, UNFCCC (December 2015), p. 3.

Climate scientists warn that extensive warming is pushing the ocean to tipping points beyond which there may be no return: some key currents – some key ocean currents – are nearing collapse. This will result in extreme weather events that are even more intense. It is especially alarming that the Arctic is warming at four times the world average. Irreversible melting of polar ice in the Arctic and the Antarctic, together with thermal expansion of water, has caused significant sea-level rise, posing existential risks to islands and coastal communities.

As Prime Minister Natano explained, for low-lying islands like Tuvalu, shown here, the consequences of sea-level rise and storm surges are nothing short of catastrophic. At its highest point, the island is only 4.6 meters above sea level. If current trends continue, Tuvalu will be fully submerged by the end of the century;⁷ its entire land territory will disappear under the sea.

The Intergovernmental Panel warns that the ocean may be reaching its maximum capacity to absorb heat. Equally concerning, the massive amounts of carbon dioxide the ocean has absorbed may soon reduce its ability to trap and store carbon. Instead of being the biggest sink and reservoir, the ocean could soon become part of a feedback loop that actually increases the pace of global warming.

Mr President, the significance of this advisory opinion must be appreciated against this stark reality. It is no exaggeration – no exaggeration – to say that climate change is an existential threat.

The UN Secretary-General has not minced his words. The “alarm bells are deafening”, he has said. Global warming is “code red for humanity”; it is a “death sentence” for vulnerable States.⁸ In July of this year, he warned that we have shifted from global warming to “global boiling”,⁹ and just last week, following the hottest summer on record, he warned that “climate breakdown has begun.”¹⁰

Yet, the Secretary-General also underscored that it is not too late for the international community to change course, to act swiftly through collective concerted action to mitigate greenhouse gas emissions.¹¹ He referred to the findings of the Intergovernmental Panel on Climate Change, which the 196 States Parties to the Paris Agreement have confirmed; that, although every increment of warming is harmful, we can avoid the worst consequences if we hold the average global temperature rise to within 1.5°C above pre-industrial levels. But time is running out.

In a sobering report released this past Friday, the Intergovernmental Panel’s first global stocktake of States’ commitments following the Paris Agreement concluded that “much more is needed now on all fronts” to achieve that 1.5°C limit.¹²

By providing authoritative guidance on the specific obligations of States under UNCLOS, this Tribunal could contribute to avoiding even more catastrophic consequences than that which the world has already witnessed.

I should note that the gravity of the problem is underscored by the other advisory proceedings before the International Court of Justice, which has authorized the Commission to submit a written statement, and the advisory proceedings in the Inter-American Court of

⁷ Tuvalu, UNGA 2022 Statement, p. 4; see also IPCC, *Chapter 4: Sea Level Rise and Implications for Low-lying Islands, Coasts, and Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), pp. 342, 357.

⁸ Secretary-General Calls Latest IPCC Climate Report ‘Code Red for Humanity,’ Stressing ‘Irrefutable’ Evidence of Human Influence, UN NEWS (9 August 2021); Current climate policies ‘a death sentence’ for the world, warns Guterres, UN NEWS (20 April 2023).

⁹ Hottest July ever signals ‘era of global boiling has arrived’ says UN chief, UN NEWS (27 July 2023).

¹⁰ Secretary-General’s message on the Hottest Summer on Record, UN Secretary General (6 September 2023).

¹¹ Secretary-General’s video message to the Major Economies Forum, UN NEWS (20 April 2023).

¹² IPCC, Global Stock-Take.

Human Rights, in which the Commission will also participate. As the first to be seized of such a request, however, ITLOS will speak first. Your opinion will set the stage for what follows.

Mr President, these are the circumstances leading to the establishment of the Commission, and to its request for this advisory opinion of unprecedented urgency and importance. Small island States are facing threats to their very existence.

Moving to the questions put to the Tribunal, they are as follows:

What are the specific obligations of State Parties to 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?

And (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

As the Commission will show over the course of the next two days, the answers to these questions are straightforward and are to be found in UNCLOS itself.

After all, the Convention is the constitution of the ocean. In fact, the protection of the marine environment was seen as an essential issue during the Third Conference on the Law of the Sea, which began in 1973.

The Stockholm Declaration had been adopted a year earlier in 1972. It influenced the drafters of UNCLOS, who recognized the global dimensions of environmental protection and the consequent need for a comprehensive regime. In the words of the preamble, ‘the problems of ocean space are closely interrelated and need to be considered as a whole.’ This is reflected in the wide scope of Part XII, comprising all sources of pollution and all maritime zones.

The *travaux préparatoires* indicate the drafters’ intention to adopt a “comprehensive approach ... to the protection and preservation of the marine environment.”¹³ Moreover, from the outset, the Tribunal itself has been conscious – in the words of its first President Judge Thomas Mensah – “of the special role it may be called upon to play in interpreting the provisions of the Convention on the protection and preservation of the marine environment.”¹⁴ ITLOS is, after all, the guardian of UNCLOS, and now it is called upon to address the most significant threat that the marine environment has ever faced.

Mr President, the Commission notes that thirty-four UNCLOS States Parties from across the world, nine intergovernmental organizations, three UN experts and nine non-governmental organizations have submitted written statements to the Tribunal. Seven more States Parties will participate in this hearing, not having previously submitted written statements. That is a total of 50 participants, not including the non-governmental organizations.

You have now studied the written statement of COSIS. In addition to its nine members, five other members of the Alliance of Small Island States – Belize, the Republic of Mauritius, the Republic of Nauru, the Federated States of Micronesia and the Republic of Singapore – have taken positions largely consistent with the Commission.

We note, in addition, that two other members of the Alliance – Comoros and Timor Leste – will also appear in this hearing.

Even beyond these small island States, which face similar circumstances, there is remarkable consensus among all the written statements, to which I now turn.

To begin with, there is no question as to the advisory jurisdiction of the Tribunal under article 21 of its Statute and article 138 of its Rules. Article 21 expressly includes all matters specifically provided in any other agreement which confers jurisdiction on the Tribunal. Its meaning is plain and clear. It is a broad, residual clause, and it makes no distinction between

¹³ Virginia Commentary, Article 192, p. 36.

¹⁴ T.A. Mensah, *The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment*, 8 REV. EUR. COMMUNITY & INT’L ENV’T L. (1999), 1, 5.

contentious disputes and advisory proceedings. The 2013 request for an advisory opinion by the Sub-Regional Fisheries Commission has already confirmed the Tribunal's jurisdiction in this regard.¹⁵

The Agreement establishing the Commission is plainly an international agreement within the scope of article 21, duly registered with and published by the UN Secretariat pursuant to article 102 of the UN Charter. Article 2, paragraph 2, of the Agreement, furthermore, specifically authorizes the Commission to request advisory opinions from ITLOS. The requirements of article 21 are clearly satisfied.

The request of the Commission, moreover, concerns a legal question, and one that clearly falls within the Commission's mandate. Its request is thus admissible, and there is no compelling reason – indeed no reason whatsoever – to decline to answer the questions presented. The fact that not all States Parties participated in requesting the advisory opinion is inapposite. The Tribunal is called upon to provide guidance on questions of international law; not to settle a dispute.

In respect of the merits of the two questions posed by the Commission, there is overwhelming consensus in the written statements on the principal issues before the Tribunal.

First, the irrefutable scientific facts are not in dispute; that temperature rise must remain within 1.5°C, which requires rapid and radical mitigation of greenhouse gas emissions, failing which there will be catastrophic consequences. None of the written statements questioned the scientific validity of the reports of the Intergovernmental Panel on Climate Change, nor could they. Indeed, most of the written statements relied affirmatively on the Panel's findings.

Second, there is no question as to whether atmospheric greenhouse gas emissions constitute pollution of the marine environment within the meaning of article 1(1)(4) of the Convention. Such emissions are plainly – in the words of that provision – “introduction by man, directly or indirectly, of substances or energy into the marine environment ... which results or is likely to result in deleterious effects.” All 50 States Parties and intergovernmental organizations that addressed article 1(1)(4) – with only two isolated exceptions – agreed with this critical and inevitable conclusion. A conclusion, I would add, which triggers a wide range of specific obligations under Part XII. That overwhelming consensus itself is a crucial contribution to the interpretation of UNCLOS.

Third, and flowing from this, there is no question that UNCLOS States Parties have exacting obligations under Part XII. This includes, in particular, the obligation to “protect and preserve” the marine environment under article 192, to “take ... all measures ... necessary to prevent, reduce and control pollution of the marine environment from any source” under article 194, paragraph 1, and to ensure, to “ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment” under article 194, paragraph 2. The text is absolutely clear.

These are not merely obligations of conduct arising from the principle of due diligence. They plainly require States to do what is necessary to ensure, to ensure that no harm is done.

In the words of Professor Alan Boyle – a distinguished member of the Commission's Committee of Legal Experts – who sadly is unable to be with us here today – Part XII of the Convention “requires States to take the necessary measures to protect the marine environment from the harmful effects of anthropogenic climate change.”¹⁶

Fourth and finally, there is no question among the written statements that, although small island States make a negligible contribution to greenhouse gas emissions, they disproportionately suffer the consequences; nor is there any question that although global warming is the common concern of humankind, there are common but differentiated

¹⁵ ITLOS, SRFC Advisory Opinion, § II.

¹⁶ Alan Boyle, *Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime*, THE LAW OF THE SEA AND CLIMATE CHANGE: SOLUTIONS AND CONSTRAINTS (2021), p. 84.

responsibilities, with the greatest burden falling on developed States to take the necessary measures.

But we note that the major polluters are not limited to developed States. And given how close we are to the brink of disaster, that differential burden cannot become a pretext for developing States not to do their fair share to protect the marine environment.

There is thus an overwhelming consensus on several fundamental issues upon which the Tribunal could formulate its advisory opinion.

Nonetheless, some written statements raise an important question as to whether the obligations of States Parties under UNCLOS go beyond obligations assumed under the 1992 UN Framework Convention on Climate Change and the 2015 Paris Agreement. We respectfully submit that the answer is obvious. UNCLOS is the applicable law in relation to the marine environment, and the global climate change regime does not in any way displace or dilute its application. Indeed, it would be misplaced to refer to the general hortatory provisions of the Paris Agreement as *lex specialis* when there is so little in the way of binding obligations.

Moreover, to the extent that there is a specialized regime for protection of the marine environment, it is found in Part XII of UNCLOS, which sets out detailed and specific obligations. There is in fact no identifiable normative conflict between competing regimes. To the contrary, there is a complementary relationship between UNCLOS and the global climate regime – including the implementation of the procedural and reporting obligations under the Paris Agreement.

But what answers the question most clearly as to whether UNCLOS goes beyond obligations under the Paris Agreement is the scientific assessment of the Intergovernmental Panel on Climate Change. Namely, that with the current commitments under the Paris Agreement, the world is set to reach average warming of 2.8°C above pre-industrial levels by the year 2100.¹⁷ That is almost twice, twice the maximum temperature rise of 1.5°C that is necessary to avert catastrophic consequences. This would spell the end of many small island States. If this trajectory continues, most will become uninhabitable or simply disappear. They will become a sacrifice zone for the major polluters. But if this trajectory continues, it will also result in mass extinction and the collapse of civilization. Ultimately, all nations, large and small, will suffer the same fate because humankind shares the same planet. It is not unreasonable to conclude that States must do what is necessary to avoid an apocalypse. By clearly spelling out the exacting and binding obligations of States Parties under the Convention, this Tribunal would contribute to our common survival.

Mr President, distinguished members of the Tribunal, in an attempt to assist you in answering the momentous questions before you, the Commission will organize its oral pleadings as follows.

Following my introduction, Ms Naima Te Maile Fifita will address the significance of the establishment of the Commission for the peoples of small island States, and the role of the global youth movement in the advisory opinion proceedings currently before international courts and tribunals.

She will be followed by Professor Phoebe Okowa, who will spell out the need for a science-based approach with respect to the interpretation and application of UNCLOS provisions on the protection of the marine environment and the special vulnerability of Small Island Developing States to climate change.

You will then hear from two eminent scientific experts, Dr Sarah Cooley and Dr Shobha Maharaj, who played leading roles in the most recent assessment cycle of the Intergovernmental Panel on Climate Change. They will explain the deleterious effects that

¹⁷ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 11.

greenhouse gas emissions and climate change have upon the marine environment, with particular reference to small island States.

They will be followed by Professor Margaretha Wewerinke-Singh, who will address the critical point that greenhouse gas emissions constitute pollution of the marine environment within the meaning of article 1(1)(4) of the Convention.

To conclude the first day of the Commission's submissions, Professor Makane Moïse Mbengue will address UNCLOS as the applicable law in this proceeding and its complementary relationship with the global climate regime.

At the beginning of the second day, tomorrow morning, Professor Brian McGarry will briefly address questions of jurisdiction and admissibility, which are largely uncontested in these proceedings.

You will then hear a series of three speeches that will address the first of two questions posed by the Commission.

First, Professor Jutta Brunnée will elaborate on the general scope and content of the due diligence obligations under Part XII, including the exacting obligations arising from an extremely high risk of catastrophic harm in the context of climate change impacts.

Second, Professor Jean-Marc Thouvenin will provide a detailed analysis of article 194 of the Convention, including the core obligations in paragraph 1 to take all measures necessary to prevent, reduce, and control pollution of the marine environment, and in paragraph 2, to prevent any harm by pollution to other States.

Third, applying the best available scientific evidence to the Part XII provisions, Ms Catherine Amirfar, the Co-Representative of the Commission in these proceedings, will identify the specific obligations of UNCLOS States Parties in relation to greenhouse gas emissions.

You will then hear two speeches addressing the second question before you.

First, Professor Philippa Webb will analyse article 192, focusing on obligations relating to the protection, preservation and mitigation of harm to the marine environment.

Second, Professor Nilüfer Oral will apply the article 192 obligations to climate change impacts, with a specific focus on adaptation and resilience.

She will be followed by Dr Conway Blake, who will address the duty of States Parties to cooperate, which applies to the entirety of Part XII.

You will then hear from Mr Eden Charles, who will demonstrate that the request for an advisory opinion before you, far from undermining ongoing diplomatic efforts regarding the climate crisis, in fact complements and reinforces such efforts by allowing States to negotiate a more ambitious climate regime consistent with both UNCLOS and the Paris Agreement.

Then, in a penultimate speech, Mr Zachary Phillips will address the requirement under the Convention to support educational programmes about climate change and the fundamental role that equity must play in responding to the climate crisis.

Last, but certainly not least, Mr Vaughan Lowe KC will offer concluding remarks on the position of the Commission.

Mr President, distinguished members of the Tribunal, one can scarcely imagine an advisory opinion of greater importance. As the International Court of Justice has observed, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."¹⁸

As climate change accelerates, and its consequences become increasingly obvious, all of us assembled in this courtroom today must ask, how will this proceeding be viewed by future generations? Will our children and grandchildren and those after them look back at a robust

¹⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep 226 ("Nuclear Weapons Advisory Opinion"), para. 29.

and courageous opinion that said what needs to be said? Will States Parties take seriously their legal obligations to ensure our common survival? Whatever the legacy of this proceeding in the years to come, one thing is clear: either a unified humankind does what is necessary now to address climate change, or it will be forced to do so after unimaginable catastrophes leave no other choice.

Mr President, that concludes the Commission's introductory remarks. I thank you for your patience and ask that you now call Ms Naima Te Maile Fifita to the podium.

THE PRESIDENT: Thank you, Mr Akhavan.

I now give the floor to Ms Naima Te Maile Fifita to make a statement. You have the floor, Madam.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS FIFITA
[ITLOS/PV.23/C31/1/Rev.1, p. 28–33]

Mr President, distinguished members of the Tribunal, it is a great privilege and honour to appear before you as counsel to COSIS, as an indigenous Tuvaluan, as a youth and as a mother to a daughter of the Pacific who opened her eyes to this world just a year ago.

As I address this distinguished Tribunal at this historic proceeding, my fears are for the kind of world she will inherit when the land of her ancestors is taken by the rising sea.

Mr President, my brief presentation reflects on the significance of this proceeding for the peoples of Small Island Developing States, or SIDS. First, I will address what an advisory opinion from this Tribunal would mean for the protection and survival of present and future generations living in the shadow of catastrophic climate change; and second, I will address the grassroots leadership of youth in calling for climate justice before international courts and tribunals. After all, it is future generations that will have to live with the consequences of choices that are made today; and it is future generations that will look back to the legacy of this Tribunal in addressing the most pressing issue of our time.

We offer this context to explain to this distinguished Tribunal just how important this proceeding is for small island peoples, especially their youth, who have made an insignificant contribution to greenhouse gas emissions, but who must now, in the prime of their lives, suffer the worst of its impacts. The world can witness this unfolding tragedy in real time as our home – and those of our ancestors and our children – is enveloped by the ocean.

For us, international law, and in particular the obligations of States to protect and preserve the marine environment, is not an abstraction. Our survival depends upon it.

Mr President, as the Honourable Prime Ministers of Antigua and Barbuda and Tuvalu stated at the outset of this hearing, COSIS was established at COP26 because the time is long overdue to address climate change in terms of immediate and binding obligations. For highly vulnerable small island States, the concept of time has a completely different meaning. It spells doom and the end of their existence.

Our generation has watched as empty promises and inaction have slowly but surely destroyed our future, and now we witness an extraordinary acceleration of that process. It is for this purpose that small island States have joined forces to create an unprecedented inter-governmental organization, dedicated to the clarification of State obligations under international law, dedicated to climate justice, dedicated to the survival of our peoples. This Commission does not seek to create new law on climate change; rather, it seeks to elucidate existing obligations of States relating to the protection and preservation of the marine environment.

The Commission is now at the forefront of international legal action on climate change. In addition to initiating these proceedings before ITLOS, the Commission has been authorized to participate in the pending ICJ advisory proceedings on the obligations of States with respect to climate change, with COSIS Member States, such as Vanuatu, having played a leadership role in the adoption of the General Assembly resolution requesting the opinion. COSIS will also participate in the advisory proceedings requested by Chile and Colombia before the Inter-American Court of Human Rights. It is a source of pride that the smallest of nations on Earth have exercised such global leadership in bringing international law to life before international courts and tribunals, with a view to placing existing binding obligations at the centre of deliberations on climate action.

Mr President, I emphasize existing obligations because it cannot be that international law as it exists today has nothing to say on the most pressing challenge of our times. It cannot be that island peoples must simply accept that their homelands will be uninhabitable because of the failures of others to take seriously their legal obligations. We have the right, and indeed the responsibility, to invoke fundamental legal principles to demand that major polluters change course, to put an end to the harm that is now threatening our very existence. And, as people of the ocean, who have navigated its vast expanse and lived off its bountiful resources since time immemorial, we see particular significance in the obligations of State Parties to the 1982 UN Convention on the Law of the Sea.

An advisory opinion by this Tribunal – an authoritative clarification of the specific and immediate obligations to protect and preserve the marine environment under Part XII, an opinion based on irrefutable scientific knowledge – would have far-reaching consequences in guiding the conduct of UNCLOS States Parties in the coming years as the grim consequences of inaction on the face of climate change becomes increasingly apparent.

Surely, the cumulative jurisprudence of international courts and tribunals cannot simply be disregarded by the international community as it deliberates on the collective action that is necessary to avert unimaginable disasters.

Mr President, over 20 years ago in 2001, the Intergovernmental Panel on Climate Change, or IPCC, explained how “the countries with the fewest resources are likely to bear the greatest burden of climate change in terms of loss of life and relative effect on investment and economy.”¹

It was a prediction that is now manifest. It is now apparent that, if unchecked, climate change will particularly devastate two groups: the poorest of the poor and those living in island States.² These groups are “set to suffer first and worst”³ despite their negligible contributions to the climate crisis. Climate vulnerability – or “susceptibility to damage – is fundamentally shaped not only by physical exposure to environmental harms, but by pre-existing power dynamics as well as social political and economic realities.”⁴ Therein lies the moral crux intrinsic to the climate issue: climate change presents not only an environmental crisis but a crisis of inequity on multiple levels. The effects are, and will continue to be, unevenly suffered.

Mr President, for many small island communities and low-lying atoll nations like Tuvalu, where most islands sit barely three metres above sea level, rising tides threaten to make the lands completely uninhabitable – gone with the tide. Crops cannot grow in saltwater. In this context, the failure to comply with obligations to protect and preserve the marine environment is, quite simply, a death sentence for entire peoples and their way of life.

In some Pacific cultures, the word for placenta, island and soil are the same: fenua. All of these terms represent home and connection. The island and the islander are one and the same. The relationship between the two is a deeply spiritual and reciprocal bond reliant on the other’s existence, a bond that shapes every aspect of a Pacific person’s individual and collective identity. Likewise, land and culture are inextricably linked. Thus, forced migration to a foreign land represents a “threat to the continued identity and culture of a people”,⁵ essentially a form of extinction. Though standing optimistic and resilient, a solemn question lingers for those

¹ POVERTY AND CLIMATE CHANGE: REDUCING VULNERABILITY OF THE POOR THROUGH ADAPTATION, AFRICAN DEVELOPMENT BANK (2003), p. 10.

² *Climate Change and the Poor: Adapt or Die*, ECONOMIST: INT’L (Sept. 11, 2008), <https://www.economist.com/international/2008/09/11/adapt-or-die>.

³ Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT’L LAW. 1 (2009).

⁴ Autumn Bordner, *Climate Migration & Self-Determination*, 51 COLUM. HUM. RTS. L. REV. 183 (2019), p. 186.

⁵ Tony Weir *et al.*, *Social and Cultural Issues Raised by Climate Change in Pacific Island Countries: An Overview*, 17 REGIONAL ENV’T. CHANGE 1017 (2017), p. 1024.

facing potential climate induced statelessness and upheaval: what will become of us absent our island home?

In the face of existential threat to small island States, the Commission urges this Tribunal to clarify for UNCLOS States Parties their immediate obligations to protect the marine environment based on scientific knowledge. Such clarification would give these populations affirmation of their inherent right to security, peace and a sustainable livelihood.

COSIS seeks to harness the potentialities of international law, to create greater awareness, to mobilize more vigorous action before it is too late. In this respect, Small Island Developing States have established themselves as climate leaders, both to mitigate greenhouse gas emissions and to adapt to the adverse effects of climate change.

Unfortunately, such leadership is unmatched by developed nations and the major polluters,⁶ but climate change is universal. Ultimately, no nation will be spared its catastrophic consequences. That is why the guidance provided by this Tribunal will be of benefit to all mankind. Aggravated nature has no consideration for the artificial boundaries that we have created. The international community should heed the cry of small island States because it is in essence an appeal to the common interest of all peoples inhabiting a single planet with a common destiny.

Mr President, across the globe young people are intensely aware of the myriad challenges resulting from climate change and how they relate to the well-being of their communities. They are receptive to new ways of organizing society, eager to learn through frontline action, and prepared to steel themselves to noble causes that put the needs of human beings and the environment above those of narrow economic conceptions.⁷ They appreciate how inextricably interconnected the world is and are sensitive to the ripple effect of positive change and just solutions. They have already devoted their energies to reimagining what climate action looks like.

In fact, they have played an important role in making possible the engagement of international courts and tribunals that has brought us here today.

COSIS enjoys the support of youth among the small island nations because it is an expression of their aspiration for a future free from the catastrophic effects of climate change. A world in which the rule of international law ensures that justice prevails. Like the ITLOS proceedings, the ICJ advisory opinion too has been inspired by youth. In 2021, a group of Pacific law students from Vanuatu, along with other youth groups operating at the grass roots, spearheaded a campaign to request an advisory opinion from the ICJ on the issue of climate change and human rights.⁸ Against what many consider to be overwhelming odds and after no more than a year of global consultations, the United Nations General Assembly adopted the resolution by consensus in March of this year.⁹

It is befitting that youth have been at the forefront of these initiatives because it is their lives and their future that are at stake. They look to international courts and tribunals, and to this Tribunal in particular, which will be the first to render an advisory opinion. They look to

⁶ *Majuro Declaration for Climate Leadership*, PACIFIC ISLANDS FORUM SECRETARIAT. (Sep. 5, 2013); Margaretha Wewerinke-Singh & Sarah Mead, *Climate Change Law in the Pacific Islands*, in ENV'T LAW & GOVERNANCE IN THE PAC., 29 (Margaretha Wewerinke-Singh et al., eds. 2020); Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 122 (2016); *Suva Declaration on Climate Change*, PAC. ISLANDS DEV. F. (Sept. 4, 2015); *Pacific Islands Nations Consider World's First Treaty to Ban Fossil Fuels*, GUARDIAN (July 14, 2016).

⁷ See Sally Neas et al., *Young people's climate activism: A review of the literature*, 4 FRONTIERS POL. SCI. (2022).

⁸ See *The General Assembly of the United Nations requests an advisory opinion from the Court on the obligations of States in respect of climate change*, ICJ Press Release 2023/20 (19 April 2023).

⁹ Maria Antonia and Jorge Alejandro Carrillo Bañuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, CLIMATE LAW: A SABIN CENTER BLOG (Mar. 29, 2023).

you for hope and justice, in the belief that the international legal order has a vital role to play in ensuring the survival of the most disadvantaged and vulnerable.

As youth, we stand in a unique generational position wherein we are both attuned to the sense of impending loss weighted on the shoulders of our elders, and the bleak possibility future generations might face in losing their country. Our dedication, commitment and effort towards climate justice are in both the name of our ancestors and generations yet unborn.

It is we who will inherit the decisions made by those before us. Therefore, international law must evince an intergenerational perspective in which the security of future inhabitants is taken into account at all levels of decision-making. We have a duty, both moral and legal, towards others yet to come.

Mr President, States have fundamental and binding obligations under UNCLOS to protect and preserve the marine environment, and compliance with those obligations is imperative for future generations. There is a clear call for clarification of the law to sustain the balance and mutual relationship upon which our existence largely depends, one that is held sacred by many in the Pacific. By providing concrete and specific guidance to States Parties – guidance rooted in science – this Tribunal can be an instrumental part of the change in consciousness that is required for humankind to steer the course away from self-destruction to harmony with nature. A harmony that our ancestors understood so well but that the present generation seems to have forgotten.

I am here before you today, Mr President, because of an exchange I had with my grandfather at 12 years of age. I had asked him how he felt about the idea that Tuvalu, his homeland, could soon disappear due to sea level rise. After a moments reflection he responded, “It will never be gone.” Only five years later, however, he relayed to me with great sadness that one of the islands in Tuvalu where he spent many of his childhood years had completely disappeared under the sea. Climate change is already wreaking havoc on our precious ancestral lands.

Mr President, to ensure that my grandfather’s declaration holds true, to ensure that Tuvalu never disappears, I endeavour to do my part. In 10 years from now I hope to still be able to take my daughter to the island in Tuvalu after which he named me: Te Maile.

By delivering a robust advisory opinion, this Tribunal will not only make a historic contribution to the protection and preservation of the marine environment, but also to the continuity of entire civilizations and ancestral connections. This matter is truly a question of life and death. Therefore, I respectfully urge you, Mr President, to consider the profound and timely impact this advisory opinion would have on those vulnerable communities who are deserving of clarity and justice.

Mr President, honourable members of this Tribunal, I now conclude my presentation and thank you sincerely for your time and attention.

I now ask that you invite Professor Okowa to the podium.

THE PRESIDENT: Thank you, Ms Fifita.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3:00 p.m. when the next speaker will take the floor.

(Lunch adjournment)

PUBLIC SITTING HELD ON 11 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLED0, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCI0LO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations: [See sitting of 11 September 2023, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 11 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLED0, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCI0LO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations : [Voir l'audience du 11 septembre 2023, 10 heures]

THE PRESIDENT: Good afternoon. The Tribunal will now continue its hearing in the request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law.

I would now like to give the floor to Ms Okowa to make her statement.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS OKOWA

[ITLOS/PV.23/C31/2/Rev.1, p. 1–5]

Mr President, members of the Tribunal, I appear before you for the first time as an advocate and it is a special privilege to continue the oral submissions for the Commission of Small Island States on International Law, or COSIS.

As you will hear shortly from Professor Mbengue in greater detail, the applicable law is supplied by UNCLOS, as well as the relationship between UNCLOS and the global climate regime, and it is both a legal and moral imperative for UNCLOS to be interpreted to take into account the most existential problem facing humanity today: pollution from greenhouse gas emissions, or GHG emissions.

I will address two points today. First, I will address why it is critical for this Tribunal to consider scientific evidence and standards in interpreting UNCLOS in light of its object and purpose; second, I will address the unique situation of Small Island Developing States within the context of UNCLOS’s object, purpose and constitutional function.

Turning to my first point, negotiating UNCLOS was an enormous task, made all the more difficult by the competing and, at times, seemingly irreconcilable interests at stake. The language of UNCLOS, so painstakingly arrived at, was thus designed to remain effective in the future through interpretation in order to meet new challenges, including those not foreseen at the time of drafting. The devastating impacts of climate change and the pollution of the marine environment by GHG emissions that bring it about, gravely illustrates this point.

Now, as has already been ably submitted by Professor Akhavan, UNCLOS has rightly been described as the ‘constitution of the oceans.’¹ The treaty declares in its preamble that the “the problems of the ocean space are closely interrelated and need to be considered as a whole.”

UNCLOS thus is a foundational text whose object is to create a functional regime for addressing practical “problems of ... ocean space”, including the ongoing need to protect and preserve the marine environment and to prevent, reduce and control marine pollution.²

The State Parties’ intent plainly was not to limit UNCLOS’s scope to the state of the world in 1982. To the contrary, COSIS submits that the scope of State Parties’ obligations under Part XII must be informed by the present-day reality of threats and harms facing the marine environment. Assessing that reality requires the best available scientific assessment of those threats and harms.³

In this sense, therefore, interpreting UNCLOS in light of the accepted science on climate change is not an aberration at all; it is, in fact, a logical continuation of how the law of the sea has always had to adapt to accommodate scientific and technological change. To properly tackle such problems, the UNCLOS regime cannot remain ossified or static. This is borne out by the text of UNCLOS itself, which contains several mechanisms that allow it to adapt to an ever-changing operational landscape.

COSIS submits that Part XII of UNCLOS reflects a strong commitment to scientific research,⁴ and that the various provisions of the treaty envisage the current state of scientific

¹ See COSIS Written Statement, para. 53; see also Tommy Koh, A CONSTITUTION FOR THE OCEANS (6 December 1982); see, e.g., Tullio Treves, UN Audiovisual Library of International Law, UNCLOS (10 December 1982); Yoshifumi Tanaka, THE INTERNATIONAL LAW OF THE SEA (4th ed. 2023), p. 40.

² See, e.g., UNCLOS, Articles 192, 194.

³ See generally COSIS Written Statement, Part II, Chapter 6; Part III, Chapter 8, Section V.

⁴ COSIS Written Statement, para. 339.

knowledge as the yardstick against which States Parties' obligations are measured.⁵ This is demonstrated by the following provisions of UNCLOS, all of which feed into one another.

The Preamble refers to the “promot[ion]” of the “study” of the ocean as part of the “legal order for the seas and oceans.” And according to the Proelss Commentary, the Preamble “emphasises the important linkages between marine scientific research, especially research directed towards understanding the sources and impacts of pollution and sustainable development.”⁶

Article 1(1)(4), which sets out the definition of “pollution of the marine environment” that is so central to the questions before the Tribunal in these proceedings, arose out of the work of UN technical bodies dedicated to marine research.⁷ One prominent commentator has called the definition “essentially a scientific one.”⁸

Articles 200 and 201, together, according to their ordinary meaning, envisage a continuing process of collaborative study and research on the marine environment by State Parties.⁹ Article 200 encourages the “exchange of information and data acquired about pollution of the marine environment” and the participation in regional and global research programmes. This bedrock of data, research and study thus makes up the foundation of a comprehensive approach to the protection of the marine environment.¹⁰ Article 201 then feeds these findings into the “appropriate scientific criteria” for the creation of rules and standards on the prevention, reduction and control of marine pollution. This ensures that the measures adopted to address marine pollution keep pace with the state of scientific knowledge.¹¹

Articles 202 and 203 extend this collaborative ethos and obligation even further by providing for programmes of “scientific, educational, technical and other assistance to developing States” as part of the wider implementation of the obligations to protect and preserve the marine environment and to prevent, reduce and control pollution under both articles 192 and 194, respectively. Article 203 buttresses the support for developing States by affording them priority in the allocation of funding from international organizations.¹²

Articles 204 to 206, when read together, give practical application to the data and research collected by States Parties either through active “surveillance [of] the effects of any activities which they permit” to determine whether they are likely to cause pollution. This takes its most recognizable form in the environmental impact assessment, now accepted as a general obligation under customary international law.¹³ The results of such assessments must be published and made available to all States through international organizations.

⁵ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 117; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 ICJ REP 7 (“*Gabčíkovo-Nagymaros Judgment*”), para. 140.

⁶ Tim Stephens, *Article 200: Studies, research programmes and exchange of information and data*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1342.

⁷ Tim Stephens, *Article 200: Studies, research programmes and exchange of information and data*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1342.

⁸ See Judge Jin-Hyun Paik, *Disputes Involving Scientific and Technical Matters and the International Tribunal for the Law of the Sea*, NEW KNOWLEDGE AND CHANGING CIRCUMSTANCES IN THE LAW OF THE SEA (Tomas Heidar ed. 2020), p. 16; see also Judge David Anderson, *Scientific Evidence in Cases Under Part XV of the LOSC*, LAW, SCIENCE AND OCEAN MANAGEMENT (Myron H. Nordquist et al. eds. 2007), p. 508 (noting that Article 1(1)(4) has a “strongly scientific flavour”).

⁹ COSIS Written Statement, para. 326.

¹⁰ *Article 200: Studies, research programmes, and exchange of information and data*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 91.

¹¹ Tim Stephens, *Article 201: Scientific criteria for regulations*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1344–1345.

¹² COSIS Written Statement, paras. 326, 332–333.

¹³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 ICJ REP. 14 (20 April), para. 204.

Articles 240 to 244 in Part XIII on marine scientific research also mirror and complement Part XII's emphasis on scientific research by imposing an obligation to share the results of that research internationally and actively promoting the flow of information and data. This, in turn, reinforces the scientific knowledge that feeds back into the applicable rules and standards for the protection and preservation of the marine environment in Part XII.

It is equally significant that UNCLOS is referred to in Agenda 21 of the 1992 Rio Conference Report as providing "the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources."¹⁴

Agenda 21 puts emphasis on an integrated and precautionary approach to the protection of the marine and coastal environment. The intent is clearly to anchor control of marine pollution within the broad framework of the science on prevention of environmental degradation and protection of marine ecosystems more broadly.

It is therefore clear, in COSIS's submission, that the normative content of the provisions just described are mutually reinforcing. The continuous progress of States Parties' knowledge of the marine environment and pollution must necessarily inform applicable rules and standards. These, in turn, fill up the substantive obligations of States under Part XII. This process is, furthermore, a continuous one, as several provisions in Part XII provide for the relevant rules and standards concerning marine pollution to be "re-examined from time to time as necessary."¹⁵

The drafters of UNCLOS, in preparing a constitutional text, also had the additional foresight to reinforce these obligations with an equitable dimension, ensuring that States Parties make knowledge open to all and ensure greater assistance for developing States, which has a particular relevance for small island States.¹⁶ COSIS further submits that this is directly relevant to the Tribunal's answers to the two questions posed, especially given the disproportionate effect climate change will have on Small Island Developing States relative to their historical GHG emissions.

Mr President, members of the Tribunal, this takes me to my second point: the need for UNCLOS to contribute solutions to the practical problems of small island States as identified by the scientific research that UNCLOS seeks to foster.

For small island States, the ocean is central to almost all aspects of life. UNCLOS's status as the "constitution of the oceans", therefore takes on a particular significance. Small island States are, by definition, surrounded by the ocean. They are, therefore, surrounded by the legal regime that governs it. Examples of the profound effects the treaty's provisions have on the lifeworld of small island States are manifold: calculation of baselines and maritime entitlements; Part IV on archipelagic States; Part VIII on the regime of islands; regulation of fisheries; the continental shelf; and, of course, provisions addressed to marine pollution and the protection and preservation of the marine environment.

The Tribunal will certainly have noted that almost all States and international organizations who have filed written submissions and have appeared before you thus far are in firm agreement that the threat posed by climate change is imminent and severe. In the context of the two questions posed to the Tribunal, I would highlight that the accepted scientific consensus, built upon by the research of States Parties, demonstrates severe risk to small island States.

The effects identified will be felt first and hardest by Small Island Developing States, who are particularly vulnerable to the following threats, which, in COSIS's submission, has been amply demonstrated by the evidence before you and the speeches of the Prime

¹⁴ UN Conference on Environment and Development, *Agenda 21*, UN Doc. A/CONF/151/26/Rev.1 (1992), para. 17.1.

¹⁵ See, e.g., UNCLOS, Articles 207(4), 208(5), 209(1), 210(4), 211(1).

¹⁶ UNCLOS, Articles 266–268.

Ministers of Antigua and Barbuda and Tuvalu and the Attorney-General of Vanuatu this morning. To recap, I will mention only three of the most important.

First, sea-level rise: rising sea levels will wreak havoc on small island States, causing loss of coastal and marine habitats, which not only threaten the marine environment but would also cause the destruction of the livelihoods across small island States.¹⁷ As the effects of climate change compound, millions face the imminent risk of displacement as small island States such as Tuvalu become uninhabitable or completely submerged.¹⁸

Second, ocean acidification and warming: the increase in average ocean temperatures and pH levels constitutes a grave threat to not only marine life but also the existence of the marine environment and ecosystem as a whole.¹⁹ This threatens not only livelihoods but the means of sustenance for entire populations of small island States whose food supply depends on the ocean.²⁰ This strikes at the heart of small island States' means of subsistence which are themselves protected by international law.

Third, extreme weather events: tropical cyclones and other extreme weather events, such as Hurricane Irma on Antigua and Barbuda in 2017 or Severe Tropical Cyclone Ian on Tonga in 2014, decimate small island States who suffer flooding damage and strains on their public health and sanitation systems.²¹ The scientific consensus is that these extreme weather events would only become more common if climate change continues unabated.²²

UNCLOS, as a living constitutional instrument, must be equipped to respond to existential threats to its subject matter: the world's marine environment and the small island States whose fate is bound up with them. The scope of any interpretation of articles 192 and 194 in relation to climate change will directly impact the survival of these States Parties. Such interpretation, therefore, must incorporate the scientific consensus on small island States' particular vulnerability.

To conclude, scientific knowledge informs the obligations of States Parties under UNCLOS. As a living instrument, UNCLOS requires that scientific research and exchange of information lead to the updating of States Parties' obligations in light of newly available data. Accordingly, the substantive duties of States Parties under UNCLOS must keep pace with scientific advancement as supplemented by articles 200 to 206. The science, as it stands today, has been accepted by almost all States that have made written submissions in these proceedings.

Mr President, members of the Tribunal, thank you for your attention. I now request that you invite Dr Sarah Cooley to the floor to share a presentation with the Tribunal.

THE PRESIDENT: Thank you, Ms Okowa.

I now give the floor to Ms Cooley to make her statement. You have the floor, madam.

¹⁷ See generally COSIS Written Statement, para. 95; Annex 5, Maharaj Report, paras. 26–29.

¹⁸ See generally COSIS Written Statement, para. 95; Annex 5, Maharaj Report, para. 84.

¹⁹ See generally COSIS Written Statement, paras. 87–89, 110–119; Annex 5, Maharaj Report, paras. 42–55.

²⁰ See generally COSIS Written Statement, paras. 87–89; Annex 5, Maharaj Report, paras. 71–76.

²¹ COSIS Written Statement, para. 123.

²² COSIS Written Statement, para. 97.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS COOLEY

[ITLOS/PV.23/C31/2/Rev.1, p. 5–16]

Good day. My name is Dr Sarah R. Cooley and I am the Director of Climate Science at Ocean Conservancy, a non-profit, non-governmental organization based in Washington, DC.

I was a key contributor to the work of the Intergovernmental Panel on Climate Change (or IPCC), the UN's body for advancing the science of climate change in assessing the impacts of global warming on the ocean. Specifically, I was the Coordinating Lead Author for the chapter entitled "Oceans and Marine Ecosystems and their Services" in the contribution of the Working Group II on Impacts, Adaptation, and Vulnerability in the IPCC's Sixth Assessment report, published just last year. I am a globally recognized expert on the ocean carbon cycle, with 16 years of professional experience focused on climate change impacts to the ocean, including ocean acidification and on ocean-related climate mitigation and adaptation options.

I submitted a report in these proceedings alongside the written statement of the Commission of Small Island States on Climate Change and International Law, or COSIS. In that report, I described climate impacts on the ocean and their effects on marine and human systems, drawing from the latest IPCC assessments.

In my presentation today, I will reiterate and further build upon the points I made in my written report to show that climate change has vast and drastic impacts on the marine environment. I will also summarize the IPCC's assessment that, to avoid the worst of those impacts, urgent and dramatic action is needed to mitigate greenhouse gas emissions and adapt to the impacts that they have on the marine environment.

My presentation will proceed in five stages. First, I will explain why the ocean is central to the climate change system as a heat and carbon sink; second, I will show that as a result of anthropogenic emissions, the ocean is absorbing more heat, and warming at rapid levels; third, I will show that as a result of anthropogenic emissions, carbon dioxide is dissolving into the ocean, which is causing the ocean to acidify; fourth, I will discuss in detail the impacts, risks and predicted future scenarios of climate change under increased ocean warming and acidification; finally, I will set out the targets for mitigation and adaptation that States must reach if they wish to avoid the worst consequences of climate change.

I will start by making the fundamental point that the ocean has a central role in the climate system. The ocean is a major reason why the Earth hosts life. The ocean covers 71 per cent of the planet and supplies fresh water to the atmosphere and the land.¹ The large amount of water on the planet helps keep temperatures within a narrow band compared to other planets.

The ocean is also the world's largest heat sink.² Water is especially able to take up heat energy from the atmosphere without showing a rapid temperature rise. So as the Earth's surface receives solar radiation, the ocean surface absorbs a great deal of heat energy due to its size and water's special heat-retaining property. At the same time, heat-trapping gases, or greenhouse gases, in the atmosphere, like carbon dioxide, capture solar energy and some of this heat energy is transferred to the ocean surface by conduction. As human activity has increased the amount of heat-trapping gases in the atmosphere, the atmosphere has captured more solar radiation, and more heat is transferred to the ocean by conduction.³

¹ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 5.

² *Id.*, p. 9.

³ COSIS Written Statement, Annex 4, Cooley Report, § II.A.

The IPCC assessed that over 91 per cent of the added heat is stored in the ocean, compared to just over 1 per cent of the heat being stored in the atmosphere.⁴

The ocean is also the largest carbon reservoir on Earth. It holds about 50 times more carbon than the atmosphere. Both physical and biological processes move carbon in different forms through the ocean. Human industrial activity is increasing the amount of carbon dioxide in the atmosphere at rates faster than any other time in the geologic record.⁵ The ocean has taken up about 26 per cent of all the carbon dioxide humans have released to the atmosphere.⁶ While this has helped slow the amount of planetary warming a little, this has also changed the chemistry of the ocean.⁷

I will turn now to how the ocean's role as the Earth's largest heat and carbon sink has put it in the crosshairs for the worst impacts of excess greenhouse gas emissions; that is, those GHGs emitted by human activities since roughly 1850.⁸

Let's take absorption of heat by the ocean first. Since the Industrial Revolution, fossil fuel burning and land use changes have unequivocally and dramatically increased the amounts of heat-trapping gases, or greenhouse gases, in the atmosphere.⁹ Solar energy makes these gas molecules vigorously bend, twist and vibrate, and their physical movement can be measured as heat. Some of the heat trapped by the atmosphere warms the ocean and land surface.¹⁰ The ocean and land also absorb solar energy directly.¹¹ Darker surfaces, like open ocean water, absorb heat better than light surfaces, like sea ice.¹²

To give you some statistics on this, the IPCC assessed that the global surface temperature increased 1.09 degrees Celsius between 1850 to 2019.¹³ Heat-trapping gases contributed 1.0 to 2.0 degrees Celsius of that increase, while human-released aerosols actually provided a slight cooling effect of 0 to 0.8 degrees Celsius by slightly shading the Earth.¹⁴

Adding heat to the ocean raises water temperatures. The IPCC assessed that the global mean sea surface temperature has increased since the beginning of the 20th century by 0.88 degrees Celsius,¹⁵ and it is virtually certain that ocean warming will continue over the 21st century.¹⁶ Different global greenhouse gas emissions pathways chosen now will measurably influence sea-surface temperatures as soon as the middle of the century.

This warming has a vast number of knock-on consequences. Many are shown here. Ocean warming is causing mobile marine species to move towards the poles in search of comfortable temperatures.¹⁷ It is also increasing the frequency and severity of marine heatwaves such as those observed in 2023 around the United Kingdom, Australia, India and both the north-west and south-east USA.¹⁸

⁴ IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1228.

⁵ COSIS Written Statement, Annex 4, Cooley Report, §§ II.C–D.

⁶ *Id.*, paras. 29, 46.

⁷ *Id.*, § IV.

⁸ See generally IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 4–5.

⁹ COSIS Written Statement, Annex 4, Cooley Report, §§ II.C–D.

¹⁰ *Id.*, § II.A.

¹¹ *Id.*

¹² *Id.*, para. 23.

¹³ IPCC, Working Group I, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, p. 18.

¹⁷ IPCC, *Chapter 5: Changing Ocean, Marine Ecosystems, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 481.

¹⁸ See, e.g., *UK Suffers Marine Heatwave*, EUR. SPACE AGENCY (20 June 2023); *Marine heatwave off north-east Australia sets off alarm over health of Great Barrier Reef*, THE GUARDIAN (21 July 2023); *Warming Bay: An*

Ocean warming, caused by human activity, has also been the major cause of sea-level rise since 1970.¹⁹ Every material expands slightly when heated, and half of observed sea-level rise from 1971 to 2018 is from heating-driven expansion of seawater.²⁰ Melting ice from glaciers contributed 22 per cent of sea-level rise, and melting from land-fast ice sheets contributed 20 per cent of sea-level rise.²¹ The remaining 8 percent of sea-level rise was due to changes in water storage by land.²²

Sea-level rise is accelerating. From 1901 to 1990, the average rate was 1.35 millimetres per year, but from 1993 to 2018 the average rate was 3.25 millimetres per year.²³ The IPCC assessed that sea-level rise will continue throughout this century because of past and future ocean heat uptake.²⁴ Sea-level rise is not reversible on timescales of centuries to millennia, and making exact predictions of sea-level rise rate or amount is difficult because of ice-related major changes that could occur.²⁵

Ocean warming also contributes to severe weather and ocean circulation changes.²⁶ Heat powers storms and evaporates moisture into the atmosphere. This has increased tropical cyclone precipitation.²⁷ The added heat has also increased melting of polar sea ice and this creates a harmful feedback loop where the dark, ice-free ocean absorbs even more heat.²⁸

Warming water also becomes less dense, so warmer seawater does not mix and exchange vertically as well as cooler seawater does, so nutrient recycling from the deep ocean to the upper ocean has decreased and will continue in the future.²⁹ The combination of warming and decreased vertical mixing also contributes to oxygen loss in the ocean's interior.³⁰

The IPCC assessed that there is high confidence that ocean oxygen levels have dropped in many regions since the mid-20th century,³¹ and that there is high confidence that ocean deoxygenation is projected to increase with ocean warming,³² which is emissions scenario dependent. Heating also alters wind-stress and ocean currents.³³

The IPCC has high confidence that many ocean currents will change this century in response to change in wind stress.³⁴ The IPCC assessed with medium confidence that

ongoing heatwave in India's eastern sea is causing extreme rain in its northwest, say experts, DOWNTOEARTH (8 July 2023); *Large Marine Heatwave Reaches Oregon and Washington Coasts*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: FISHERIES (4 August 2023); *The Ongoing Marine Heat Waves in U.S. waters, explained*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (14 July 2023).

¹⁹ COSIS Written Statement, Annex 4, Cooley Report, § III.B.

²⁰ IPCC, Working Group I, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 11.

²¹ *Id.*

²² *Id.*

²³ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 20; IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1287.

²⁴ IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1288.

²⁵ IPCC, Working Group I, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 21.

²⁶ COSIS Written Statement, Annex 4, Cooley Report, § III.C.

²⁷ *Id.*

²⁸ *Id.*, § III.D.

²⁹ *Id.*, § III.E.

³⁰ *Id.*

³¹ IPCC, Working Group I, *Technical Summary*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 74.

³² IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 677.

³³ COSIS Written Statement, Annex 4, Cooley Report, §§ III.C, III.E.

³⁴ IPCC, Working Group I, *Technical Summary*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 74.

subtropical gyres, the East Australian Current Extension, the Agulhas Current, and the Brazil Current are projected to intensify in response to wind stress while the Gulf Stream and the Indonesian Throughflow are projected to weaken.³⁵

The IPCC assessed with high confidence that all of the four main eastern boundary upwelling systems are projected to weaken at low latitudes and intensify at high latitudes this century.³⁶ In addition, a decline in Atlantic Meridional Overturning Circulation, a part of the Gulf Stream system that also redistributes heat all over the planet, is very likely this century.³⁷ Changes in ocean circulation would have very strong effects on regional weather and the water cycle.

Another impact of anthropogenic emissions is the dissolution of carbon dioxide into the ocean.

Carbon is found everywhere on Earth in multiple forms and provides the foundation for life on the planet. For millennia the Earth's carbon cycle was in steady state, with carbon releases from one reservoir balanced by carbon storage in another reservoir.³⁸ In just 200 years, humans have upended this steady cycling of carbon by burning fossil fuels and dramatically altering land use.³⁹ Since human activities have begun, about 26 per cent of anthropogenically released carbon dioxide gas has dissolved in the ocean.⁴⁰

Carbon dioxide dissolves in water into a collection of ions – hydrogen, bicarbonate and carbonate – in a series of reversible acid-base chemical reactions. In total, this increases the seawater's acidity, which is measurable as lower pH – and it lowers the concentration of carbonate ions in the water.⁴¹ Altogether, this process is called ocean acidification. It is most apparent in surface seawater, but scientists have detected it deeper in the ocean as well.⁴²

Now I will turn to the impacts, risk and predicted future scenarios of anthropogenic carbon emissions, particularly in light of the ocean warming and acidification risks I just identified.

But first, I will briefly introduce you to the IPCC process.

The impacts, risks, and future projected conditions on the ocean from climate change are regularly assessed by the IPCC. The IPCC brings together 195 Member States of the United Nations or World Meteorological Organization. It carries out a process every five to seven years to develop a set of reports that assess the causes, impacts and future risks of climate change.

These reports also evaluate how adaptation measures or efforts to stop climate change, called mitigation, can reduce climate change risks. The reports are not meant to be policy prescriptive but rather to inform the UN Framework Convention on Climate Change (or UNFCCC) policy negotiations. IPCC reports are created by thousands of subject matter expert volunteers from around the world.

Authors use a rigorous process to compile and assess the latest information on climate change. First, report outlines are agreed upon by UNFCCC member nations. Then report drafts undergo several rounds of expert and government review, and authors are required to make appropriate revisions and respond to each individual comment of the thousands provided

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*, pp. 72, 74.

³⁸ COSIS Written Statement, Annex 4, Cooley Report, § II.C.

³⁹ *Id.*, §§ III.C–D.

⁴⁰ *Id.*, paras. 29, 46.

⁴¹ *Id.*, § IV.

⁴² IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), pp. 728–729.

throughout this process. The Summary for Policymakers, essentially the executive summary of each report, undergoes a lengthy government approval process.⁴³

IPCC reports are written in an extremely dense format, using what's called calibrated language. IPCC authors evaluate the type, amount, quality and consistency of evidence on a particular topic, using previous IPCC reports and all new information produced since. This helps authors examine the degree of agreement of the evidence on the topic.⁴⁴

Authors also examine multiple lines of evidence; for example, they consider models, observations and indigenous knowledge. The amount of evidence and agreement allow authors to determine a confidence statement. When confidence is high to very high and quantitative or probabilistic information is available, authors can even determine the likelihood of a particular outcome.⁴⁵ The drawback of this process is that IPCC phrasings and confidence assessments are extremely carefully chosen, but they can be variably interpreted by non-IPCC audiences.

Now that I have set out the IPCC's process for assessing impacts, risks and future scenarios of climate change, I will address what those assessments say. In short, warming, acidification and oxygen loss affect marine organisms individually and collectively.

Every species has ideal temperature, acidity and oxygen conditions, but the effects of climate change are shifting these conditions so that it's harder for organisms to find and stay in ideal conditions.⁴⁶ Non-ideal conditions place organisms under stress, and this can force organisms to move, adapt or even die.⁴⁷ While under stress, organisms' growth and reproduction might be decreased, making the whole population more susceptible to harmful events.⁴⁸

Different species in an ecosystem are likely to respond differently, with some species migrating or disappearing and others adapting. This can disrupt predator-prey relationships, habitat interactions, seasonal events and other beneficial ecosystem interactions. It also reduces marine biodiversity, which places ecosystems at greater risk of harmful events in the future.⁴⁹

The IPCC assessed that average global biomass of marine animals is expected to decline due to climate change, but there will be significant regional variations.⁵⁰ Other well-known effects of climate change in the ocean include coral reef bleaching and death, marine heat waves and losses of juvenile Pacific oysters from ocean acidification.⁵¹

Some harmful algal species appear to survive better in warmer, more acidic conditions.⁵² Systems from locations without much natural temperature variability, such as

⁴³ See COSIS Written Statement, Annex 4, Cooley Report, § I.C.

⁴⁴ *Id.*, § I.C.1; see also IPCC, Working Group II, *Technical Summary*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 41.

⁴⁵ IPCC, Working Group II, *Technical Summary*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 41.

⁴⁶ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE (2019), pp. 12–14.

⁴⁷ IPCC, *Technical Summary*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE (2019), pp. 60–61; IPCC, *Chapter 5: Changing Ocean, Marine Ecosystem, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE (2019), pp. 450–453.

⁴⁸ IPCC, *Chapter 5: Changing Ocean, Marine Ecosystem, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE (2019), pp. 478–481.

⁴⁹ *Id.*, pp. 451–454, 480–486.

⁵⁰ COSIS Written Statement, Annex 4, Cooley Report, § IV.F; IPCC, *Chapter 5: Changing Ocean, Marine Ecosystem, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND THE CRYOSPHERE (2019), pp. 452–453.

⁵¹ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND THE CHANGING CRYOSPHERE (2019), pp. 9, 13; IPCC, Working Group II, *Chapter 11: Australasia*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 1584; see also *id.*, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, p. 412.

⁵² *Id.*, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, p. 412; COSIS Written Statement, Annex 4, Cooley Report, § V.

tropical systems and deep-sea systems, are often more sensitive to warming than those from environments with more variable temperature conditions.⁵³

Climate hazards affect every ocean system. This figure lists climate-driven changes across the top and ocean systems down the left. Just note the high number of large dark circles, which show the high to very high impacts that are known with a high degree of scientific confidence. The many check marks on the right of this figure indicate harmful influences that are present, but not caused by climate change. These frequently worsen climate impacts.

The IPCC assessed with high confidence that climate driven impacts on ocean and coastal environments have caused measurable changes in specific industries, economic losses, emotional harm, and altered cultural and recreational activities around the world.⁵⁴

The challenge to drawing broad conclusions about these impacts is that people’s vulnerability to climate change is strongly influenced by local context. So climate-driven harm from ocean changes can and does vary greatly within and among communities.⁵⁵

Sea-level rise is a major hazard for the more than one billion people around the world that will be living in low-lying coastal zones by 2050.⁵⁶ Together, sea-level rise, storm surge and heavy rainfall create compound flooding risks that harm and endanger ecosystems, infrastructure, food and people’s health and livelihoods.⁵⁷ At the same time, climate change is already moving many fisheries poleward and changing the catch composition in specific places.⁵⁸ Small-scale, recreational, artisanal and subsistence fishers, which often includes indigenous peoples and local peoples, are less able to adapt to climate-driven fishery changes.⁵⁹

Women are also proportionally more involved in small-scale fisheries, so disruptions worsen not just wealth inequality but also gender inequality.⁶⁰

Climate change is additionally disrupting coastal freshwater aquifers and spreading or increasing water-borne pathogens.

I will turn now to how the IPCC assesses Earth’s climate future. IPCC assessments consider the possible outcomes from several emission scenarios, or “shared socioeconomic pathways”, that map out different policy and social system assumptions. These are called SSPs, and they are listed in the left column.

The best estimates of average global warming vary among different scenarios. By the middle of the century, the best estimate average global temperature rise under the high emissions scenario is 2.4°C.⁶¹ The best estimate for the medium emissions scenario is 2.0°C by mid-century, and for the lowest emissions scenario it is 1.6°C.⁶² We are currently at average global warming of 1.1°C, and average global ocean sea surface warming of 0.88°C.⁶³

Given the widespread and severe impacts already happening today at planetary warming of 1.1°C, the IPCC wrote that there is high confidence that “[e]very increment of

⁵³ IPCC, Working Group II, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 400; COSIS Written Statement, Annex 4, Cooley Report, § V.F.

⁵⁴ COSIS Written Statement, Annex 4, Cooley Report, § VI.

⁵⁵ *Id.*

⁵⁶ *Id.*, § VI.A.

⁵⁷ *Id.*, §§ VI.A–B.

⁵⁸ *Id.*, § VI.C.

⁵⁹ *Id.*

⁶⁰ *Id.*, § VI.C.

⁶¹ IPCC, Working Group I, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 14, table SPM.1.

⁶² *Id.*

⁶³ *Id.*, p. 5; IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere, and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1214.

global warming will intensify multiple and concurrent hazards.”⁶⁴ In plain language, this means that every degree of additional warming beyond where we are today matters greatly.

The IPCC assessed climate risks to open ocean and coastal systems, and reported that ocean temperatures associated with a medium scenario (where the best estimate global average temperature rise will be 2.7°C by end of century) would place estuaries, salt marshes, mangrove forests, seagrass meadows, kelp forests, sandy beaches, rocky shores, epipelagic systems, eastern boundary upwelling systems and seamount systems at least at moderate risk by end of century, with warm water corals being at very high risk by then.⁶⁵

In all scenarios, there is a 66 to 100 per cent chance that the Arctic Ocean will become practically sea ice free before 2050.⁶⁶ And already today these systems are experiencing significant harm, especially from extreme events like marine heat waves.

Some future emissions scenarios involve a period of time where temperature increases will be above 1.5° or 2°C because of the difficulty of stopping greenhouse gas emissions. These “overshoot” situations are just beginning to be researched. In the ocean, overshoot effects depend on whether a climate impact is reversible.

Impacts like sea surface temperatures, seasonal Arctic ice cover, surface ocean acidification and surface ocean deoxygenation are reversible.⁶⁷ But other impacts like sea-level rise are irreversible. Deep ocean changes related to heating, ocean acidification and deoxygenation are irreversible for multiple centuries. Ecological changes, especially species losses, could be irreversible into the next century or beyond.⁶⁸

Climate impacts are also causing some ocean systems to reach “tipping points” where they undergo rapid changes that fundamentally alter the system in ways that make it extremely difficult and unlikely for the system to return to its previous stable state.⁶⁹

Some examples of ocean tipping points under study include: melting of the Greenland Ice Sheet or West Antarctic Ice Sheet; loss of Arctic permafrost and Arctic summer sea ice; widespread coastal and open ocean deoxygenation; severe coastal ocean acidification; large-scale ocean circulation changes; frequent and severe marine heat waves; changes in atmosphere-ocean connections like El Niño and monsoons; and replacement of warm-water coral reefs with macroalgae.⁷⁰

The IPCC assessed that “ocean tipping points are being surpassed more frequently as the climate changes” and that abrupt shifts in marine species occurred over 14 per cent of the ocean in 2015, compared to 0.25 per cent of the ocean in the 1980s.⁷¹ After tipping points are crossed, the new systems offer different opportunities and experiences to people than before, thereby heightening vulnerability for specific groups and economic sectors.

But all is not lost. If States act now and reduce their emissions by the necessary amounts and undertake adaptation measures, these impacts can be reduced or, in some cases, eliminated.

As the IPCC assessed, and as reflected in this figure, global GHG emissions in 2030 associated with the implementation of the Nationally Determined Contributions announced by

⁶⁴ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 12.

⁶⁵ IPCC, Working Group II, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), pp. 381–384.

⁶⁶ IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere, and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1215.

⁶⁷ COSIS Written Statement, Annex 4, Cooley Report, § V.H.

⁶⁸ *Id.*

⁶⁹ *Id.*, § V.G.

⁷⁰ IPCC, Working Group I, *Technical Summary*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), pp. 42, 65, 113–114; IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 2071.

⁷¹ IPCC, Working Group II, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 448.

2021, prior to COP26, would make it likely that warming will exceed 1.5°C during the 21st century.⁷²

Having a 66 to 100 per cent chance of limiting warming to 2°C would require rapidly accelerating mitigation efforts after 2030.⁷³ Policies implemented by the end of 2020 are projected to result in higher GHG levels than those implied by NDCs, indicating an implementation gap between actual emissions and intended pathways.⁷⁴

This figure shows the current gap in 2022. But this gap has shrunk since the initial round of NDCs submitted in 2015 and 2016.⁷⁵ The first Global Stocktake last week actually indicated that the gap to emissions consistent with limiting warming to 1.5°C in 2030 is now estimated to be 20.3-23.9 Gt CO₂.⁷⁶

The IPCC grouped emission scenarios into different categories that have different likelihoods of exceeding different global warming levels both at peak emissions and at 2100.⁷⁷

As shown here, all global modelled pathways that have a greater than 50 per cent chance of limiting warming to 1.5°C with no or limited overshoot and those that have a greater than 67 per cent chance of limiting warming to 2°C involve rapid, deep, and immediate GHG emissions reductions from all sectors.⁷⁸

These emissions reductions include transitioning rapidly from fossil fuels without carbon capture and sequestration to very low or zero carbon energy sources such as renewables or fossil fuels with carbon capture and storage, improving efficiency, reducing non-CO₂ emissions and deploying carbon dioxide removal measures to counterbalance residual GHGs.⁷⁹

Carbon dioxide removal research and development has captured many people’s imaginations around the world and it’s a very active area of work. The IPCC included some modelled analysis of how carbon dioxide removal, or “CDR”, would contribute to different emission pathways.⁸⁰

In modelled pathways that assume CDR and that limit warming to 1.5°C with no or limited overshoot, global cumulative CDR from 2020 to 2100 from bioenergy with carbon capture and sequestration (or “BECCS”), and direct air capture carbon dioxide capture and storage (or “DACCS”) is 30 to 780 Gt CO₂ and 0 to 310 Gt CO₂, respectively.⁸¹

Total cumulative net negative CO₂ emissions including CDR deployment across all modelled pathways are 20 to 660 Gt CO₂.⁸² The bottom line is that the longer GHG emissions are allowed to grow, the more challenging it will be to reach temperature targets and the more interventions like carbon dioxide removal will be needed.

But what does the current reality of CDR look like? The current amount of carbon dioxide removal is estimated to be just 2 billion tons, or 2 Gt CO₂ per year.⁸³ This is just 1 to

⁷² IPCC, Working Group III, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), p. 14.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ UNFCCC, *Technical Dialogue of the First Global Stocktake*, UN Doc. FCCC/SB/2023/9 (8 September 2023), para. 10.

⁷⁷ IPCC, Working Group I, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), pp. 12–14.

⁷⁸ IPCC, Working Group III, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), p. 24.

⁷⁹ *Id.*, pp. 23–24, 29, 36.

⁸⁰ *See, e.g.*, IPCC, Working Group III, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), pp. 24–25.

⁸¹ IPCC, Working Group III, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), p. 25.

⁸² *Id.*

⁸³ *The State of ‘Carbon Dioxide Removal’ in Seven Charts*, CARBON BRIEF (19 January 2023).

10 per cent of the modelled need for carbon removal. And most of that removal currently comes from conventional land management practices rather than engineered or enhanced carbon removal methods.⁸⁴

To meet the IPCC's modelled targets needed to limit warming to 1.5°C with no or limited overshoot, a massive effort is needed to both cut GHG emissions immediately and explore how CDR could most realistically complement this global systemic shift.

In addition to this, States must also adapt to climate change and its impacts. Another major message from the latest IPCC assessment report cycle is that both adaptation to climate change and mitigation must happen at the same time.

The IPCC assessed that the combination of adaptation and ambitious, rapid GHG emissions cuts can meaningfully reduce impacts, but available adaptation options are unable to offset climate-change impacts on marine ecosystems and the services they provide.⁸⁵ In addition, insufficient mitigation will decrease the number and effectiveness of feasible ocean and marine-based adaptations.⁸⁶ One type of action cannot replace the other.

There are three major groups of ocean-focused adaptations: those operating through social institutions, those focused on built infrastructure and technology, and those that leverage marine and coastal nature-based solutions.

Socio-institutional adaptations include actions like increasing participation, diversifying ocean-based livelihoods, improving finance and management.⁸⁷ Built infrastructure and technology include things like coastal protection, early warning systems, monitoring systems, or assisted evolution.⁸⁸

Marine and coastal nature-based solutions include activities like habitat restoration, sustainable harvesting, marine spatial planning, and ecosystem-based management.⁸⁹

Human-caused climate change has measurably changed the ocean, the organisms that live in and around it, and the people who depend on ocean resources and environments.

Both adaptation to climate impacts and mitigation of anthropogenic greenhouse gas emissions must occur simultaneously to safeguard people and natural systems from worsening climate damage. There is a gap separating current emissions commitments from nations and the emissions allowable to achieve a 1.5°C future, which retains more of the ocean functions and relationships that sustain ecosystems and cultures.

This concludes my presentation on the science of climate change impacts on the ocean. I would be happy to answer any questions that you have orally or in writing. For now, unless I can assist the Tribunal further, I would ask that you please invite my colleague Dr Shobha Maharaj to address you.

THE PRESIDENT: Thank you, Ms Cooley.

I now give the floor to Ms Maharaj to make her statement. You have the floor, Madam.

⁸⁴ *Id.*

⁸⁵ COSIS Written Statement, Annex 4, Cooley Report, § VI; IPCC, Working Group II, *Chapter 3: Oceans and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 383.

⁸⁶ IPCC, Working Group II, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 21.

⁸⁷ See IPCC, Working Group II, *Summary for Policymakers*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), pp. 21–28.

⁸⁸ *Id.*

⁸⁹ *Id.*

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS MAHARAJ
[ITLOS/PV.23/C31/2/Rev.1, p. 16–23]

Mr President, honourable members of the Tribunal, good afternoon.

It is a privilege to appear before you as a scientific expert on behalf of the Commission of Small Island States on Climate Change and International Law, or COSIS.

I am an environmental biologist with over 15 years of experience investigating the impacts of climate change, particularly on small islands and across global biodiversity hotspots. I participated in various ways in the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, or IPCC, including as a Lead Author of the Small Islands Chapter in Working Group II's contribution to the report. As Dr Cooley explained to you a few minutes ago, the IPCC's reports reflect the best available scientific evidence on climate change and its impacts, including on small islands.

I currently serve as Science Director at Terraformation, a Hawaiian-based company which is dedicated to scaling native, biodiverse reforestation globally. I hold a Bachelor of Science in Zoology and Botany and a Master of Philosophy in Environmental Biology from the University of the West Indies at St. Augustine, in my home country of Trinidad and Tobago. In 2012, I received my Doctorate of Philosophy from the University of Oxford, where I researched the impacts of climate change on biodiversity within Caribbean small islands.

COSIS asked me to give expert testimony on the impacts of climate change on small islands. I already submitted a written report on 16 June 2023. Today, I will focus on two main points:

I will begin by addressing the catastrophic effects of climate change on small islands, which threaten the ability of their residents to reside and thrive on them.

Then I will describe some of the challenges that these highly vulnerable communities face in adapting to the climate that is changing all around them.

Members of the Tribunal, small islands are extremely vulnerable to the impacts of climate change, particularly those stemming from increasing ocean warming and acidification. I will discuss why small islands are so vulnerable, the current and likely future effects of climate change on them, and how those effects create systemic risks to habitability.

Although small islands are vastly diverse in their physical, socioeconomic and cultural characteristics, they share important similarities that make them especially susceptible to the impacts of climate change.

First and foremost, small islands are characterized by their physical boundedness, geographic remoteness, limited terrain and isolation.¹ In part as a result, small islands typically possess a narrow resource base, including limited surface water and land availability.²

Large proportions of settlements, infrastructure and other economic assets on small islands are often located close to the coast, making island populations extremely vulnerable to the impacts of sea-level rise, storm surges, flooding and extreme weather events.³ The lack of diversity in small islands' economies subjects these nations to economic volatility and exogenous economic shocks.⁴

¹ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2048.

² *Id.*, p. 2050.

³ *Id.*, p. 2063.

⁴ *Id.*, p. 2048.

Finally, human and natural systems in small islands are highly interconnected, as island populations heavily rely on marine and terrestrial ecosystems for much of their needs including nutrition, culture and development. As such, negative impacts on island ecosystems can often quickly and adversely impact the people who live on these islands.

Synergies among all these unique traits have amplified the impacts of climate change on small islands. As a result, these communities are already suffering, and will continue to suffer, from the compounding and systematic effects of sea-level rise, tropical cyclones, storm surges, droughts and other changes in precipitation patterns which are becoming more frequent and/or severe due to climate change.⁵

The deleterious effects of these compound events on natural and human systems have already been observed by various islands around the world, and they are expected to continue to worsen as global temperatures increase.

One of the most critical of these is sea-level rise, which presents a threat to the very existence of some small islands. As you heard earlier today, rising sea levels risk the complete submergence and uninhabitability of entire island nations, such as Tuvalu.

Small islands are also facing increasingly intense tropical cyclones. During 2017 alone, 22 among 29 Caribbean islands were impacted by at least one Category 4 or Category 5 tropical cyclone, damaging hundreds of thousands of human lives, livelihoods and critical infrastructure.⁶ These storms are so large that they simply overwhelm small islands in their wake, as you can see here from Hurricane Maria, which hit the Caribbean in September 2017. The Pacific islands, too, are vulnerable to tropical cyclones, such as Tropical Cyclone Gita, shown here south of Tonga in February 2018. Notably, the IPCC has concluded that climate change is likely to make such extreme weather events even more intense.⁷

Climate-induced physical phenomena such as sea-level rise, ocean warming and extreme weather events contribute to the deterioration of key marine ecosystems, such as coral reefs, seagrass meadows, and mangroves, and the ecosystem services they supply.⁸ For example, countries like The Bahamas, Vanuatu, Fiji, the Maldives and Palau – shown here – have documented severe coral bleaching and death, driven by elevated sea surface temperatures.⁹ In fact, globally, coral reefs are projected to decline by 70 to 90 per cent at 1.5 degrees Celsius warming.¹⁰

Significant declines have also been observed in seagrass meadows and mangroves around many small islands.¹¹

These and other climate-induced physical effects also have cascading impacts across both natural and human systems. As the risks to small islands intensify – as summarized in this diagram from the IPCC – communities and settlements across them will continue to suffer not just loss of life but also damage to infrastructure, property and livelihoods, as their food and water security, energy supplies, health, well-being, culture and economies are negatively impacted. Some of these impacts are already being felt on small islands. I will discuss only six of them now.

First, sea-level rise, tropical cyclones, storm surges and the resulting destruction of ecosystems have led to significant losses in marine and coastal biodiversity. Coral reefs, seagrass meadows, and mangroves provide key habitats for marine flora and fauna. Thus, fish

⁵ See *id.*, pp. 2045, 2052.

⁶ *Id.*, p. 2071.

⁷ See IPCC, *Chapter 6: Extremes, Abrupt Changes and Managing Risks*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE (2019), pp. 591–593.

⁸ See IPCC, *Chapter 6: Extremes, Abrupt Changes and Managing Risks*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE (2019), pp. 591–593.

⁹ *Id.*, p. 2071.

¹⁰ *Id.*, p. 2048.

¹¹ *Id.*, p. 2057.

and other dependent life-forms have suffered habitat loss with the degradation of these ecosystems.¹² This resulting decline in biodiversity is exacerbated by the destructive impacts of extreme weather events and the migration of species away from small islands towards the poles due to warming of the waters that surround these islands.¹³

Second, coastal settlements, infrastructure, cultural sites and other economic assets have also been impacted by these natural hazards. Critical ecosystems, such as coral reefs, are very effective in buffering wave damage, and so play an important part in reducing the extent of marine inundation and shoreline retreat.¹⁴

As a consequence, the degradation of these ecosystems has significantly reduced much needed protection services for coastal areas and populations.¹⁵ Such coastal protection is extremely important and vital in small islands, as human populations are very often concentrated near to the shoreline within low-elevation coastal zones.¹⁶

In addition, the destruction of coastal settlements, cultural sites and critical infrastructure has been further exacerbated by intensifying tropical cyclones.¹⁷ In Dominica, for example, Tropical Cyclone Maria destroyed almost all of the country's infrastructure with losses amounting to more than 225 per cent of its annual gross domestic product.¹⁸

Third, the degradation and loss of coral reefs and mangroves, as well as resulting shoreline erosion, and flooding are already contributing to the deterioration of livelihoods associated with tourism, fishing and coastal agriculture.¹⁹

As fish and other dependent organisms disappear, the fishing and ecotourism industries, and associated livelihoods dependent on those sectors, will also significantly decline.²⁰

Similarly, sea-level rise and extreme-weather events, together with increasingly intense tropical cyclones, will continue to impact agricultural production and associated livelihoods on small islands.²¹

Fourth, the combined effects of increasing tropical storm intensity and sea-level rise threaten water security in small islands by saline intrusion into aquifers.²²

The IPCC has already confirmed that domestic freshwater resources on small islands may be unable to recover from increased drought, sea-level rise and decreased precipitation by 2030, 2040 or 2060 under both mid- and high future warming scenarios. In fact, some islands are already water insecure.²³ For example, in Barbados, water consumption has reached 100 per cent of the island's capacity, and in Saint Lucia, there is a water supply deficit of close to 35 per cent.²⁴

Fifth, climate hazards have also impaired food security in small islands. Their degradation of ecosystems together with the warming of waters which surround these islands are already leading to significant declines in fish stocks, while threats to freshwater supplies have impacted agriculture.²⁵

¹² *Id.*, p. 2058.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, p. 2063.

¹⁷ *Id.*, p. 2064.

¹⁸ *Id.*

¹⁹ *Id.*, pp. 2066, 2096–2097.

²⁰ *Id.*, pp. 2065–2067.

²¹ *Id.*, p. 2066.

²² *Id.*, p. 2065.

²³ *Id.*, Chapter 16: Key Risks Across Sectors and Regions, p. 2449.

²⁴ IPCC, Working Group II, Chapter 15: Small Islands, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2065.

²⁵ *Id.*

The IPCC has found that some small islands will experience over 50 per cent decline in maximum catch potential by 2100 under both mild and high future warming scenarios.²⁶ The IPCC has also found that, by 2050, local food accessibility could decrease significantly in islands such as Fiji, the Solomon Islands, Papua New Guinea, the Philippines and other small islands within the Western Pacific, with potentially 300,000 associated deaths.²⁷

Sixth and finally, extreme weather events such as tropical cyclones have destroyed human lives and impaired health and well-being.²⁸ For example, tropical cyclones can damage water and sanitation services causing outbreaks of infectious disease, as was the case with a cholera outbreak that occurred in Haiti during the aftermath of Tropical Cyclone Matthew.²⁹

At the end of the day, the inherent vulnerabilities of small islands, combined with the effects of climate change and the resulting systemic harms they suffer, will likely increase the inevitability of the worst effect of all for small islanders: which is, the increasingly serious risk that their homelands may become uninhabitable within their lifetimes or the lifetimes of their children or grandchildren. This is simply the reality of the punishing series of harms that islands face year in and year out.

Members of the Tribunal, I would like to conclude this portion of my presentation with a word on the scientific rigor that backs up the findings of the IPCC on which I have relied in this presentation. The Sixth Assessment Report makes clear that climate change poses risks of serious harm to small islands. Yet at the same time, it assigns levels of certainty to these harms that are sometimes lower than those for the impacts on the ocean as a whole.

This should *not* give the false impression that small islands are not being severely impacted by climate hazards. Lower confidence levels, where they exist, very often indicate simply a lack of published or other available data given the limited resources of small islands. There is, in fact, very high agreement among scientists on the devastating impacts that small islands are facing and will continue to face with changing climate conditions.

Mr President, members of the Tribunal, the IPCC has found that, in light of the extreme risk of serious harm that small islands face as a result of climate change, adaptation to this new, increasingly adverse climate reality is critical to sustain life on small islands. Only through adaptation can we blunt the most catastrophic impacts of climate change, such as food and water scarcity, population displacement and death.

However, the IPCC found with high confidence that, quote, “the vulnerability of small communities in small islands, especially those relying on coral reef systems for livelihoods, may exceed adaptation limits well before 2100 even for a low greenhouse gas emissions pathway,” end quote.³⁰

Furthermore, due to the chronic lack of available robust, downscaled, island-specific data, small islands are unable to develop effective adaptation strategies which are essential if they are to enhance their resilience capacities in response to changing climate conditions.³¹ I will discuss two key examples that demonstrate how this paucity of data constitutes a critical hurdle to adaptation.

The first is fisheries management. It is impossible to effectively replenish fisheries without adequate data. As I described earlier, fisheries are a pillar of economic development

²⁶ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2066.

²⁷ *Id.*

²⁸ *Id.*, p. 2064–2065.

²⁹ *Id.*, p. 2065.

³⁰ IPCC, Working Group II, *Chapter 15: Small Islands*, Climate Change 2022: Impacts, Adaptation and Vulnerability (2022) p. 2046.

³¹ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2094–2095.

and provide essential food security and livelihoods on many small islands.³² And yet, access to suitable fisheries monitoring tools is often limited.³³ This has led to a chronic lack of data regarding habitat destruction, changing migration patterns, breeding grounds and population numbers of species.³⁴

This paucity of data also inhibits the robust projection and modelling of future trends and changes which are absolutely critical for entities such as the IPCC to deliver accurate assessments of future risks regarding these natural and human ecosystems.

Further, this lack of detailed projections on how small islands may experience the redistribution of fish stocks renders it difficult to develop adequate adaptation strategies.³⁵ These strategies may include measures such as rehabilitating key ecosystems, for example mangroves, modifying coastal aquaculture infrastructure, or simply changing fishing locations.³⁶

My second example is coastline mapping. Although on a global level we have some oceanographic and meteorological mapping data, as well as future sea-level-rise and wave-climate projections, these models are not downscaled to fit the small size of these islands.³⁷ It is incredibly difficult to plan new infrastructure without adequately downscaled data of this kind to match the complex coastline edges of small islands.³⁸

This lack of data also severely constrains modelling studies and inhibits our understanding of sea-level rise, future coastal flooding, erosion and rates of saline intrusion into freshwater aquifers on a country-by-country basis.³⁹

Furthermore, the diverse geography of small islands means there is no single one-size-fits-all solution to these issues, and small islands cannot depend on global data.

Further, the building climate-resilient infrastructure requires such highly downscaled data to understand where and what kind of adaptation solutions can be implemented to protect their coastlines from the encroaching sea, or where to build new coastal infrastructure that will not wash away in future storm surges or sea-level rise. The graphic here shows the kind of adaptation decisions that governments face on small islands. Without robust data, governments cannot adequately adapt to the rapidly changing climate, and this already is and will continue to result in displacement, loss of livelihood and death of their people.

Compounding all of these issues is the lack of technical and financial aid available to small island nations.⁴⁰

³² IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2066; *see also id.* at 2099.

³³ Gill et al., *Making the most of data-poor fisheries: Low cost mapping of small island fisheries to inform policy*, 101 MARINE POLICY (2019), pp. 198–207, <https://www.sciencedirect.com/science/article/pii/S0308597X17302312>.

³⁴ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2099–2100.

³⁵ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2099–2100.

³⁶ M. Mozumder, *Climate change adaptation strategies for small-scale Hilsa fishers in the coastal area of Bangladesh: social, economic, and ecological perspectives*, 10 MARINE FISHERIES, AQUACULTURE AND LIVING RESOURCES (27 July 2023), <https://www.frontiersin.org/articles/10.3389/fmars.2023.1151875/full>.

³⁷ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2047.

³⁸ *See* J. Morim, *A global ensemble of ocean wave climate projections from CMIP5-driven models*, 7 SCIENTIFIC DATA (27 March 2020) <https://www.nature.com/articles/s41597-020-0446-2>.

³⁹ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2047, 2094.

⁴⁰ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2047, 2088.

Small islands often lack the economic capacity of larger countries and require global support to adopt the necessary but expensive mitigation and adaptation measures to combat climate change.⁴¹ However, the unavailability of up-to-date baseline and future climate data relevant to small islands impairs our capacity to both understand the current impact and to project the future impacts of climate change on these islands, which further exacerbates the underrepresentation of these nations within global projections and reports such as those of the IPCC.⁴²

Mr President, members of the Tribunal, it is clear that the severe consequences of human-driven climate change to the closely interconnected ecological and human systems will render human life incredibly difficult on small islands over time. In some cases, as has been mentioned earlier, islands may become completely submerged, potentially wiping out whole nation States within our lifetimes. However, I would like to highlight a more insidious emerging reality that some islands will likely become uninhabitable over time without ever becoming completely submerged by the ocean. Indeed, millions of people are already being forced to leave their homes, further endangering not only their livelihoods and cultural heritage, but the rights of them and their children to not only survive but thrive in the place they call home. The critical risks of climate change should be a clarion call for us all.

Mr President, members of the Tribunal, this concludes my presentation before you today. Thank you for your kind attention, and I would be happy to take your questions. If I cannot assist you further, may I ask that you please invite Professor Margaretha Wewerinke-Singh to address you after the break.

THE PRESIDENT: Thank you, Ms Maharaj.

My idea was to call on Ms Wewerinke-Singh to start with her statement for about 15 minutes and we will take a break. But if you prefer to break now, I am happy to do so and we can start in 30 minutes from now. If you can give me an indication? Sorry, can you use the microphone please.

MR AKHAVAN: Yes, Mr President, if you have no objection, we prefer to break now and have the two concluding speeches, both after the break.

THE PRESIDENT: Very well. Then we will break for 30 minutes and we will come back here at 4:50.

(Short break)

THE PRESIDENT: I now give the floor to Ms Wewerinke-Singh to make her statement. You have the floor, madam.

⁴¹ IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2088–2089.

⁴² See IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 2093–2094.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS WEWERINKE-SINGH
[ITLOS/PV.23/C31/2/Rev.1, p. 24–29]

Thank you, Mr President.

Mr President, distinguished members of the Tribunal, it is an honour for me to appear before you on behalf of the Commission of Small Island States on Climate Change and International Law. The point I will be addressing is straightforward, uncontroversial and, above all, of critical importance in the present context – namely, that anthropogenic greenhouse gas emissions constitutes “pollution of the marine environment” under the Convention. This proposition follows from a plain reading of article 1(1)(4) of UNCLOS, which defines “pollution of the marine environment” as follows: “...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 of use of seawater and reduction of amenities.”

As we can see, this definition applies disjunctive conditions on three separate counts: it talks about the introduction of “substances” or “energy”; “directly or indirectly”; which “results” or “is likely to result” in deleterious effects.

It is plain from this formulation that anthropogenic greenhouse gas emissions would constitute marine pollution under UNCLOS even if they met only one of each of the disjunctive criteria listed on each count. But, Mr President, members of the Tribunal, the support for understanding anthropogenic greenhouse gas emissions as marine pollution is not just sufficient; it is overwhelming.

Accordingly, what I will demonstrate in the next 30 minutes is not only that greenhouse gas emissions can constitute “pollution of the marine environment” but that it is impossible for these terms to be interpreted as excluding anthropogenic greenhouse gas emissions.

This is so because, in sum, inland and offshore human activities give off greenhouse gases, mainly carbon dioxide, methane and nitrous oxide, which, in turn, introduce energy (in the form of heat), and a substance (carbon) into the marine environment, which results or is likely to result in “deleterious effects”, indeed massive harm, to the marine environment.

As noted, this proposition enjoys overwhelming support and is backed by a compelling scientific consensus,¹ amongst participants in the present proceedings, out of the 29 States and international organizations that address the interpretation of article 1(1)(4) in their written statements, 28 endorse this proposition² and only one explicitly rejects it.³

¹ See COSIS Written Statement, Ch. 5.

² African Union Written Statement, § IV.B; Australia Written Statement, paras. 24–30; Bangladesh Written Statement, paras. 29–30; Belize Written Statement, paras. 48–52; Canada Written Statement, para. 13–16; Chile Written Statement, § III; Democratic Republic of the Congo Written Statement, paras. 171–182; Egypt Written Statement, paras. 20–26; European Union Written Statement, paras. 42–52; France Written Statement, paras. 55–95; Germany Written Statement, para. 41; International Seabed Authority Written Statement, paras. 19, 52; International Union for Conservation of Nature Written Statement, para. 52; Japan Written Statement, p. 3; Republic of Korea Written Statement, para. 12; Latvia Written Statement, para. 18; Mauritius Written Statement, § V.A; Micronesia Written Statement, paras. 30–32; Mozambique Written Statement, paras. 3.7–3.19; Nauru Written Statement, para. 38; the Netherlands Written Statement, para. 4.7; New Zealand Written Statement, Ch. 3, § II; Pacific Community Written Statement, para. 34; Rwanda Written Statement, Ch. 5, § I; Sierra Leone Written Statement, paras. 29–48; Singapore Written Statement, Ch. 3; United Kingdom Written Statement, para. 91; Vietnam Written Statement, § III.

³ Indonesia Written Statement, paras. 57–64.

The reading of that State is, with respect, clearly erroneous, and the sources that it cites only confirm that article 1(1)(4) is intentionally flexible and should be interpreted in light of the best available scientific evidence. In fact, article 1(1)(4) is a testament to the dynamic and resilient nature of UNCLOS.

Mr President, members of the Tribunal, the proposition at stake here has significant legal implications because it means that the obligations set out in the relevant provisions of UNCLOS govern anthropogenic greenhouse gas emissions and, more specifically, the acts and omissions of States leading to such emissions.

My presentation will proceed as follows. First, I will explain how greenhouse gas emissions introduce both energy and substance into the marine environment; second, I will discuss the terms “marine environment” and “introduction by man” in article 1(1)(4); and, third, I will set out the deleterious effects that greenhouse gas emissions cause, both directly and indirectly, to the marine environment.

I now turn to the first part of my pleading, demonstrating that anthropogenic greenhouse gas emissions constitutes introduction of energy and substances into the marine environment. Such “introduction” of greenhouse gas emissions into the marine environment manifests in two distinct ways. The first is the indirect introduction of energy in the form of excess heat into the marine environment. “Heat” is, in fact, a form of “energy”: the ordinary definition of “energy” is, and I quote, “power or force derived from the exploitation of physical and chemical resources”, including “light” and “heat”.⁴

As we just heard from Dr Cooley, science leaves no room for questioning the premise that greenhouse gas emissions introduce energy – heat – into the marine environment. She has explained to us how the ocean absorbs heat from the atmosphere through the process of thermal transfer from hotter air to the cooler water, making the ocean Earth’s largest heat sink.⁵ The marine cryosphere – that is, sea ice and ice shelves – also absorbs heat at rates higher than land or water.⁶ The Intergovernmental Panel on Climate Change (the IPCC) has authoritatively concluded that the ocean and marine cryosphere have absorbed more than 90 per cent of the excess heat accumulated in the climate system since 1850.⁷ We have also heard how this excess heat causes profound physical changes in the marine environment. This includes thermal expansion of water, a melting of sea ice and ice shelves, all contributing to sea-level rise; ocean stratification and deoxygenation; and shifts in ocean and air currents.

The second “introduction” by greenhouse gas emissions manifests in the direct and indirect introduction of excess carbon into the marine environment. “Carbon” is a “substance” both in the ordinary meaning of the term⁸ and in its scientific meaning. The International Court of Justice has confirmed that carbon dioxide emissions qualify as “substance” when interpreting an almost identical treaty provision that was applicable in the *Pulp Mills* case.⁹

Human activities have emitted more than 2,400 gigatons of carbon dioxide into the atmosphere, mainly through industrial processes, land-use change and land management, and through the burning of fossil fuels. A whopping one quarter of this amount has been absorbed by the marine environment, causing ocean acidification and related harmful consequences to marine life.¹⁰ Dr Cooley also described how greenhouse gas emissions directly introduce sooty black carbon into the ocean and marine cryosphere and contribute to global warming by reducing the ice-albedo effect.

⁴ *Oxford English Dictionary*, “energy.”

⁵ See also COSIS Written Statement, § 4.I.A.; Annex 4, Cooley Report, § II.

⁶ COSIS Written Statement, § 4.II.A.

⁷ COSIS Written Statement, Section 4.II.A.

⁸ *Oxford English Dictionary*, “substance”.

⁹ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 2010 ICJ Rep. 14 (20 April), para. 264.

¹⁰ See COSIS Written Statement, § 4.III.A.

To conclude this point, Mr President and members of the Tribunal, greenhouse gas emissions indirectly introduce energy into the marine environment in the form of excess heat, and they directly and indirectly introduce a substance (carbon) into the marine environment. Thus, anthropogenic greenhouse gas emissions clearly and unambiguously meet the first limb of the definition.

I will now briefly address two salient points, namely, the interpretation of two of the terms utilized in UNCLOS article 1(1)(4). The two terms are “marine environment” and “introduction by man”.

First, on the interpretation of the term “marine environment”, it is of note that the term is not expressly defined in UNCLOS. The ordinary meaning of the term clearly indicates that the definition is an inclusive one, comprising the entire marine ecosystem.¹¹ The definition thus includes, at a minimum, the ocean (including internal waters, such as estuaries); the marine cryosphere, including ice shelves (floating glaciers) and sea ice (frozen seawater); the seabed; coastlines; the air-sea interface; and living and non-living resources.¹² This reading is also consistent with the context of article (1)(1)(4) and with the object and purpose of UNCLOS, as evidenced by the preamble and application of the term in UNCLOS Part XII.

The interpretation is clear and unambiguous, and therefore conclusive.¹³ If resort to supplementary means of interpretation were to be made, however, they lead to the exact same result: the Virginia Commentary to UNCLOS confirms that the drafters intentionally abstained from defining “marine environment”, as it, and I quote, “allowed the Convention an element of flexibility in accommodating the continuously expanding human knowledge and human activities relating to the marine environment, including its protection and preservation.”¹⁴

The jurisprudence of the Tribunal and of Annex VII tribunals also confirms this reading. To cite two examples: this Tribunal, in the *SRFC* Advisory Opinion stated that, I quote, “living resources and marine life are part of the environment.”¹⁵

Similarly, the *South China Sea* Tribunal opined that “marine environment” encompasses “a dynamic complex of plant, animal and micro-organism communities” as well as “their non-living environment.”¹⁶

The second point I would like to briefly reflect on is the meaning of “introduction by man” in article 1(1)(4). The provision talks about “the introduction by man, directly or indirectly, of substances or energy into the marine environment”. First, the context for this term provided in Part XII of UNCLOS makes it clear that the human activities leading to the introduction can originate from any source. Article 194(1) specifies that the pollution of the marine environment can come from literally “any source” and explicitly includes land-based sources, with article 207(1) specifically obliging States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources.¹⁷

The ICJ has recognized the possibility of indirect pollution of a river through a paper plant’s carbon emissions in the *Pulp Mills* case.¹⁸ While the dispute was not based on

¹¹ See COSIS Written Statement, paras. 132–142.

¹² *Id.*, para. 134.

¹³ Vienna Convention on the Law of Treaties, Article 32.

¹⁴ *Article 1: Use of Terms and Scope*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 42.

¹⁵ *SRFC* Advisory Opinion, para. 216; see also *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan) (Case Nos. 3 & 4), Order (Provisional Measures), 1999 ITLOS Rep. 280 (27 August), para. 70; *Arctic Sunrise* (*Netherlands v. Russia*), PCA Case No. 2014-02, Award on the Merits (14 August 2015), paras. 82, 87, 105.

¹⁶ *South China Sea* (Philippines v. China), PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 945; see also *Chagos Marine Protected Area* (*Mauritius v. United Kingdom*), PCA Case No. 2011-03, Award (18 March 2015), para. 538.

¹⁷ See also UNCLOS Articles 211, 212 and 213.

¹⁸ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 2010 ICJ Rep. 14 (20 April), para. 220.

UNCLOS, the applicable treaty, as indicated, included an almost identical provision, which defined the pollution as “the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects”.¹⁹ Similarly, in the *MOX Plant* case, this Tribunal recognized the possibility of an “indirect” pollution of the marine environment via atmospheric release.²⁰

Now I will turn to the second segment of my presentation where I will demonstrate that anthropogenic greenhouse gas emissions results in a wide range of deleterious effects. First, however, I would like to make an important qualification. As noted in our written statement, it is not our submission that any kind of introduction of substance or energy into the marine environment, no matter how indirect and no matter how remote, will automatically qualify as pollution of the marine environment under UNCLOS.²¹ The definition of “pollution” requires that the introduction results in or be likely to result in “deleterious effects”. Article 1(1)(4) lists several examples of such deleterious effects. These are, and I quote, “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 of use of seawater and reduction of amenities.” Importantly, the list is non-exhaustive and, indeed, the scope of the harmful effects of greenhouse gas emissions is far wider than the handful of examples that I have just listed.

Mr President, distinguished members of the Tribunal, it is our submission that both limbs of this part of the definition are met. Accordingly, I will demonstrate that anthropogenic greenhouse gas emissions have already resulted in deleterious effects and are “likely” to result in further deleterious effects. The term “likely” is defined in the Oxford English Dictionary as “probable [or] having a high chance of occurring.”²² We find particularly authoritative the definition adopted by the IPCC in the context of climate change: according to the IPCC, an outcome being likely means having a 66 to 100 per cent probability of occurrence.²³ *A fortiori*, “likely” must also include the IPCC’s confidence levels of “very likely” and “virtually certain”, which range from 90 and 99 to 100 per cent, respectively.²⁴ The IPCC consistently uses the terms “very likely” and “high confidence” when discussing the deleterious effects of anthropogenic greenhouse gas emissions.²⁵

Turning to the actual deleterious effects, Dr Cooley and Dr Maharaj have explained in their testimony how staggering amounts of excess heat and excess carbon have been introduced into the marine environment. I will now discuss the deleterious effects thereof, starting with the deleterious effects of the introduction of excess heat, and then those of the introduction of excess carbon.

The deleterious effects that the introduction of excess heat into the marine environment results in, or is likely to result in, include at least the following: *Harm to living resources and marine life*, such as decline in marine biodiversity and abundance, including loss of coral reefs due to heat stress, and ecosystem and food cycle disruption; *Hazards to human health*, such as food insecurity, extreme weather events, lack of access to water and foods, and population displacement due to sea-level rise; *Hindrance to marine activities*, including fishing and other legitimate uses of the sea, such as decline in fish abundance and diversity; and reduction of amenities in the form of beach loss due to flooding and sea-level rise, submergence and destruction of coastal and reef ecosystems, and loss of cultural heritage.

¹⁹ See Statute of River Uruguay, 1935 UNTS 340 (19 November 1975), Article 40.

²⁰ *MOX Plant (Ireland v. United Kingdom)*, Case No. 10, Order (Provisional Measures), 2001 ITLOS REP. 95 (3 December), paras. 82, 84, 89; see COSIS Written Statement, para. 149.

²¹ COSIS Written Statement, para. 144.

²² *Oxford English Dictionary*, “likely.”

²³ See COSIS Written Statement, § 4.I, footnote 66.

²⁴ COSIS Written Statement, § 4.I, footnote 65.

²⁵ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 4.

I refer to paragraph 165 of our written statement for a more comprehensive list of these deleterious effects, complete with references to the scientific evidence supporting our submissions.

In addition to the harmful effects of excess heat, greenhouse gas emissions introduce carbon, a substance, into the marine environment causing ocean acidification. The ocean has been constantly absorbing excess carbon dioxide throughout at least the 20th century, with more than one quarter of carbon emissions ending up in the marine environment.²⁶

Extreme levels of ocean acidification are reducing the ocean's ability to act as a carbon sink, leaving more carbon dioxide in the atmosphere and running the risk that the ocean may become a net carbon emitter. Thus, carbon dioxide emissions exacerbate the changes caused by excess heat.

The introduction of excess carbon dioxide into the marine environment has resulted in or is likely to result in the following deleterious effects, among others: first, decline in marine biodiversity due to the inability of certain species to survive in acidic environments, and this is an evidence of harm to living resources and marine life; second, food insecurity and malnutrition arising out of the decline in seafood as an essential source of animal protein, resulting in hazards to human health; third, decline in abundance and diversity of fish, marine mammals, shellfish and crustaceans, and decline in fishing and ecotourism, which qualifies as a hindrance to marine activities; and finally again, the introduction of excess carbon further exacerbates the deleterious effects of excess heat absorption that I discussed just a couple of minutes ago.

I refer to paragraph 167 of our written statement for a more comprehensive list of these deleterious effects, complete with references to the scientific evidence supporting our submissions.

To conclude, Mr President, distinguished members of the Tribunal, the evidence is compelling, the science is unambiguous, UNCLOS's provisions are unequivocal and the overwhelming consensus among States is evident: anthropogenic greenhouse gas emissions are "pollution of the marine environment" under article 1(1)(4). With that, I rest my case and express my gratitude for your attention. I now ask that you please invite Professor Makane Moïse Mbengue to the podium.

THE PRESIDENT: Thank you, Ms Wewerinke-Singh.

I now give the floor to Mr Mbengue to make his statement.

²⁶ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 9.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR MBENGUE
[ITLOS/PV.23/C31/2/Rev.1, p. 29–40]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you and to do so on behalf of COSIS.

Mr President, since the birth of international environmental law in the 1970s, the ocean, the seas, and the marine environment, which I will collectively refer to as “the ocean”, have been recognized by the international community as being an integral part of the environment, and crucial for the functioning of the Earth system.

The expert testimony that the Tribunal heard earlier today has shown that climate change, driven by anthropogenic greenhouse gas emissions, is harming on a daily basis our ocean and seas, causing severe and existential threats to small island States, but also to other developing and developed nations. Protecting and preserving the marine environment is particularly vital due to the ocean’s vulnerability and substantial role in CO₂-induced climate change, which has led to rising ocean temperatures, sea-level rise, and ocean acidification.

It is, thus, as emphasized by several written statements,¹ a matter of urgency for the international community, and not only for COSIS, that clarity is brought on what the precise obligations are, under the law of the sea, to protect and preserve the ocean from climate change.

This is not only a matter of “climate urgency”; it is a *sine qua non* to ensure a stable and predictable “legal order for the seas and oceans”. UNCLOS, as underlined in its Preamble, was concluded with a view to “establishing a legal order for the seas and oceans”, which would “promote the peaceful uses of the seas and ocean, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”

Such a “legal order” that forms an integral part of the object and purpose of UNCLOS is today threatened by climate change and its adverse impacts on the ocean. By clarifying the precise obligations for Parties to UNCLOS in relation to climate change, the Tribunal will contribute to preserving the integrity of the Convention while allowing it to fulfil its very object and purpose.

Mr President, by contrast to what some of the participating States have advanced in their written statements, by doing so the Tribunal would surely not act *contra legem*. Indeed, the global climate regime was never intended to displace² or dilute UNCLOS,³ or even less intended to be more specialized than UNCLOS.⁴

¹ Australia Written Statement, para. 6; Bangladesh Written Statement, para. 4, 5; Canada Written Statement, paras. 3, 6; Djibouti Written Statement, para. 7; Egypt Written Statement, para. 12; France Written Statement, para. 107; Republic of Korea Written Statement, paras. 3, 31; Mauritius Written Statement, para. 3; Micronesia Written Statement, para. 69; Mozambique Written Statement, para. 1.4; Nauru Written Statement, paras. 5, 6; New Zealand Written Statement, para. 9; Norway Written Statement, paras. 2.1, 2.5; Portugal Written Statement, para. 90; Democratic Republic of the Congo Written Statement, para. 6; Rwanda Written Statement, paras. 2, 7; Sierra Leone Written Statement, para. 9; Singapore Written Statement, para. 11; The Netherlands Written Statement, paras.2.1, 7.1; United Kingdom Written Statement, paras. 4, 9; African Union Written Statement, paras. 2, 5.

² China Written Statement, paras. 27–28; Indonesia Written Statement, paras. 35–42; Japan Written Statement, p. 3.

³ Portugal Written Statement, paras. 67, 79, 88.

⁴ Singapore Written Statement, para. 38; Mauritius Written Statement, para. 47; India Written Statement, paras. 16–17, 21.

As I will show, the relationship between UNCLOS and the global climate regime is, to the contrary, one of complementarity and mutual supportiveness. Such a relationship cannot be and should not be framed in exclusionary terms. Both the climate regime and UNCLOS are supposed to achieve their respective and specific objects and purposes and to pursue the *raison d'être* for which they were established. And, when it comes to the protection and the preservation of the ocean, there is no doubt that UNCLOS is the cornerstone and remains the applicable legal framework within which the obligations of States must be assessed and determined.

It is this crucial aspect that I will first emphasize, Mr President, that UNCLOS stands at the centre of the legal framework dedicated to the protection and preservation of the ocean. Then, I will demonstrate that UNCLOS is not exclusionary of the global climate regime and surely not incompatible,⁵ as advanced by some participants to the present advisory proceedings. UNCLOS can and must be informed by the global climate regime with respect to matters relating to climate change impacts on the ocean.

I turn now to the first part of my submission, in which I will highlight that UNCLOS stands at the centre of the international legal framework dedicated to the protection and preservation of the ocean.

As I mentioned a few minutes ago, since the 1970s, the ocean was a preoccupation of the international community in the early developments of international environmental law. The ocean was considered an essential part of the ecosystem, vulnerable to environmental changes. It is against this background that the Stockholm Declaration, adopted during the UN Conference on the Human Environment, and which marked the birth of international environmental law in 1972, recognized from the outset the need for States to “take all possible steps to prevent pollution of the seas.”⁶

The Action Plan for the Human Environment, adopted at the very same Conference, went further, and in a section dedicated to marine pollution it recommended to governments to “[p]articipate fully ... in the Conference on the Law of the Sea, scheduled to begin in 1973 ... with a view to bringing all significant sources of pollution within the environment ... under appropriate controls and particularly to complete elimination of deliberate pollution by oil from ships.”⁷

Distinguished members of the Tribunal, the words speak for themselves, and it would be contrary to the basic tenets of the interpretation of international instruments to give them a meaning other than their ordinary and plain meaning. What do those words tell us? Well, that from its very inception, international environmental law – to which the global climate regime forms today an integral part – has called upon the international community to use UNCLOS in order to deal with “all significant sources of pollution” of the marine environment. So, long before its conclusion, UNCLOS was already deemed to be the applicable law for matters related to the protection and preservation of the marine environment, including the prevention, reduction and control of marine pollution. This was the state of international law in 1972; and it has not changed since then.

Indeed, when negotiations for the Convention began at the Third United Nations Conference on the Law of the Sea in 1973, the Stockholm instruments and principles found echoes in the work of the Seabed Committee, the predecessor of the Third United Nations Conference on the Law of the Sea, and, in particular, its Subcommittee III, which was

⁵ Indonesia Written Statement, paras. 35–42.

⁶ See, e.g., Principle 2, 6, 7.

⁷ Report of the UN Conference on the Human Environment, Stockholm, 5–16 June 1972, UN Doc. No. A/CONF.48/14/Rev.1 (1973), Recommendation 86(e).

responsible for preparing draft articles on the protection and preservation of the marine environment for consideration by the Conference on the Law of the Sea.⁸

Among the Stockholm echoes, which confirm that international environmental law and UNCLOS were always conceived where relevant to complement each other, the Tribunal has surely noted that the long-standing vision of the international community was that UNCLOS would deal with “all, all significant sources of pollution”. The expression is not static. It is by definition adaptive and encompasses today, without any doubt, and as highlighted before us by the scientific testimony of Dr Cooley, emissions of GHG that harm significantly the ocean.

In 1979, when negotiations during the Third United Nations Conference on the Law of the Sea were well under way, the First World Climate Conference, which was convened by the World Meteorological Organization, adopted a declaration that stated that “[t]he nations of the world must work together to ... lessen pollution of the atmosphere and the oceans”,⁹ and it equally highlighted the importance of improving and acquiring “oceanographic” data in order to develop a “success[ful] climate programme”.¹⁰

It seems reasonable, not to say evident, that one of the primary fora where “nations of the world must work together” would be UNCLOS. It was visionary back then; it is compelling today.

The trends initiated by the First World Climate Conference led to subsequent acknowledgment of the synergies between the climate and the ocean, and *par ricochet*, of synergies between the global climate regime and the law of the sea.

For instance, in 1985, the UN Environment Programme, the World Meteorological Organization and the International Council of Scientific Unions jointly organized the Villach Conference on the Assessment of the role of carbon dioxide and of other greenhouse gases in climate variations and associated impacts. Working Group II of the Villach Conference specifically recognized the role of the ocean as the ultimate sink for anthropogenic CO₂,¹¹ and urged governments to strongly support “the study of interactions, among the atmosphere, oceans and ecosystems.”¹²

Mr President, members of the Tribunal, it is exactly in this spirit of interactions – and not exclusions – between the climate and the ocean that the global climate regime, as a legal framework, was going to be shaped. These calls for interactions, as matter of good sense, were never purported at diluting or displacing UNCLOS.

The famous Brundtland Report of 1987, entitled, “Our Common Future”, confirms this aspect. The Report, drawing on the Villach Conference’s findings,¹³ expressed concern about the potential consequences of global temperature rise, which, it noted, would lead to sea-level rise. The report also stressed the importance of adopting strategies needed to minimize damage and cope with climate change and rising sea level.¹⁴ But what is more striking is the subsection

⁸ See *Keynote Address by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations*, CONFERENCE ON STOCKHOLM DECLARATION AND LAW OF THE MARINE ENVIRONMENT (25 May 2002), https://legal.un.org/ola/media/info_from_lc/LawSea_stockholm.pdf.

⁹ Declaration of the World Climate Conference, World Climate Conference-1 (WCC-1) (12–23 February 1979, Geneva, Switzerland), WORLD METEOROLOGICAL ORGANIZATION, p. 4.

¹⁰ *Id.*, p. 3.

¹¹ *Report of the International Conference on the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts*, Villach, 9–15 October 1985, WMO No 661, WORLD CLIMATE PROGRAMME (1986), p. 50.

¹² *Report of the International Conference on the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts*, Villach, 9–15 October 1985, WMO No 661, WORLD CLIMATE PROGRAMME (1986), p. 4.

¹³ Julia Kreienkamp, *The Long Road to Paris—The History of the Global Climate Change Regime*, UCL GLOBAL GOVERNANCE INSTITUTE (November 2019), p. 2.

¹⁴ Brundtland Report, *Chapter 7: Energy: Choices for Environment and Development*, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987) (“Brundtland Report”), paras. 22–23.

of the Brundtland Report dedicated to the law of the sea,¹⁵ and in which it was stated that the "UN Conference on the Law of the Sea" represented "the most ambitious attempt ever to provide an internationally agreed regime for the management of oceans."¹⁶ The Report called on all nations to ratify the Law of the Sea Convention,¹⁷ while encouraging the acceptance of the Convention's provisions, especially as regards "those provisions that relate to the environment."¹⁸

Again, Mr President, allow me to pause briefly here to reiterate a point of fact and of law that became a constant since the starting of the negotiations of UNCLOS and after its conclusion: the significant role that has been given to UNCLOS to address specifically and continually the concerns of the international community with respect to environmental impacts on the ocean in general, and climate change impacts on the ocean in particular. The Brundtland Report, when read as a whole, confirms this interpretation of the function and operation of UNCLOS.

It does not come as a surprise then that the 1992 Rio Conference on Environment and Development, whose foundations were laid down by the Brundtland Report, reinforced this aspect and crystallized the complementary relationship between the emerging climate regime and UNCLOS.

Indeed, the United Nations Framework Convention on Climate Change, the UNFCCC, which was one of the conventions opened for signature in Rio, was among the new generation of "international agreements which respect the interests of all and protect the integrity of the global environmental ... system",¹⁹ the global environmental system of which the ocean forms an integral part.

Mr President, if the Rio Conference, which informs the context of the UNFCCC, contemplated that the UNFCCC could contribute to a certain extent to the protection of the ocean – and thus to UNCLOS – it also stressed how the ocean would primarily benefit from UNCLOS. Agenda 21 is revealing at this level. A whole chapter of that programme of action adopted in Rio, and which is dedicated to the ocean, deals with such matters as marine environmental protection, the sustainable use and conservation of marine living resources, and management of the marine environment and climate change.²⁰ The said chapter, which is the longest of Agenda 21, makes references to UNCLOS which is characterized as "*the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources.*"²¹

This statement shows a strong consensus amongst the international community by 1992 – two years before the entry into force of UNCLOS – that UNCLOS is the appropriate framework at the international level to develop and strengthen rights and obligations of States concerning the protection of the marine environment, including from the adverse effects of climate change.

Transposed to the present advisory proceedings, it confirms, Mr President, distinguished members of the Tribunal, that COSIS, as a matter of international law, is justified in requesting the Tribunal to provide clarity on the precise obligations of States Parties to

¹⁵ Brundtland Report, *Chapter 10: Managing the Commons*, § I.2.5.

¹⁶ Brundtland Report, *Chapter 10: Managing the Commons*, para. 49.

¹⁷ Brundtland Report, *Chapter 10: Managing the Commons*, para. 55.

¹⁸ Brundtland Report, *Chapter 10: Managing the Commons*, para. 55.

¹⁹ The Rio Declaration on Environment and Development (1992) ("1992 Rio Declaration"), Preamble.

²⁰ *Agenda 21, Chapter 17: Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources*, 1992 Rio Declaration.

²¹ *Agenda 21, Chapter 17: Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources*, para. 1 (emphasis added).

UNCLOS in an era of climate change. Such a clarification would not only serve the purpose of UNCLOS, it would also serve the implementation of the UNFCCC and related instruments in a manner compatible with UNCLOS.

I pause here, Mr President, to make one brief interpretative point. These developments in the international environmental law context, which I have just taken you through, have crystallized into what we now call the global climate regime. That regime, as it stands, was never intended to be exclusionary or restrictive in its application for addressing issues relating to climate change. It is thus not a *lex specialis* vis-à-vis UNCLOS and would not prevent the Tribunal to rule on precise obligations under UNCLOS.

Lex specialis is even foreign to the global climate regime for the purposes of the present proceedings. Both the UNFCCC and the Paris Agreement recognize the importance of the ocean within the global climate regime. States Parties to the UNFCCC commit to protecting the “climate system for the benefit of present and future generations of humankind.”²² The “climate system” is defined as “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions”,²³ and therefore includes the ocean. As set out in article 2 of the UNFCCC, the main objective of the UNFCCC “and any related legal instruments”, such as the Paris Agreement, is “the stabilization of greenhouse gas concentrations ... at a level that would prevent dangerous anthropogenic interference with the climate system.”²⁴ The Paris Agreement also highlights in its preamble the “importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity.”²⁵ Through this clause, Parties to the Paris Agreement found an “encompassing way of referring to the ‘integrity of all ecosystems’” and explicitly mentioning the ocean.²⁶ This particular recital of the Paris Agreement has been regarded as assuming an integrative role and one of conflict avoidance with other areas of international law and policy,²⁷ which include the law of the sea as embodied in UNCLOS. It is against this legal background that, for instance, in its 2019 Special Report on the Ocean and Cryosphere in a Changing Climate, the IPCC explicitly references the crucial role of UNCLOS in strengthening obligations on States Parties to take action to combat the main sources of pollution.²⁸

Honourable members of the Tribunal, in sum, and in order to conclude the first part of my intervention today, UNCLOS is and remains the applicable law to deal with climate change impacts on the ocean. The request of COSIS focuses on the interpretation of UNCLOS as the constitution of the ocean, and as such, the Tribunal has jurisdiction to render the requested advisory opinion as will be shown by my colleague Professor McGarry tomorrow.

In interpreting UNCLOS, the Tribunal should take into account new international legal developments of significant importance to the ocean and the marine environment and be informed by them. And those developments include necessarily those that are taking place within the global climate regime. UNCLOS is not incompatible with the global climate regime and vice versa.

This brings me to the second part of my submission, Mr President, in which I will stress that the Tribunal can and should take into account the relevant rules, principles and norms of both the UNFCCC and the Paris Agreement when identifying and interpreting specific

²² United Nations Framework Convention on Climate Change (21 March 1994) (“UNFCCC”), Article 3(2).

²³ UNFCCC, Article 1(3).

²⁴ UNFCCC, Article 2.

²⁵ Paris Agreement, Preamble.

²⁶ María Pía Carazo, *Contextual Provisions (Preamble and Article 1)* in KLEIN ET AL (EDS), THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY (OUP 2017), p. 118.

²⁷ María Pía Carazo, *Contextual Provisions (Preamble and Article 1)* in KLEIN ET AL (EDS), THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY (OUP 2017), p. 118.

²⁸ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 96.

obligations under UNCLOS related to the protection and preservation of the marine environment from adverse impacts of climate change.

Before that, allow me to recall that both annual Conferences of the Parties to the UNFCCC and IPCC reports²⁹ put a growing focus on the role of the ocean. By emphasizing the significance of the ocean’s vulnerability to the impacts of the current climate crisis, the global climate regime encourages a mutual supportiveness of the two regimes. The Tribunal, in interpreting obligations under UNCLOS, in the context of the present advisory proceedings, and staying within the confines of the UNCLOS framework, can give *effet utile* to all those relevant legal developments that have permeated the global climate regime. In this context, UNCLOS has a role to play as the centre of the legal framework on matters related to marine protection and preservation.

Indeed, UNCLOS as the “constitution for the oceans”³⁰ and a “living treaty”³¹ offers a framework to deal, prevent and govern all impacts – including climate change impacts – on the ocean and seas.³²

Again, Mr President, this should not come as a scoop. As I have already shown, the climate change challenge was not totally unknown at the time of the finalization of the negotiations of UNCLOS. However, even if the severity of the deleterious effects of climate change were to be perceived as a new and recent challenge, as rightly pointed out, UNCLOS has “built-in flexibility intended to enable it to adapt to new challenges unknown at the time it was negotiated.”³³

UNCLOS is the framework for dealing with climate change impacts on the ocean. In the words of the former President of the Tribunal, Judge Paik, the UNCLOS regime is “stable, yet flexible.”³⁴ This means, Mr President, that while UNCLOS was negotiated at a time when the global climate regime per se was not yet established, it “was never meant to be a static or immutable regime”,³⁵ and “must be interpreted and applied with subsequent developments in international law and policy in mind.”³⁶

Such a potential integrative approach for UNCLOS, is confirmed, in particular, in Part XII of UNCLOS, which is of utmost importance in the present proceedings and which contains explicit rules governing its interactions with other treaties. During the drafting of Part XII, the drafting committee faced the challenge of establishing a comprehensive framework for the protection of the marine environment, which would remain open for future developments and growing knowledge of the ecology of the ocean.³⁷

²⁹ See IPCC, Working Group II, *Summary for Policymakers*, FIFTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2014), p. 4.

³⁰ Tommy T.B. Koh, *A Constitution for the Oceans: Remarks by Tommy T.B. Koh, of Singapore President of the Third United Nations Conference on the Law of the Sea* (11 December 1982), http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

³¹ Virginia Commentary on the United Nations Convention on the Law of the Sea (1982), Volume IV, pp. 36–37; see also *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April), Separate Opinion of Judge Lucky, para. 18.

³² UNGA Res. 67/78, Preamble, Oceans and the Law of the Sea (18 April 2013); UNCLOS Preamble.

³³ Jakobsen, Johansen & Nickels, *The Law of the Sea as Part of the Climate-Change Regime Complex in JOHANSEN ET AL. (EDS), THE LAW OF THE SEA AND CLIMATE CHANGE: SOLUTIONS AND CONSTRAINTS (CUP)*, pp. 376–377.

³⁴ Judge Jin-Hyun Paik, *UNCLOS Conference: How healthy is the ocean’s constitution? 25 Years of the United Nations Convention on the Law of the Sea Keynote address* (17 October 2019), ITLOS, p. 1.

³⁵ Alan Boyle, *Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime*, THE LAW OF THE SEA AND CLIMATE CHANGE: SOLUTIONS AND CONSTRAINTS (Johansen et al. eds. 2021), p. 83.

³⁶ Alan Boyle, *Litigating Climate Change under Part XII of the LOSC*, 34 INT’L J. MARINE & COASTAL L. 458, 462 (2019).

³⁷ Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl ed. 2017) (“PRÖHL COMMENTARY”), p. 1282.

At the same time, they had to build upon the existing international treaties that dealt with protecting and preserving the marine environment in a piecemeal manner.³⁸ As a consequence, the provisions in Part XII, Section 1, had to be crafted with enough flexibility to accommodate both known and unknown anthropogenic pollution and intrusion. This approach made Part XII dynamic rather than static, allowing it to be adaptable to future legal developments.³⁹ The global climate regime, as governed by the UNFCCC and the Paris Agreement, reflects subsequent developments in international law and policy that inform rights and obligations under UNCLOS, and can therefore serve to complement and support the UNCLOS regime.

This is a matter of good legal sense since the Preamble of the Convention itself clearly states that “the problems of ocean space are closely interrelated and need to be considered as a whole.”⁴⁰ Interpreted in the ordinary meaning of its terms and in light of the object and purpose of UNCLOS, this passage of the Preamble cannot refer only to factual problems, such as climate change impacts, that the ocean space faces on a daily basis. This passage also refers to the legal problems, the legal problems or issues with which the ocean space is confronted here, again, on a day-to-day basis. And one of those main problems relates without any doubt to the precise legal obligations that are incumbent upon States to prevent, mitigate and adapt to the adverse effects of climate change on the ocean.

Interpreting UNCLOS in light of the UNFCCC and the Paris Agreement is, thus, necessary to achieve the Convention’s purpose of addressing “problems of ocean space” in a “closely interrelated” manner and “as a whole”.⁴¹ As rightly pointed out by a commentator, “problems of ocean space should not be considered under the Convention as isolated from any other problems of this space.”⁴²

Honourable members of the Tribunal, the present advisory proceedings definitely allow the Tribunal to address the problems that arise from oceanic climate change – and more specifically the legal problems – in a way that will guide States Parties, and COSIS in particular, on the content and scope of their obligations under UNCLOS to prevent significant harm to the ocean from adverse climate change impacts taking into account the global climate regime.

As I indicated at the beginning of my speech, COSIS prioritizes, in conformity with the Convention, the need for “a legal order for the seas and oceans.”⁴³ The term “legal order” encompasses “all issues relating to the law of the sea.”⁴⁴

According to the Proelß commentary, the use of the term “all issues” as relating to the law of the sea, which is referred to at the very beginning of the Convention, indicates that the Convention chose “a comprehensive approach”.⁴⁵ The global climate regime, because of its relevance to the ocean, is thus an issue relating to the law of the sea, and should be taken into account where relevant and appropriate by the Tribunal in the present advisory proceedings when identifying and interpreting the specific obligations.

³⁸ Detlef Czybulka, *Article 192: General Obligation*, PRÖLß COMMENTARY, p. 1282.

³⁹ Detlef Czybulka, *Article 192: General Obligation*, PRÖLß COMMENTARY, p. 1282.

⁴⁰ UNCLOS, Preamble.

⁴¹ UNCLOS Preamble; G.A. Res. 3067 (XXVIII) (16 November 1973), para. 3. See COSIS Written Submission, para. 353.

⁴² Rainer Lagoni, *Preamble*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Proelß ed. 2017), p. 9.

⁴³ UNCLOS, Preamble.

⁴⁴ Rainer Lagoni, *Preamble*, PRÖLß COMMENTARY, p. 10 (referring to UNCLOS, Preamble).

⁴⁵ Rainer Lagoni, *Preamble*, PRÖLß COMMENTARY, p. 8.

In this context, “UNCLOS should not be considered in isolation, but within the wider international legal context of other rules of international law.”⁴⁶

Article 237 of Part XII specifically embodies this inherent dynamism of UNCLOS. It “provides a mechanism for integrating the detailed substantive provision of other legal instruments into the general law of the sea within the overall framework of Part XII.”⁴⁷

The significance of this provision, article 237, was underscored by the Annex VII arbitral tribunal in the *South China Sea* arbitration (*Philippines v China*), which affirmed that the contents of the obligations in Part XII are informed by the “corpus of international law related to the environment.”⁴⁸

In interpreting article 192, which is “a broadly-formulated general” provision,⁴⁹ the arbitral tribunal stated that the content of that obligation “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.”⁵⁰

The arbitral tribunal in that case examined two external treaties: The Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which respectively postdate and predate UNCLOS, to specify the substantive content of articles 192 and 194.⁵¹

Besides article 237, article 293 of the Convention on applicable law further “provides for the possibility to have recourse to other rules of international law.”⁵²

In interpreting and applying the specific UNCLOS provisions over which it has jurisdiction in a given case, the Tribunal, as stated in the *M/V “Norstar” (Panama v Italy)* case, said that it “is not precluded from applying other provisions of the Convention or other rules of international law not incompatible with the Convention.”⁵³ In the advisory opinion in *Responsibilities and Obligations of States with Respect to Activities in the Area*, the Seabed Disputes Chamber explicitly referred to article 293 as the applicable law,⁵⁴ while examining the obligations of sponsoring States in the Area. To shed light on these obligations, the Seabed Disputes Chamber relied on various instruments related to environmental protection, such as the Rio Declaration.⁵⁵ The same rationale applies to the global climate regime when it comes to assessing and determining precise obligations under UNCLOS in relation to oceanic climate change.

Mr President, honourable members of the Tribunal, these provisions under Part XII of the Convention make clear that, in answering the questions submitted, the Tribunal can take account of the UNFCCC and the Paris Agreement where relevant and appropriate. All States

⁴⁶ Christina Voigt, *The Power of The Paris Agreement in International Climate Litigation*, 32 RECIEL 237 (2023), p. 244.

⁴⁷ *Article 237: Obligations under other conventions on the protection and preservation of the marine environment*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 423.

⁴⁸ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016) (“*South China Sea Award*”), para. 941.

⁴⁹ Detlef Czybulka, *Article 192: General Obligation*, PRÖLB COMMENTARY, p. 1278 (“The initial section comprising Arts. 192 to 196 is entitled ‘General Provisions’, which reflects the wide-ranging scope of the following articles.”)

⁵⁰ *South China Sea Award*, para. 942.

⁵¹ *South China Sea Award*, paras. 945, 956. See also *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility (4 August 2000), para. 52.

⁵² UNCLOS, Article 293.

⁵³ *M/V “Norstar” (Panama v. Italy)*, Case No. 25, Judgment, ITLOS Reports 2018-2019 (10 April 2019), para. 137. See also *South China Sea Award*, para. 236.

⁵⁴ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), paras. 51–52.

⁵⁵ *Area Advisory Opinion*, paras. 125–130, 135.

Parties to UNCLOS are also Parties to the UNFCCC and the Paris Agreement, and in COSIS's view, both agreements form part of the general corpus of international law that informs the content of specific obligations under UNCLOS to prevent, mitigate and adapt to oceanic climate change.⁵⁶

Therefore, and contrary to what certain States have suggested in their written statements, considering the global climate regime as *lex specialis* is fundamentally misguided. The global climate regime is neither a *lex specialis* nor a self-contained regime. When applying and interpreting UNCLOS to respond to the questions posed by COSIS, the Tribunal has the power – under UNCLOS – to take into account that regime. The latter – the climate regime – does not prevent the Tribunal from exercising jurisdiction and from rendering an advisory opinion on legal questions that are, at the end of the day, matters of UNCLOS and not matters of the global climate regime per se.

Mr President, distinguished members of the Tribunal, as the guardian of UNCLOS, and to a certain extent, of “the legal order of the oceans”, the Tribunal's task is to guide States on their precise obligations under UNCLOS. In today's era, where climate change undeniably threatens the legal order of the ocean, it is imperative to define States' specific obligations with respect to the marine environment in relation to the adverse effects of climate change, and in particular those obligations in relation to the prevention of marine pollution, mitigation and adaptation. This should be done by taking into account the UNFCCC and the Paris Agreement, where relevant and appropriate.

In this pursuit, the Tribunal will orientate the international community in better addressing the challenge of oceanic climate change that arises at the intersection of both the law of the sea and the global climate regimes.

As the constitution of the ocean, UNCLOS has to play its part and allow the international legal framework for the protection and preservation of the marine environment to be more predictable. This is both a legal and scientific necessity.

Mr President, honourable members of the Tribunal, this will conclude my presentation on behalf of COSIS. My colleagues tomorrow will set out COSIS's submissions on the two questions before the Tribunal. I thank you for your kind attention.

THE PRESIDENT: Thank you, this brings us to the end of this afternoon's sitting. The hearing will resume tomorrow at 10:00 to hear further oral arguments of the Commission of Small Island States on Climate Change and International Law. The sitting is now closed.

(The sitting closed)

⁵⁶ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 956.

PUBLIC SITTING HELD ON 12 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations: [See sitting of 11 September 2023, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 12 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations : [Voir l'audience du 11 septembre 2023, 10 heures]

THE PRESIDENT: Good morning. The Tribunal will now continue its hearing in the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law. This morning we will hear further oral statements on behalf of the Commission of Small Island States on Climate Change and International Law.

Before I give the floor to the first speaker, I would like to inform you that questions from a Judge were communicated to two delegations in writing yesterday. The text of the questions was also posted on the website of the Tribunal.

I now give the floor to Mr McGarry to make his statement. You have the floor.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR McGARRY
[ITLOS/PV.23/C31/3/Rev.1, p. 1–5]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you this morning on behalf of COSIS – the Commission of Small Island States on Climate Change and International Law.

At the close of yesterday’s hearing, Professor Mbengue showed how the object and purpose of the United Nations Convention on the Law of the Sea, or UNCLOS, are inseparable from the factual and legal problems posed by climate change. And as our colleagues will demonstrate today, obligations under UNCLOS to protect and preserve the marine environment are also inseparable from the impacts of climate change upon the uses and resources of our shared ocean.

It thus falls quite plainly within the Tribunal’s mandate, as the guardian of this “constitution for the ocean”,¹ to clarify these obligations in regard to a dire threat to the health and sustainability of the ocean. Indeed, the vast majority of States Parties to UNCLOS have either expressly agreed that the Tribunal has and should exercise jurisdiction in these proceedings, or else have not challenged this point.

I will therefore briefly address two threshold questions that have not been seriously contested before the Tribunal: firstly, that you have jurisdiction to render your advisory opinion in these proceedings; and secondly, that the request submitted by COSIS is admissible and should be answered.

As the Tribunal observed in its 2015 advisory opinion – and as emphasized yesterday by Professor Akhavan – the Rules of the Tribunal outline three prerequisites for the exercise of its advisory jurisdiction.²

The first prerequisite is that “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.”³ This is satisfied by article 1 of COSIS’s constitutive Agreement, as the Tribunal can see on the screen.

Article 1(3) establishes COSIS’s mandate, in keeping with Part XII of UNCLOS, “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.” This mandate is why the International Court of Justice in June of this year considered COSIS “likely to be able to furnish information on the question before the Court” in its own advisory proceedings relating to climate change.⁴

The second prerequisite is that “the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement.”⁵ This is satisfied by COSIS’s

¹ See Tommy T.B. Koh, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. I (Myron H. Nordquist et al. eds.1985), p. 34.

² *Contra* Brazil Written Statement, para. 8; China Written Statement, paras. 6-25; India Written Statement, paras. 5-8.

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 (“SRFC Advisory Opinion”), para. 60; see also ITLOS, Rules of the Tribunal, articles 138(1); COSIS Written Statement, para. 40.

⁴ Letter from Philippe Gautier, Registrar of the International Court of Justice, to the Commission of Small Island States on Climate Change and International Law, No. 159614, 19 June 2023.

⁵ *SRFC Advisory Opinion*, para. 60; see also ITLOS, Rules of the Tribunal, articles 138(2); COSIS Written Statement, para. 41.

unanimous decision authorizing its Co-Chairs to submit the present request to the Tribunal in accordance with articles 2(2), 3(3), and 3(5) of the COSIS Agreement.

The final prerequisite is that the requested opinion is “given on ‘a legal question’.”⁶ The questions submitted to the Tribunal concern obligations under UNCLOS, which are inherently legal obligations. As the International Court of Justice and the Seabed Disputes Chamber of this Tribunal have found, “questions ‘framed in terms of law and raising problems of international law [...] are by their very nature susceptible of a reply based on law’.”⁷

In its 2015 advisory opinion, the Tribunal observed that a “further question” may arise under article 21 of its Statute, as to whether “the questions posed [...] constitute matters which fall within the framework” of the requesting organization’s constitutive agreement.⁸ No such issue arises here, as there is plainly a “sufficient connection” between the submitted request and the “purposes and principles” of COSIS’s constitutive Agreement,⁹ which anchor its ongoing work as an organization grappling with an intergenerational threat to the health of our ocean. By virtue of its representation of small island States, the relationship between the mandate of COSIS and the submitted request could not be clearer.

In light of the States Parties’ overwhelming consensus regarding the singular import of the questions before the Tribunal, there is simply no doubt as to your competence here. As I will now show the Tribunal, the admissibility of the questions before you, like your jurisdiction, is also a straightforward matter.

As both the Tribunal and the International Court of Justice have observed, a request for an advisory opinion should not be refused except for “compelling reasons.”¹⁰ The present proceedings do not give the Tribunal any such basis to decline to answer these questions. To the contrary, there are clearly compelling reasons for you to answer them. Indeed, the request submitted by COSIS is not merely admissible – it is necessary.

Simply put, that is the end of the matter. Yet a few States Parties have offered three ways to complicate the Tribunal’s analysis on this point.

Firstly, some have queried whether the submitted questions concern existing law in force, *lex lata*, or else the law as it “ought” to be, *lex ferenda*.¹¹ Quite evidently, a request to clarify the current obligations of States Parties does not require the Tribunal to adopt a legislative role. Rather, as we heard yesterday – and as will be elaborated by my colleagues today – the answers to the submitted questions are found in the text and history of UNCLOS and the rules and principles reflected therein.

Secondly, a few States consider that the questions concerned are overly broad. They thus ask the Tribunal to judge the clarity of these questions not by their terms, but by their scope.¹² On this point, some contend that these questions should have referred to specific provisions of the COSIS Agreement – a more formalistic standard than the Tribunal applied in its 2015 advisory opinion.¹³ As the Tribunal found, “[t]he questions need not necessarily be

⁶ *Id.*; see also ITLOS, Rules of the Tribunal, articles 138(1); COSIS Written Statement, para. 42.

⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403, para. 25; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 39.

⁸ *SRFC Advisory Opinion*, para. 67.

⁹ *Id.*, para. 68 (quoting *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 66, para. 22).

¹⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226, para. 14; *SRFC Advisory Opinion*, para. 71. See also COSIS Written Statement, paras. 45-46.

¹¹ See France Written Statement, para. 15; United Kingdom Written Statement, para. 24.

¹² See United Kingdom Written Statement, paras. 22-23.

¹³ See France Written Statement, para. 16.

limited to the interpretation or application of any specific provision” of the treaty at hand, as “there is no reason why [...] article 21 of the Statute should be interpreted restrictively.”¹⁴

A request submitted to the Tribunal on “the specific obligations of States Parties”¹⁵ regarding the marine environment is, in the words of the Tribunal, “clear enough to enable it to deliver an advisory opinion.”¹⁶ The terms of the questions before you are indeed clear, as is the crucial importance of your answer.

Finally, it is irrelevant that third States did not participate in the drafting and adoption of these questions.¹⁷ The Tribunal and the International Court of Justice have made clear that the authorization of third States is not required before seeking an advisory opinion,¹⁸ a particularly impractical threshold for clarifying general obligations under a Convention with 169 parties. The only notable limitation in this respect arises when the questions address an exclusively bilateral dispute¹⁹ – a far cry from proceedings relating to climate change and other common concerns of humankind.

COSIS submitted the present request based on its aforementioned mandate to “promote and contribute to the definition [...] of rules and principles of international law concerning climate change.”²⁰ This follows from the principle of common but differentiated responsibilities, under which all States, however small, have obligations to implement regarding climate change.

There is no question as to the urgency of the crisis that has led to COSIS’s creation, nor to the essential nature of this organization’s purposes and functions. As previously noted, the International Court of Justice recognized COSIS’s character as an international organization when it admitted it to participate in the Court’s own advisory proceedings. This is consistent with the Court’s longstanding approach of assessing an organization’s “purposes and functions as specified or implied in its constituent documents and developed in practice.”²¹

The object and purpose of the COSIS Agreement is reflected in its Preamble’s call to “take immediate action to protect and preserve the climate system and marine environment.”²² As explained earlier, the Agreement gives effect to these purposes by setting out the functions of COSIS in article 1 and expressly specifying these functions in article 2.²³

This was clearly confirmed in practice during the first year of the organization’s existence, when it unanimously adopted the present request in furtherance of these purposes and functions.²⁴ Since taking that decision, COSIS has tripled its membership and now includes

¹⁴ *SRFC Advisory Opinion*, para. 68.

¹⁵ Request for an Advisory Opinion of 12 December 2022, p. 2.

¹⁶ *SRFC Advisory Opinion*, para. 72 (citing *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion*, 1948, *I.C.J. Reports 1947-1948*, p. 57, 61. See also COSIS Written Statement, para. 47.

¹⁷ *Contra Brazil* Written Statement, para. 9; France Written Statement, paras. 22–24; United Kingdom Written Statement, paras. 18–19.

¹⁸ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, *I.C.J. Reports 1950*, p. 65, 71; *SRFC Advisory Opinion*, para. 76; *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment*, *ITLOS Reports 2020-2021*, p. 17, paras. 202–203.

¹⁹ See *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, paras. 33, 38; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004 (I)*, p. 136, paras. 47, 50.

²⁰ COSIS Agreement, articles 1(3).

²¹ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, *I.C.J. Reports 1949*, p. 174, 180.

²² COSIS Agreement, Preamble.

²³ See COSIS Agreement, articles 1(3), 2(2).

²⁴ See Decision of the Third Meeting of the Commission of Small Island States on Climate Change and International Law, 26 August 2022.

more parties than the Sub-Regional Fisheries Commission that requested and received the Tribunal's 2015 advisory opinion.

Mr President, members of the Tribunal, whatever questions might arise in future proceedings, there can be no question as to the legitimacy of the present proceedings. Nine States, having joined COSIS to combine their efforts to protect and preserve the marine environment from a common threat, have accordingly fulfilled the requirements to stand before the Tribunal today. After negotiating for 30 years as this threat endangered its members' way of life – and indeed, very existence – COSIS asks the Tribunal to assist it in the performance of its vital functions²⁵ and to authoritatively interpret the Constitution for the Ocean.

In conclusion, there are no compelling reasons to decline to exercise your well-founded jurisdiction over this request. To the contrary, there is a critical need to contribute your expertise, rigour and scrutiny to these questions, to clarify specific obligations regarding the marine environment, and to safeguard the health of our ocean and the sustainability of the most vulnerable coastal populations.

The few objections posed in these proceedings have sought to complicate this simple legal analysis while obscuring the gravity and inequity of the specific threats facing small island States. In contrast, a diverse and nearly unanimous majority of States Parties agree that the Tribunal should proceed to directly answer the questions at hand.

Mr President, honourable members of the Tribunal, this will close my presentation. I thank you for your attention and ask that you please give the floor to Professor Jutta Brunnée, who will begin to detail COSIS's position on the urgent questions before you.

THE PRESIDENT: Thank you. Mr McGarry.

I now give the floor to Ms Brunnée to make her statement. You have the floor.

²⁵ See *SRFC Advisory Opinion*, para. 77; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, *I.C.J. Reports 2019*, p. 95, paras. 76, 88.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS BRUNNÉE
[ITLOS/PV.23/C31/3/Rev.1, p. 5–14]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you on behalf of COSIS.

My presentation will focus on a matter that is uniquely within the purview of this Tribunal: the due diligence that is required of States Parties in the context of their obligations under Part XII of UNCLOS to protect and preserve the marine environment in the face of climate change. This presentation will be the first of a series of three, together with the presentations of Professor Jean-Marc Thouvenin and Ms Catherine Amirfar, formulating COSIS’s position on the first question before the Tribunal. I will proceed as follows:

First, I will outline the key parameters of the due diligence incumbent upon States under Part XII, highlighting the significant degree of agreement on those parameters in the written statements submitted to the Tribunal.

Second, I will show that, in the context of the high probability of disastrous harm from climate change, these parameters of due diligence entail objective and stringent requirements for the conduct of States Parties.

Third, due diligence is not a matter of unbounded national discretion. While the requirements of due diligence in the context of Part XII may be modulated by factors that are specific to the obligated State, the relevant factors, once again, are objective ones.

In sum, due diligence entails binding, objective standards of conduct. It is for this Tribunal, building on its jurisprudence on Part XII of UNCLOS, to specify what due diligence requires of States in the face of the high probability of disastrous harm to the marine environment from greenhouse gas emissions and climate change.

Part XII of UNCLOS is dedicated to the protection and preservation of the marine environment. Prior jurisprudence has confirmed that due diligence provides the standard of conduct in this context, as is helpfully set out in the *South China Sea* arbitral award.¹

The *South China Sea* tribunal considered that the content of the general obligation in article 192 is informed by the corpus of international law.² It cited with approval the conclusion of the International Court of Justice (ICJ) in its *Nuclear Weapons* Advisory Opinion that States are required to “ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control.”³ The arbitral tribunal went on to observe that “the content of the general obligation in Article 192 is further detailed in subsequent provisions of Part XII, including Article 194.”⁴ For present purposes, the main point is that articles 192 and 194(2) entail “obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment.”⁵ The arbitral tribunal observed that this Tribunal’s *Fisheries* Advisory Opinion, in drawing on the ICJ’s *Pulp Mills* judgment

¹ *South China Sea Arbitration* (Republic of the Philippines v. People’s Republic of China), PCA Case No 2013–19, Award on the Merits, 12 July 2016 (“*South China Sea Award*”).

² *Id.*, para. 941.

³ *Id.* (citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226 (“*Nuclear Weapons Advisory Opinion*”), para. 29).

⁴ *Id.*, para. 942.

⁵ *Id.*, paras. 943, 944.

and the Seabed Chamber’s *Area Advisory Opinion*, noted that “the obligation to ‘ensure’” requires States to exercise due diligence.⁶

The written statements of States and international organizations evidence broad agreement around the proposition that various provisions in Part XII are expressions of the obligation under general international law to prevent harm to the environment,⁷ and that at least some of the provisions require States to exercise due diligence.⁸

The relevant obligations to prevent harm to the marine environment are triggered by the risk of such harm.⁹ And, as affirmed in many of the written statements, their stringency is determined in important part by the degree of risk and the foreseeability and severity of potential harm.¹⁰ As a result, States are subject to a stringent obligation, to quote the Seabed Chamber, “to deploy adequate means, to exercise best possible efforts, to do the utmost.”¹¹

This obligation to do the utmost must be understood in the context of the goal of protecting and preserving the marine environment, bearing in mind that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”¹² And so “vigilance and prevention are required on account of the often irreversible character of damage to the environment.”¹³

There is broad agreement across the written statements that, in keeping with the jurisprudence of international courts and tribunals,¹⁴ due diligence in the context of the general obligation to prevent harm to the environment requires not only the adoption of appropriate

⁶ *Id.*, para. 944; see also *SRFC Advisory Opinion*, paras. 131, 132 (citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, 2010 *I.C.J. Reports* 2010, p. 14) (“*Pulp Mills Judgment*”), para. 197; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, *ITLOS Reports* 2011, p. 4 (“*Area Advisory Opinion*”), para. 117).

⁷ See e.g., African Union Written Statement, paras. 14–15; Canada Written Statement, para. 55; Democratic Republic of the Congo Written Statement, para. 171; Republic of Djibouti Written Statement, paras. 48, 51, 53–55; Egypt Written Statement, para. 40; European Union Written Statement, para. 24; France Written Statement, paras. 101, 102; Indonesia Written Statement, para. 67; International Union for Conservation of Nature Written Statement, para. 137; New Zealand Written Statement, para. 69; Mauritius Written Statement, para. 78; Micronesia Written Statement, para. 60; Mozambique Written Statement, paras. 3.47, 3.85; Portugal Written Statement, para. 64; Rwanda Written Statement, paras. 177–181; Singapore Written Statement, para. 30; United Kingdom Written Statement, para. 65.

⁸ See e.g., African Union Written Statement, para. 169; Bangladesh Written Statement, para. 37; Belize Written Statement, paras. 59(c), 68; Canada Written Statement, paras. 54, 62(v); Chile Written Statement, para. 48; Democratic Republic of the Congo Written Statement, para. 141; Egypt Written Statement, para. 30; European Union Written Statement, para. 14; France Written Statement, paras. 103, 143; International Union for Conservation of Nature Written Statement, para. 75; Korea Written Statement, paras. 10, 15, 29; Latvia Written Statement, paras. 14, 18; Mauritius Written Statement, paras. 68, 79; Micronesia Written Statement, para. 39; Mozambique Written Statement, paras. 3.56, 3.61, 3.87(d); Nauru Written Statement, para. 52; The Netherlands Written Statement, para. 3.2; New Zealand Written Statement, para. 69; Portugal Written Statement, para. 63; Rwanda Written Statement, paras. 190, 223; Sierra Leone Written Statement, para. 50; Singapore Written Statement, para. 29.

⁹ See, e.g., COSIS Written Statement, para. 232; see also ILC, *Prevention of Transboundary Harm from Hazardous Activities*, UN Doc. A/56/10 (2001), article 1.

¹⁰ See, e.g., COSIS Written Statement, paras. 54, 232, 281, 284, 361, 425; see also African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 54; European Union Written Statement, para. 20; France, paras. 107, 144; International Union for Conservation of Nature Written Statement, para. 79; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Mozambique Written Statement, para. 3.62; New Zealand Written Statement, para. 58; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 33; United Kingdom Written Statement, paras. 66, 67.

¹¹ *Area Advisory Opinion*, para. 110.

¹² *Nuclear Weapons Advisory Opinion*, para. 29.

¹³ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *Judgment*, *I.C.J. Reports* 1997, p. 7 (“*Gabčíkovo-Nagymaros Judgment*”), para. 140.

¹⁴ See *Pulp Mills Judgment*, para. 197; *Area Advisory Opinion*, para. 114.

rules and measures but also “a certain level of vigilance in their enforcement and the exercise of administrative control.”¹⁵

Similarly, there is consensus that due diligence entails substantive requirements, such as the adoption of appropriate measures to prevent harm, as well as procedural requirements.¹⁶ Relevant procedural requirements include the obligations to undertake environmental impact assessments,¹⁷ and to notify and consult other States.¹⁸ States must also cooperate with one another, in good faith,¹⁹ directly or through relevant international organizations, in order to protect and preserve the marine environment.²⁰

Another area of agreement in the written statements is that due diligence is a variable and contextual standard.²¹ As such, the conduct that is required of States is determined by several factors. In addition to the level of risk and the foreseeability and severity of potential

¹⁵ See COSIS Written Statement, para. 278; see also African Union Written Statement, para. 174; Belize Written Statement, para. 59(c); Canada Written Statement, para. 57; Egypt Written Statement, para. 49; European Union Written Statement, para. 20; France Written Statement, para. 115; International Union for Conservation of Nature Written Statement, para. 78; Korea Written Statement, para. 10; Micronesia Written Statement, para. 41; Nauru Written Statement, para. 40; Singapore Written Statement, para. 30; United Kingdom Written Statement, para. 66; Vietnam Written Statement, para. 4.4.

¹⁶ See COSIS Written Statement, paras. 277, 302–308; see also European Union Written Statement, paras. 16–38; France Written Statement, para. 158; Indonesia Written Statement, para. 66; Micronesia Written Statement, para. 45; Rwanda, paras. 197–206, 236; United Kingdom Written Statement, para. 64; see also *Pulp Mills Judgment*, paras. 77–79; ILC, Commentaries on the Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), General Commentary, para. 1; see generally Jutta Brunnée, *Procedure and Substance in International Environmental Law*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW Vol. 405 (2020), pp. 124–129, 140–141.

¹⁷ See COSIS Written Statement, paras. 179, 303–308, 417; see also Belize Written Statement, para. 60(c); Egypt Written Statement, para. 49; Mauritius Written Statement, paras. 78, 79; European Union Written Statement, para. 34; International Union for Conservation of Nature Written Statement, para. 151. On general international law, see *Pulp Mills Judgment*, para. 204; ILC, *Prevention*, article 7. And see UNCLOS, articles 204–206.

¹⁸ See COSIS Written Statement, paras. 308, 326(a). On general international law, see *Gabčíkovo-Nagymaros Judgment*, paras. 140–147; ILC, *Prevention of Transboundary Harm from Hazardous Activities*, UN Doc. A/56/10 (2001), articles 8, 9; UNCLOS, articles 198.

¹⁹ *SRFC Advisory Opinion*, para. 210.

²⁰ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 (“*MOX Plant Order*”), para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 92; *South China Sea Award*, paras. 984–986; see also UNCLOS, article 197; France Written Statement, paras. 120, 122, 155–156, 161; Indonesia Written Statement, para. 66.

²¹ See COSIS Written Statement, paras. 54, 281; see also African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 54; Chile Written Statement, para. 80; European Union Written Statement, para. 20; France Written Statement, paras. 106, 144; International Union for Conservation of Nature Written Statement, paras. 79, 190; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 32; United Kingdom Written Statement, para. 63; see also *Area Advisory Opinion*, para. 117; ILC, Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 11.

harm to which I have already referred, the state of science,²² relevant international rules and standards,²³ and the relevant State's capacities are key factors.²⁴

From the contextual nature of due diligence follows that the attendant obligations do not have a fixed content but rather evolve over time, depending on the situation and as the salient factors evolve.²⁵ For example, and crucially, due diligence requirements become more stringent as risk increases or scientific understanding of the severity of potential harm evolves.²⁶ This point too finds wide support in the written statements.²⁷

Finally, as is implicit in the preceding point, the exercise of due diligence is a continuous duty.²⁸

Mr President, it is for this Tribunal to clarify what these *generally accepted* considerations entail when brought to bear on due diligence in relation to obligations under UNCLOS in the context of climate change. In what follows, I submit that they entail concrete requirements for the conduct of States and that States Parties to UNCLOS, therefore, are subject to stringent obligations with *objective* parameters.

²² See African Union Written Statement, paras. 15, 127, 168, 171; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Chile Written Statement, paras. 79, 80, 96, 118(5); Egypt Written Statement, para. 41; European Union Written Statement, para. 25; International Union for Conservation of Nature Written Statement, paras. 78, 79; Mauritius Written Statement, para. 80; Micronesia Written Statement, paras. 42, 44; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 34; United Kingdom Written Statement, paras. 67, 68; see also *Area Advisory Opinion*, paras. 117, 131.

²³ See Bangladesh Written Statement, para. 51; Chile Written Statement, paras. 51, 77; Egypt Written Statement, para. 30; European Union Written Statement, paras. 14, 19, 23–24, 32; Latvia Written Statement, para. 21; Micronesia Written Statement, para. 62; Mozambique Written Statement, para. 3.85; New Zealand Written Statement, para. 70; Singapore Written Statement, para. 37; see also *South China Sea Award*, para. 941 (quoting *Nuclear Weapons Advisory Opinion*, para. 29); *Gabčíkovo-Nagymaros*, Judgment, para. 140; ILC, articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 4; ILC, Draft Guidelines on the Protection of the Atmosphere, with Commentaries thereto, UN Doc. A/76/10 (2021), Guidelines 3, 9(1).

²⁴ See e.g., Brazil Written Statement, para. 23(iii); Canada Written Statement, para. 58; European Union Written Statement, para. 25; France Written Statement, paras. 145, 161; International Union for Conservation of Nature Written Statement, paras. 190–191, 194; United Kingdom Written Statement, para. 69; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 43 (“*Bosnian Genocide Judgment*”), para. 430; ILC, Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, paras. 12, 13, 17.

²⁵ See COSIS Written Statement, paras. 54, 340; see also Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, para. 36; Chile Written Statement, paras. 80, 118(5); Egypt Written Statement, para. 41; International Union for Conservation of Nature Written Statement, para. 79; Mauritius Written Statement, para. 80; Micronesia Written Statement, para. 42; Rwanda Written Statement, para. 192; Sierra Leone Written Statement, para. 64; United Kingdom Written Statement, para. 67; United Nations Environment Programme Written Statement, para. 12; see also *Area Advisory Opinion*, para. 117; *Gabčíkovo-Nagymaros* Judgment, para. 140; ILC, Commentaries on the articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 11.

²⁶ *Gabčíkovo-Nagymaros* Judgment, para. 140; *Area Advisory Opinion*, para. 117.

²⁷ See African Union Written Statement, paras. 171, 228; Bangladesh Written Statement, para. 37; Belize Written Statement, para. 68; Canada Written Statement, paras. 36, 54; Chile Written Statement, paras. 79–80, 96, 118(5); Egypt Written Statement, para. 41; European Union Written Statement, para. 20; International Union for Conservation of Nature Written Statement, para. 79; Korea Written Statement, para. 10; Mauritius Written Statement, para. 80; Mozambique Written Statement, para. 3.62; Sierra Leone Written Statement, para. 64; Singapore Written Statement, para. 33; United Kingdom Written Statement, para. 67.

²⁸ See *Pulp Mills Judgment*, para. 205; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 (“*Construction of a Road Judgment*”), para. 161; see also COSIS Written Statement, para. 280.

First of all, as I have already noted, and as many of the written statements concur, the stringency of the due diligence obligations in Part XII is determined in important part by the degree of risk and the foreseeability and severity of potential harm, and so by objective factors.

The observations of the International Law Commission in the commentaries to the 2001 Draft Articles on Prevention of Transboundary Harm are on point: “The notion of risk is ... to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.”²⁹

The ILC defines the relevant risk as encompassing a spectrum ranging from “a high probability of significant transboundary harm” to “a low probability of disastrous transboundary harm.”³⁰ As the Commission rightly points out in the commentary on this definition, it is “the combined effect of ‘risk’ and ‘harm’ which sets the threshold.”³¹ It is also what drives what due diligence requires of States.

The degree of risk, the foreseeability of possible harm, and the severity of that harm are elucidated by scientific evidence.³² As the ILC observes, when it comes to threats of serious or irreversible harm, the precautionary principle instructs that lack of full scientific certainty ought not to be a reason to delay steps to protect the environment.³³ In the context of activities in the Area, the Seabed Chamber confirmed that “the precautionary approach is also an integral part of the general obligation of due diligence.”³⁴

Distinguished members of the Tribunal, while precaution is an essential part of the protection and preservation of the marine environment, it stands to reason that the situation at hand is no longer one of precaution. The current state of evidence is such that we know with a frightening degree of confidence that the ocean’s absorption of excess heat and CO₂ due to uncontrolled greenhouse gas emissions has progressed beyond the risk spectrum contemplated by the ILC. To paraphrase, we face a *high probability of disastrous harm* to the marine environment, even “existential threats.”³⁵

My colleague, Catherine Amirfar, will provide you with a detailed account of what the scientific consensus entails in terms of actions required of States at this stage. Let me simply say this: the content of States’ due diligence obligations under Part XII of UNCLOS must be determined on an objective scientific basis and therefore in accordance with the current scientific consensus on the high probability of disastrous climate harm.

Distinguished members of the Tribunal, as I mentioned, the obligations contained in articles 192 and 194(2) have been found to constitute obligations of due diligence, and some States have suggested that due diligence applies more broadly.³⁶ I hope to have shown that, while it may be true in general that, as the Seabed Chamber put it, due to their variable content, due diligence obligations “may not easily be described in precise terms”,³⁷ that does not apply in the calamitous circumstances at issue in this advisory opinion request. It is *not* the case, therefore, that the content of the due diligence obligations at issue here is “highly general,” as

²⁹ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 1, para. 14.

³⁰ *Id.*, article 2(a).

³¹ *Id.*, article 2, para. 2; see also France Written Statement, para. 108.

³² *Gabčíkovo-Nagymaros* Judgment, para. 140; *Area* Advisory Opinion, para. 117; see also COSIS Written Statement, paras. 337–340.

³³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 10, paras. 5–7; Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I) (Annex I) [Rio Declaration], Principle 15.

³⁴ *Area* Advisory Opinion, para. 131.

³⁵ African Union Written Statement, para. 229.

³⁶ See European Union Written Statement, para. 14; Mauritius Written Statement, para. 69; Mozambique Written Statement, para. 3.56; New Zealand Written Statement, para. 57; Sierra Leone Written Statement, para. 50; United Kingdom Written Statement, para. 68.

³⁷ *Area* Advisory Opinion, para. 117; *SRFC* Advisory Opinion, para. 132.

some written statements suggest.³⁸ Instead, it is surely right that, in the context of greenhouse gas emissions and climate change, the relevant standards are objective,³⁹ specific and “particularly severe”.⁴⁰

Further, regardless of how you characterize the applicability of due diligence in the context of UNCLOS, the text of UNCLOS in Part XII goes beyond due diligence. In particular, article 194(1) could not be clearer and stronger regarding the stringency of the obligations placed upon States Parties, as Professor Thouvenin will explain shortly.

So far, I have shown that due diligence obligations in Part XII are obligations with objective, science-driven parameters. I also noted earlier that due diligence is contextual in that it may be modulated by factors that are specific to the obligated State. Contrary to what appears to be suggested in some written statements,⁴¹ this does not mean that States have unbounded discretion in complying with their obligations under Part XII. While contextual, the parameters of due diligence obligations remain objective.

Mr President, members of the Tribunal, as I mentioned in my discussion of the parameters that determine the stringency of the due diligence obligations incumbent on a given State in a given situation, it is generally accepted that State’s capacities are a key factor. This consideration is particularly relevant to the respective obligations of developed and developing countries,⁴² which may have a relatively greater or lesser capacity to combat marine pollution and protect the marine environment. It is well established that “the degree of care expected of a State with a well-developed economy and human and material resources ... is different from States which are not so well placed.”⁴³

Furthermore, the standard of due diligence must be appropriate and proportional to the degree of risk of transboundary harm that activities pose,⁴⁴ and so it is both logical and just that industrialized and developed States should bear more demanding obligations with respect to the prevention of harm to the marine environment from greenhouse gas emissions.⁴⁵ As detailed in COSIS’s written statement, industrialized and developed States play an outsized role in generating greenhouse gas emissions and associated damage to the marine environment.⁴⁶ A related idea has found expression in the principle of common but differentiated responsibilities,⁴⁷ which similarly recognizes that a State’s individual circumstances may affect what can reasonably be expected of it.

To repeat, the contextual nature of the due diligence standard does not render it subjective. States’ particular circumstances are individual, but nonetheless objective, factors. And although States do retain a certain margin of discretion as to the precise measures to be

³⁸ See e.g., European Union Written Statement, para. 40.

³⁹ See Belize Written Statement, para. 70.

⁴⁰ France Written Statement, para. 107.

⁴¹ See e.g., Australia Written Statement, para. 48; Canada Written Statement, para. 58; Chile Written Statement, para. 96; Indonesia Written Statement, para. 68; European Union Written Statement, para. 24; United Kingdom Written Statement, para. 69.

⁴² See European Union Written Statement, para. 73; France Written Statement, para. 113; International Union for Conservation of Nature Written Statement, paras. 190–191, 194; Singapore Written Statement, para. 58.

⁴³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 17.

⁴⁴ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 11.

⁴⁵ See COSIS Written Statement, para. 301.

⁴⁶ *Id.*

⁴⁷ See UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I) (“Rio Declaration”), Principle 7; see also Brazil Written Statement, para. 18; Egypt Written Statement, para. 92; France Written Statement, para. 161; Rwanda Written Statement, para. 220; Singapore Written Statement, para. 35.

adopted,⁴⁸ what measures to take “is *not* ... purely a question for the subjective judgment of the party.”⁴⁹ Article 193 of UNCLOS underscores the bounded nature of national discretion by stipulating that States’ sovereign rights are to be exercised “*in accordance with* their duty to protect and preserve the marine environment.”⁵⁰

In sum, the objective parameters of due diligence, combined with the high probability of disastrous harm occasioned by climate change, limit the margin of national discretion under UNCLOS.⁵¹ It stands to reason that measures must be adopted by States that can actually “obtain this result”⁵² of averting calamity, determined on an objective basis and allowing for States’ particular national circumstances.

And so, notwithstanding the relevance of national circumstances, the required degree of care is proportional to the degree of hazard.⁵³ For States Parties to UNCLOS, this central point keeps the standard of due diligence tightly connected to what is objectively required to protect and preserve the marine environment and to ensure the prevention of damage from climate change. As the Study Group of the International Law Association observed in its report on due diligence in international law, “discretion in the choice of means can be limited” because “a specific type or measure is indispensable to avoid harm.”⁵⁴

Further, the fact that “the risks of harm to the marine environment resulting from climate change are dependent on global concentrations of greenhouse gas emissions in the atmosphere” does *not* mean, as has been suggested to the Tribunal, that “it is not possible to determine the standard of conduct, or the ‘necessary’ measures, required of an individual State in isolation from the collective measures [that are] required.”⁵⁵ As the ICJ observed in the *Bosnian Genocide* case, where action by more than one State is required to prevent a certain outcome, each individual State is nonetheless obligated to “take all measures ... which were within its power.”⁵⁶

Cooperation is essential in the context of marine environmental protection, as this Tribunal has reiterated on a number of occasions. But cooperation does *not* absolve States, much less States with a well-developed economy and human and material resources,⁵⁷ from their individual obligations to adopt rules and measures that are capable of protecting the marine environment from harm due to greenhouse gas emissions and the effects of climate change. Whereas it may be incumbent on States to coordinate their efforts, each State remains subject to its individual obligations under Part XII.

That assessment applies even more so when a cooperative arrangement is premised upon national discretion regarding greenhouse gas emission reductions. In fact, it is precisely the universally agreed parameters of general international law and UNCLOS that I have outlined that underscore that individual States do *not* have unbounded discretion to determine

⁴⁸ See European Union Written Statement, para. 40; see also COSIS Written Statement, para. 282.

⁴⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 1986 I.C.J. Reports 1986, p. 14, para. 282 (citations and internal quotation marks omitted; emphasis added).

⁵⁰ Alan Boyle & Catherine Redgwell, *INTERNATIONAL LAW AND THE ENVIRONMENT* (2021), p. 511 (emphasis added).

⁵¹ See also COSIS Written Statement, paras. 284, 289.

⁵² *Area Advisory Opinion*, para. 110.

⁵³ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 18.

⁵⁴ International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 7–8.

⁵⁵ New Zealand Written Statement, para. 70 (addition mine for flow).

⁵⁶ *Bosnian Genocide*, para. 430.

⁵⁷ ILC, Commentaries on the Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), article 3, para. 17.

what measures are appropriate.⁵⁸ As Ms Amirfar will explain in her speech, the current scientific consensus around the 1.5°C temperature increase threshold provides an objective basis for the obligations that are incumbent upon States under Part XII.

Mr President, members of the Tribunal, allow me to sum up.

The conduct required of States Parties to UNCLOS under Part XII is informed, among other things, by due diligence obligations, as this Tribunal has confirmed with respect to articles 192 and 194(2).⁵⁹

The focus on conduct and due diligence obligations does *not* mean that States' obligations in relation to climate change under Part XII of UNCLOS are unspecified or discretionary. To the contrary, as Professor Thouvenin is about to detail for article 194, the clear text of the attendant obligations is quite specific and stringent as to what conduct is required in the context of climate change.⁶⁰

Distinguished members of the Tribunal, because the requirements of due diligence are both contextual and objective, they are especially well suited to a complex challenge like climate change. Quite appropriately, indeed, crucially, the greater the threat, scientific understanding of its severity and urgency, and capacity to address it, the greater the demands on States.

Building on its jurisprudence on Part XII of UNCLOS, this Tribunal has a historic opportunity to specify further what due diligence requires of States Parties in the face of the high probability of catastrophe that we face.

Mr President, honourable members of the Tribunal, this concludes my presentation on behalf of COSIS. I thank you for your kind attention. And may I ask that you please invite Professor Thouvenin to the podium.

THE PRESIDENT: Thank you, Ms Brunnée.

I now give the floor to Mr Thouvenin to make his statements, of course. You have the floor, sir.

⁵⁸ *South China Sea Award*, paras. 941, 959; International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 8–10.

⁵⁹ See *SRFC Advisory Opinion*, paras. 125, 128–132; *Area Advisory Opinion*, paras. 116–117.

⁶⁰ See COSIS Written Statement, paras. 177, 222.

Exposés de la Commission des petits États insulaires sur le changement climatique et le droit international (suite)

EXPOSÉ DE M. THOUVENIN

[TIDM/PV.23/A31/3/Rev.1, p. 15–26]

Monsieur le Président, Mesdames et Messieurs les juges, c'est un immense honneur pour moi de m'adresser à votre Tribunal ce jour, et je remercie vivement la Commission des petits États insulaires ici présente de m'avoir confié la tâche de vous présenter certains de ses arguments. Je le fais avec la conscience de la responsabilité qui est la nôtre dans la présente situation.

Ma tâche, comme la vôtre, est de déterminer les obligations des États Parties pour faire face au phénomène de pollution du milieu marin, celui-là même qui a permis l'éclosion de la vie sur notre planète, et conditionne la survie de ce groupe magnifique qu'on appelle l'humanité.

Vous venez d'entendre la professeure Brunnée expliquer ce que recouvre la diligence due qui est généralement attendue des États dans le contexte de la mise en œuvre des obligations qui leur incombent en vertu de la partie XII de la Convention.

Mais l'article 194 de la Convention, qui est au cœur de la partie XII de la Convention, va bien plus loin. Son texte est clair, pour peu qu'on veuille bien le lire de bonne foi. Il impose aux États des obligations directes et immédiates, que l'on peut considérer comme sévères, pour reprendre un adjectif utilisé à bon escient par la France. Il revient au Tribunal de préciser dans quelle mesure elles se rapportent aux émissions atmosphériques de gaz à effet de serre qui, chacun l'a bien compris, génèrent une pollution du milieu marin.

Comme le Tribunal le sait, l'article 194 est composé de cinq paragraphes. J'insisterai pour ma part sur les trois premiers.

Ce faisant, je démontrerai :

a) premièrement que, parce que la science nous apprend que le rejet de gaz à effet de serre dans l'atmosphère entraîne une pollution du milieu marin, l'article 194 1) oblige les États à concevoir et adopter toutes les mesures objectivement nécessaires, au sens d'indispensables, pour réduire et maîtriser les émissions de gaz à effet de serre et leur présence massive dans l'atmosphère en vue de mettre un terme à cette pollution. L'intensité de cette obligation varie selon les capacités respectives des États, lesquelles s'évaluent de manière objective au regard du niveau de développement et des ressources de chacun d'eux ;

b) deuxièmement que, par l'article 194 2), chacun des États Parties s'est engagé à prendre toutes les mesures objectivement nécessaires, au sens d'indispensables, pour que les émissions atmosphériques de gaz à effet de serre qui relèvent de leur juridiction ou de leur contrôle ne causent aucun dommage significatif par pollution à d'autres États, y compris, mais pas seulement, à leur environnement, et à prendre également toutes les mesures objectivement nécessaires, au sens d'indispensables, pour que ces émissions ne polluent pas la haute mer au-delà des zones économiques exclusives ;

c) enfin, du moins pour ce qui concerne mon exposé, je rappellerai que par l'article 194 3), les États Parties se sont engagés à ce que « toutes les mesures nécessaires » mentionnées aux paragraphes précédents du même article visent toutes les sources de pollution du milieu marin. En particulier, chacun des États Parties s'est engagé à prendre des mesures afin de prévenir, réduire et maîtriser la pollution d'origine tellurique, celle des navires, ainsi que la pollution d'origine atmosphérique ou transatmosphérique.

Monsieur le Président, permettez-moi de projeter au profit du Tribunal le texte du premier paragraphe de l'article 194 :

Les États prennent, séparément ou conjointement selon qu'il convient, toutes les mesures compatibles avec la Convention qui sont nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin, quelle qu'en soit la source ; ils mettent en œuvre à cette fin les moyens les mieux adaptés dont ils disposent, en fonction de leurs capacités, et ils s'efforcent d'harmoniser leurs politiques à cet égard.

C'est un texte d'une grande clarté, mais je vais y revenir en détail.

Le constat qu'il est immédiatement loisible de faire est que le premier paragraphe est composé de deux blocs qui s'articulent logiquement. Le premier fait état d'une obligation nette et précise :

Les États prennent, séparément ou conjointement [...] toutes les mesures [...] nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin, quelle qu'en soit la source.

Le second bloc précise les moyens que les États sont tenus de mettre en œuvre pour répondre à leur obligation :

ils mettent en œuvre à cette fin les moyens les mieux adaptés dont ils disposent, en fonction de leurs capacités, et ils s'efforcent d'harmoniser leurs politiques à cet égard.

Quatre éléments clés en ressortent, que l'on peut résumer ainsi :

Les États : a) ont l'obligation de « prendre, séparément ou conjointement »,
b) « toutes les mesures »,
c) « nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin »,
d) correspondant aux « moyens les mieux adaptés dont ils disposent, en fonction de leurs capacités ».

Si vous me le permettez, Monsieur le Président, je vais revenir sur chacun de ces éléments clés.

Premièrement, les États « prennent » des mesures. C'est un impératif, une obligation, pas une suggestion ni une recommandation ou un souhait. La formule n'est pas « soft ». Elle impose aux États d'adopter une conduite bien définie.

L'obligation est de prendre des mesures « séparément ou conjointement selon qu'il convient », dit le texte. La formule très large « selon qu'il convient » signifie, par exemple, que si des mesures « conjointes », qui apparaîtraient *a priori* les plus efficaces, ne peuvent pas être prises, il « convient » de prendre les mesures nécessaires séparément. En ce qui concerne la pollution du milieu marin par l'émission atmosphérique de gaz à effet de serre, les États ne sauraient donc se libérer de leurs obligations individuelles de la prévenir, la réduire et la maîtriser, sous prétexte qu'une action conjointe conviendrait mieux, ou encore pour la raison que d'autres États ne prennent pas toutes les mesures nécessaires.

La Cour suprême des Pays-Bas a très correctement fait valoir ce point en affirmant, dans l'affaire *Urgenda*, que

each reduction of greenhouse gas emissions has a positive effect on combatting dangerous climate change as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual States does not help because other countries will continue

their emissions cannot be accepted for this reason either: no reduction is negligible.¹

Dans le même sens, la Cour constitutionnelle d'Allemagne a récemment jugé que

the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. ...The state may not evade its responsibility here by pointing to greenhouse gas emissions in other states.²

L'article 194 1) ne dit certainement pas le contraire.

Deuxièmement, les États doivent prendre « toutes les mesures ». Le terme important ici est « toutes ». Le terme « toutes » a fait l'objet d'une clarification dans l'affaire de l'*Application de la Convention internationale sur la répression du terrorisme et de la Convention internationale pour l'élimination de la discrimination raciale, Ukraine c. Russie*. Selon la Cour internationale de Justice dans cette affaire, le sens ordinaire de ce terme vise « de manière générale » ce qu'il détermine³, et il n'y a aucune justification à en limiter la portée lorsque la convention dans laquelle il est utilisé ne contient « aucun élément de nature à exclure quelque catégorie [...] que ce soit. »⁴

Tel qu'ils sont utilisés dans l'article 194 1), les termes « toutes les mesures [...] nécessaires » signifient donc que les États n'ont pas seulement l'obligation de prendre certaines mesures, un certain nombre de mesures, « des » mesures, ou encore « les » mesures qu'ils jugeraient pertinentes. Le sens du texte est comminatoire : les États doivent prendre « toutes » les mesures « nécessaires », sans exclure aucune d'entre elles dès lors qu'elles sont matériellement ou formellement « nécessaires ». Autrement dit, aucune mesure nécessaire ne peut être écartée, pour quelque raison que ce soit.

Par ailleurs, toutes formes et tous types de mesures sont visés : l'adoption de lois, règlements, décisions, bien sûr, mais encore toute autre action matérielle, financière, scientifique, ou autre, dès lors qu'elle est nécessaire pour prévenir, réduire et maîtriser la pollution du milieu marin. Au demeurant, l'article 207 prévoit explicitement l'adoption « des lois et règlements pour prévenir, réduire et maîtriser la pollution du milieu marin d'origine tellurique », ainsi que « toutes autres mesures qui peuvent être nécessaires » par rapport aux lois et règlements. Cela comprend naturellement là encore les mesures financières. Et pour garantir l'application de ces mesures, l'article 213 dispose que « [l]es États assurent l'application des lois et règlements adoptés conformément à l'article 207 ».

L'article 212 exige également des lois et règlements et autres mesures nécessaires pour ce qui concerne la pollution d'origine atmosphérique ou transatmosphérique, tandis que l'article 222 oblige les États Parties à assurer l'application des lois et règlements qu'ils ont adoptés conformément à l'article 212.

J'en viens, Monsieur le Président, Mesdames et Messieurs les juges, à la question de savoir ce que signifie « prévenir, réduire et maîtriser la pollution du milieu marin ».

Il faut reconnaître que la formule est *a priori* déroutante. Prévenir la pollution du milieu marin signifie l'empêcher. Je note d'ailleurs que dans la sentence du *Rhin de fer*, la « *duty to*

¹ Supreme Court of the Netherlands, *Urgenda v. the Netherlands*, No. 19/00135, 20 December 2019, pt 5.7.8: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007>.

² BVerfG, Order of the First Senate, 24 March 2021, 1 BvR 2656/18, paras. 202–203 : https://www.bundesverfassungsgericht.de/e/rs20210324_1bvr265618en.html.

³ *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie)*, Arrêt – Exceptions préliminaires, 8 novembre 2019, par. 61.

⁴ Ibid.

prevent » mentionnée dans la sentence en anglais est traduite dans la version française par l'« obligation d'empêcher »⁵. D'un autre côté, réduire et maîtriser la pollution revient à la limiter, pas à l'empêcher. Or, l'article 194 1) indique qu'il faut mettre en œuvre ces actions non pas alternativement, mais simultanément, comme l'indique la conjonction de coordination « et » qu'il retient, préférée à « ou », qu'il ne retient pas. La formule est donc ici nettement différente de celle retenue dans la sentence du *Rhin de fer*, dans laquelle est évoquée l'« obligation d'empêcher, ou au moins d'atténuer » la pollution⁶.

L'article 194 1) pose donc une obligation composite, qui est de prévenir, réduire et maîtriser la pollution du milieu marin, ce qui est parfaitement adapté à cette pollution. S'il est en effet évident que cette pollution ne saurait, en toutes situations, être immédiatement ou totalement empêchée, il est également clair que toute pollution du milieu marin peut être immédiatement réduite et maîtrisée, dans la perspective de parvenir à la prévenir. C'est cette obligation que contient cette disposition. Et elle est différente d'une obligation classique ou d'une obligation standard de prévention de la pollution, car elle précise dans sa formulation même le processus par lequel une prévention effective doit être atteinte.

Dans le cadre spécifique de la présente affaire, on peut constater que la prévention totale, absolue de la pollution du milieu marin par les émissions atmosphériques de gaz à effet de serre ne peut être qu'un objectif à moyen terme ; dès lors, l'obligation immédiate qui s'applique pour y parvenir est de la réduire et de la maîtriser, dans un processus visant à la prévenir au plus vite. Il ne s'agit donc certainement pas seulement de « réduire et maîtriser » la pollution sans plus se préoccuper de la « prévenir », mais bien de la réduire et de la maîtriser dans le cadre d'une action continue visant à parvenir progressivement à la prévenir. Le Tribunal songera peut-être à ce stade, un peu en avance sur nos plaidoiries, que l'on retrouve ici, comme en miroir, le concept de réduction progressive, mais dans un temps très contraint par l'urgence climatique, des émissions atmosphériques de gaz à effets de serre adopté dans le cadre de l'Accord de Paris⁷.

Mais permettez-moi, Monsieur le Président, de préciser encore le contenu de l'obligation posée par l'article 194 1). Comme je viens de le montrer, elle n'est pas une simple obligation de prévention sans autre précision, mais c'est une obligation de prendre toutes les mesures nécessaires pour « prévenir, réduire et maîtriser » la pollution du milieu marin.

La Cour internationale de Justice a eu l'occasion de préciser ce que l'obligation de prendre « toutes les mesures [...] nécessaires » pour qu'un résultat soit atteint exige une action directe et immédiate, du moins lorsque ledit résultat n'est pas « matériellement impossible ou [s'il n'] imposerait [pas] une charge hors de proportion avec [s]es avantages. »⁸ Dans l'affaire des *Immunités juridictionnelles de l'État*, l'Allemagne avait demandé à la Cour de juger que l'Italie avait l'obligation « de prendre, par les moyens de son choix, toutes les mesures nécessaires » afin que les décisions italiennes contrevenant à l'immunité souveraine de l'Allemagne soient privées d'exécution⁹. La Cour fit droit à cette requête et jugea que, puisque ce qu'elle demandait (ladite requête) n'était pas matériellement impossible ou ne créerait pas une charge excessive au regard des avantages, l'Italie avait l'obligation d'adopter une législation appropriée ou d'avoir recours à toute autre méthode de son choix également susceptible de produire le même effet¹⁰. Vous noterez naturellement que lorsque la Cour a

⁵ *Arbitrage du Rhin de fer (Belgique/Pays-Bas)*, affaire CPA No. 2003-02, sentence, 24 mai 2005, par. 59.

⁶ *Ibid.* Voir aussi *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, affaire CPA No. 2011-01, sentence finale, 20 décembre 2013, par. 112.

⁷ Voir Article 4 de l'Accord de Paris.

⁸ *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt, 3 février 2012, par. 137.

⁹ *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt, 3 février 2012, par. 15-17.

¹⁰ *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt, 3 février 2012, par. 137.

indiqué que l'Italie pouvait adopter la « méthode de son choix » pour s'acquitter de son obligation, elle ne laissait aucune discrétion quant au contenu de l'obligation devant être respectée, qui demeurait évidemment la même¹¹.

Vous noterez également que, dans l'affaire de l'interprétation de l'arrêt *Avena*, la Cour internationale de Justice avait adopté une mesure conservatoire ordonnant aux États-Unis de prendre toutes les mesures nécessaires pour que des personnes ne soient pas exécutées avant épuisement de certaines procédures¹², et elle avait par la suite jugé que cette obligation avait été violée, puisqu'une des personnes visées avait été exécutée sans que les procédures indiquées par la Cour aient été suivies¹³.

De là, Monsieur le Président, Mesdames et Messieurs les juges, on peut sans doute considérer que l'obligation de l'article 194 1), est une obligation directe, immédiate, qui est d'atteindre un résultat précis qui n'est ni matériellement impossible ni disproportionné, à savoir prendre, c'est-à-dire concevoir et mettre en œuvre, toutes les mesures nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin.

Ceci dit, Monsieur le Président, est-il exact, comme cela semble soutenu par certains États et autres intervenants dans cette procédure, que la détermination de « toutes les mesures [...] nécessaires » relève de l'appréciation discrétionnaire des États¹⁴ ? Cela n'est pas le cas, pour au moins deux raisons.

D'abord, parce que le terme « nécessaire » signifie « indispensable ». C'est ce qu'a constaté l'organe d'appel de l'Organisation mondiale du commerce, pour lequel :

« Le mot “nécessaire” désigne normalement quelque chose “dont on ne peut se passer, qui est requis, essentiel, indispensable”. »¹⁵

Or, bien entendu, ce qui est « indispensable » ne se détermine pas discrétionnairement, mais objectivement.

Ensuite, parce que la Cour internationale de Justice a déjà interprété la notion de « nécessaire » en jugeant que

« la question de savoir si une mesure donnée est “nécessaire” ne “relève pas de l'appréciation subjective de la partie intéressée” [...], et peut donc être évaluée par la Cour. »¹⁶

C'est donc une évaluation objective qui commande la détermination de ce que sont toutes les mesures nécessaires que les États doivent adopter pour prévenir, réduire et maîtriser la pollution du milieu marin. Maître Amirfar développera ce point tout à l'heure. Ce qu'il est important de retenir ici est que dès lors que des mesures sont objectivement nécessaires, elles doivent être prises.

Passons au quatrième élément du texte, qui appelle les États à mettre en œuvre « les moyens les mieux adaptés dont ils disposent, en fonction de leurs capacités ». Les moyens à

¹¹ *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant))*, arrêt, 3 février 2012, par. 139, point 4).

¹² *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique)*, Ordonnance – Demande en indication de mesures conservatoires, 16 juillet 2008, par. 80.

¹³ *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique)*, Arrêt – 19 janvier 2009, par. 52. Voir P. D'argent, « Les obligations internationales », *Recueil des Cours de l'Académie de droit international de La Haye*, Vol. 417, 2021, par. 222, p. 157.

¹⁴ Voir, notamment, l'exposé écrit de l'Union européenne, par. 40, 66 et 76. Voir aussi l'exposé écrit de Singapour, par. 32. Voir aussi, *contra*, exposé écrit du Portugal, par. 78-79 ; exposé écrit de la République démocratique du Congo, par. 252-253 ; et exposé écrit soumis par Opportunity Green, par. 55, point b., et par. 68.

¹⁵ WT/DS161/AB/R – WT/DS169/AB/R, 11 décembre 2000, *Corée – Mesures affectant les importations de viande de bœuf fraîche, réfrigérée et congelée*, rapport de l'Organe d'appel, par. 160.

¹⁶ *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique)*, arrêt – fond, 6 novembre 2003, par. 43 ; *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique)*, arrêt, 30 mars 2023, par. 106.

mettre en œuvre se rapportent au contenu matériel des mesures que les États doivent adopter pour répondre à leurs obligations. Du reste, les termes « moyens les mieux adaptés » renvoient habituellement à des techniques, des technologies ou des moyens scientifiques ou financiers¹⁷.

En l'occurrence, il n'est pas nécessaire d'être un grand savant pour comprendre que l'un des moyens les « mieux » adaptés pour prévenir, réduire et maîtriser la pollution du milieu marin causé par les émissions atmosphériques de gaz à effet de serre est de les réduire le plus rapidement possible, en vue de prévenir au plus tôt la pollution qu'ils génèrent. Je note que c'est également le moyen actuellement le mieux adapté, de l'avis de tous, pour réduire la progression du réchauffement climatique.

Quant à la référence au fait que les États doivent agir « en fonction de leurs capacités », votre Tribunal a déjà interprété cette mention dans l'avis consultatif sur la Zone, en relation avec le principe de précaution posé par la première phrase du principe 15 de la Déclaration de Rio selon laquelle :

« Pour protéger l'environnement, des mesures de précaution doivent être largement appliquées par les États selon leurs capacités. »

Votre Tribunal a considéré que ceci « implique des variations possibles dans l'application de l'approche de précaution au vu des capacités respectives de chaque État »¹⁸.

Il ressort enfin de votre avis que ces variations s'apprécient de manière objective, au regard notamment du niveau de développement et des ressources chaque État¹⁹.

Il y a donc un degré dans l'obligation d'adopter « toutes les mesures [...] nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin ». En fonction de leurs capacités, certains États ont davantage d'efforts à faire pour prévenir, réduire et maîtriser la pollution du milieu marin que d'autres. On retrouve, là encore, comme en miroir, un concept présent dans l'Accord de Paris, notamment à l'article 2 2), qui reconnaît le principe des responsabilités communes, mais différenciées et tient compte des capacités respectives de chaque État.

Monsieur le Président, Mesdames et Messieurs les Juges, pour conclure sur ce point, l'article 194 1) oblige les États à adopter toutes les mesures objectivement nécessaires, au sens d'indispensables, pour réduire et maîtriser les émissions de gaz à effet de serre qui relèvent de leur juridiction, en vue de cesser au plus tôt leur rejet dans l'atmosphère, qui provoque, la science nous le dit, la pollution du milieu marin. Cette obligation voit son intensité varier selon les capacités des États, capacités qui s'évaluent de manière objective au regard notamment du niveau de développement et des ressources de chaque État.

Je me tourne à présent vers le paragraphe 2 de l'article 194, qui retranscrit sous forme d'obligation conventionnelle une obligation qui est déjà très profondément ancrée dans le droit international général, comme cela a été rappelé dans nos observations écrites²⁰. Vous en voyez le texte à l'écran :

Les États prennent toutes les mesures nécessaires pour que les activités relevant de leur juridiction ou de leur contrôle le soient de manière à ne pas causer de préjudice par pollution à d'autres États et à leur environnement et pour que la pollution résultant d'incidents ou d'activités relevant de leur juridiction ou de leur contrôle ne s'étende pas au-delà des zones où ils exercent des droits souverains conformément à la Convention.

¹⁷ Voir, par exemple, art. 2, par. 11, de la Directive 96/61/CE du Conseil du 24 septembre 1996 relative à la prévention et à la réduction intégrées de la pollution.

¹⁸ *Responsabilités et obligations des États dans le cadre d'activités menées dans la Zone, avis consultatif, 1^{er} février 2011, TIDM Recueil 2011*, par. 129.

¹⁹ *Responsabilités et obligations des États dans le cadre d'activités menées dans la Zone, avis consultatif, 1^{er} février 2011, TIDM Recueil 2011*, par. 151-163.

²⁰ Voir exposé écrit de la Commission des petits États insulaires, par. 206-207.

Dans son sens ordinaire, et de manière synthétique, cette disposition contient l'obligation pour les États d'adopter toutes les mesures nécessaires pour empêcher que ce qui se passe sous leur juridiction ou leur contrôle affecte les tiers ou la haute mer au-delà des zones économiques exclusives.

Je vais l'aborder en trois temps, d'abord, et brièvement, en évoquant la nature de l'obligation, ensuite en détaillant l'obligation de ne pas créer de préjudice aux tiers, et enfin en exposant le sens et la portée de l'obligation de ne pas polluer la haute mer.

Monsieur le Président, comme l'a décrit ma collègue la professeure Brunnée, l'article 194 2) a été considéré par votre Tribunal comme comportant une obligation de diligence due. Le raisonnement qui a conduit à cette conclusion de votre Tribunal reposait surtout sur le verbe « to ensure » qui apparaît dans la version anglaise de l'article 194 2), verbe que l'on retrouve à l'article 139 1) de la Convention.

Mais les deux formules présentes dans ces deux articles sont à vrai dire bien différentes. L'article 139 1), dispose que « States Parties shall have the responsibility to ensure » que les activités sur lesquelles ils ont juridiction sont exercées conformément aux exigences de la Convention. C'est de « responsibility to ensure » dont il est question. Par contraste, l'article 194 2) ne retient pas cette formule, mais celle-ci :

« States shall take all measures necessary to ensure » que les activités sur lesquelles ils ont juridiction ne causent pas de dommages.

On retrouve cette différence de formulation dans la version française. L'article 139 1) se lit : « Il incombe aux États Parties de veiller à », tandis que le texte de l'article 194 2) se lit : « Les États prennent toutes les mesures nécessaires pour ».

Ainsi, si, comme vient de l'exposer la professeure Brunnée, la diligence due est incluse dans l'article 194 2), la formulation de cette disposition est encore plus exigeante que ce qui découle de la diligence due pour peu que ce soit possible. Elle impose aux États de prendre « toutes les mesures nécessaires » pour faire en sorte que les événements qui doivent être évités ne se produisent pas, ce qui est, pour reprendre les termes de votre Tribunal au paragraphe 122 de votre avis sur la *Zone*, une « obligation directe ». ²¹

Cette obligation est, pour une part, de ne pas causer de préjudice par pollution à d'autres États et à leur environnement.

La pollution visée ici est plus large que la « pollution du milieu marin » telle que définie à l'article 1 1) 4) de la Convention, puisque ces termes « du milieu marin » sont omis, et que lorsque l'article 194 entend viser la pollution du milieu marin, il le fait expressément. Ici, le texte parle de la pollution causée aux États et à « leur » environnement, sans autre précision. On peut donc penser que « pollution », au sens de l'article 194 2), se définit de manière plus large que la « pollution du milieu marin », tout en demeurant bien entendu dans le champ d'application de la Convention. La Commission du droit international avait elle-même considéré que la pollution des plages était visée. Selon la CDI – je cite un de ses rapports en 2001 :

La pollution de la haute mer en violation de l'article 194 de la Convention des Nations Unies sur le droit de la mer peut avoir une incidence particulière sur un ou plusieurs États dont les plages peuvent être polluées par des résidus toxiques, ou dont les pêcheries côtières peuvent être fermées. Dans un tel cas, indépendamment de l'intérêt général des États Parties à la Convention [...] à voir préservé

²¹ *Responsabilités et obligations des Etats dans le cadre d'activités menées dans la Zone, avis consultatif, 1^{er} février 2011, TIDM Recueil 2011, par. 121.*

l'environnement marin, les États Parties côtiers concernés devraient être considérés comme lésés par la violation.²²

La pollution en cause ici peut donc englober, par exemple, la pollution générée par les ordures des navires (Convention Marpol, annexe V), ou la pollution de l'atmosphère par les navires (Convention Marpol, annexe VI). Ce ne sont que des exemples.

Le préjudice n'est pas qualifié par le texte. Pour autant, dans la plupart des conventions sur la protection de l'environnement, il s'entend comme étant un préjudice d'une certaine importance²³. La Cour internationale de Justice a d'ailleurs relevé dans l'affaire des *Usines de pâte à papier* qu'il résulte du droit international général que

l'État est tenu de mettre en œuvre tous les moyens à sa disposition pour éviter que les activités qui se déroulent sur son territoire, ou sur tout espace relevant de sa juridiction, ne causent un préjudice sensible à l'environnement d'un autre État.²⁴

Quant à la Commission du droit international, elle a retenu dans son projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses la notion de « dommage transfrontière significatif », en précisant que :

« Il doit être entendu que “significatif” est plus que “détectable”, mais sans nécessairement atteindre le niveau de “grave” ou “substantiel”. Le dommage doit se solder par un effet préjudiciable réel sur des choses telles que la santé de l'homme, l'industrie, les biens, l'environnement ou l'agriculture dans d'autres États. Ces effets préjudiciables doivent pouvoir être mesurés à l'aide de critères factuels et objectifs. »²⁵

Monsieur le Président, la Commission des petits États insulaires, en accord avec des États ayant soumis des exposés écrits dans le cadre de la présente procédure²⁶, considère que cette définition du dommage correspond à celle qu'il convient de retenir aux fins de l'interprétation de l'article 194 2).

Les activités relevant de la juridiction ou contrôle des États Parties ne doivent pas « causer de préjudice par pollution à d'autres États et à leur environnement ». Cette mention signifie que ce sont non seulement les dommages à l'environnement des autres États qui sont visés, mais aussi que ce sont les dommages de toute nature causés aux États par la pollution relevant d'autres États. Par exemple, dans la mesure où la montée du niveau des mers génère des dommages catastrophiques qui ne sont pas uniquement environnementaux, c'est l'ensemble de ces dommages que les États ont l'obligation de prévenir en adoptant « toutes les mesures nécessaires ».

Monsieur le Président, Mesdames et Messieurs les juges, l'article 194 2) ne vise pas seulement à protéger les États tiers de tout préjudice significatif qui leur serait causé par la pollution des autres, comme je viens de l'indiquer ; il impose aussi aux États de prendre toutes les mesures nécessaires pour que la pollution résultant d'incidents ou d'activités relevant de leur juridiction ou de leur contrôle ne s'étende pas à la haute mer au-delà des zones économiques exclusives. Je laisserai de côté ici l'hypothèse de l'incident, qui ne semble pas pertinent dans la présente réflexion, pour me concentrer sur les activités.

²² *Rapport de la Commission du droit international sur les travaux de sa cinquante-troisième session*, A/56/10, ACDI, 2001, vol. II, partie 2, p. 127, par. 12.

²³ Voir les instruments mentionnés dans l'exposé écrit de la Commission des petits États insulaires, par. 231.

²⁴ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, 20 avril 2010, par. 101.

²⁵ Projet d'Articles sur la prévention des dommages transfrontières résultant d'activités dangereuses et commentaires y relatifs, 2001, *Annuaire de la Commission du droit international*, 2001, vol. II (2), Commentaire du projet d'article 2, p. 417, par. 4.

²⁶ Voir notamment exposé écrit de la France, par. 108 ; ainsi que exposé écrit de Maurice, par. 78-79 et 92, point d.

Telle qu'elle est rédigée, cette disposition ne se prononce pas sur le fait que des États pourraient éventuellement laisser persister sur leur territoire des activités générant une pollution du milieu marin localisée dans des zones où ils exercent des droits souverains. La disposition ne dit rien à cet égard. Mais si les États se livrent à ce type d'activité, cette disposition, c'est son objet, les engage à prendre toutes les mesures nécessaires pour que cette pollution ne se répande pas au-delà de leurs zones, ce qui vise en particulier la haute mer au-delà des zones économiques exclusives.

Le cas typique est la pollution plastique ; on voit bien que toutes les mesures nécessaires ne sont pas prises pour empêcher la pollution par le plastique, qui commence par envahir les littoraux, avant de se répandre partout en mer, ce qui est dramatique. Un nouveau traité est en discussion pour faire face à ce fléau, mais il est clair que la Convention des Nations Unies sur le droit de la mer dispose déjà d'une disposition extrêmement claire permettant de déterminer les obligations des États pour y faire face.

Il en va de même de la pollution par la cause du réchauffement climatique que sont les émissions atmosphériques de gaz à effet de serre, qui se répand dans l'ensemble des océans. Il ressort de l'article 194 2) que les États doivent prendre « toutes les mesures nécessaires », au sens d'objectivement indispensables, pour ne pas laisser un tel phénomène se produire.

Monsieur le Président, comme je l'ai déjà souligné, le paragraphe 1 de l'article 194 oblige les États à prendre toutes les mesures nécessaires – au sens d'indispensables – pour prévenir, réduire et maîtriser la pollution du milieu marin. Le paragraphe 3 de l'article 194 confirme qu'aucune source de pollution n'échappe à cette obligation.

Les exposés écrits reçus dans le cadre de la présente procédure suggèrent que les sources de pollution les plus pertinentes en l'espèce sont celles d'origine tellurique – c'est-à-dire la pollution provenant de « sources ponctuelles et diffuses à terre, à partir desquelles des substances ou de l'énergie atteignent la zone maritime, par l'intermédiaire des eaux, de l'air ou directement depuis la côte »²⁷ – je cite là la définition de la pollution d'origine tellurique de la Convention pour la protection du milieu marin de l'Atlantique du Nord Est, la Convention OSPAR, à son article 1^{er} e). Est également pertinente la pollution plus largement d'origine atmosphérique ou transatmosphérique.

Ces sources sont spécifiquement visées par l'article 194 3) a). Quant à la pollution par les navires, qui fait l'objet de l'alinéa b), elle ne saurait bien entendu pas davantage être négligée. Il me semble que ceci ne fait pas le moindre débat.

Pour m'en tenir ici à la pollution d'origine tellurique par les navires et atmosphérique ou transatmosphérique, les articles 207, 211 et 212 de la Convention énoncent respectivement une série d'obligations qui les concernent spécifiquement, telles que l'obligation qu'ont les États d'adopter des lois et règlements en tenant compte des règles, normes et pratiques et procédures internationalement convenues, de prendre toutes autres mesures nécessaires, et d'harmoniser leurs politiques au niveau régional afin de prévenir, réduire et maîtriser la pollution du milieu marin qui en émane. Les États ont également l'obligation, lorsqu'ils agissent par l'intermédiaire des organisations internationales compétentes ou des conférences diplomatiques, d'adopter des règles et normes, pratiques et procédures, visant le même objectif.

De manière complémentaire, et afin d'assurer un effet pratique aux obligations de la partie XII de la Convention, les articles 213 et 222 obligent les États à mettre en application les lois et règlements adoptés en vertu des articles 207 et 212.

Monsieur le Président, Mesdames et Messieurs les juges, ceci me conduit à conclure qu'il me semble avoir apporté la démonstration que les trois conclusions que j'annonçais dès l'introduction de mon propos sont confirmées. Je vous remercie de votre aimable attention et

²⁷ Article 1 e) de la Convention pour la protection du milieu marin de l'Atlantique du Nord-Est (Convention OSPAR).

vous prierais à présent ou après la pause de bien vouloir appeler à la barre Mme Catherine Amirfar.

THE PRESIDENT: Thank you, Mr Thouvenin.

I think that at this stage the Tribunal will withdraw for a break of 30 minutes. We will continue this hearing at 11.55. Thank you.

(Short break)

THE PRESIDENT: I now give the floor to Ms Amirfar to make her statement. You have the floor, Madam.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS AMIRFAR

[ITLOS/PV.23/C31/3/Rev.1, p. 24–35]

Mr President, honourable members of the Tribunal, good afternoon. It is a privilege to appear before you and on behalf of the Commission of Small Island States on this important occasion.

My task today is to present the Commission’s position on the first question before the Tribunal and in particular, to identify the specific obligations that States Parties have under the Law of the Sea Convention in respect of pollution of the marine environment by greenhouse gas emissions.

We submit that the answer to the first question flows from the clear text of the Convention, as well as from the unequivocal record of scientific evidence. The focus of my intervention today is the role of climate science in informing the content of States Parties’ obligations under Part XII with respect to greenhouse gas emissions.

The role of science under the Convention is multifaceted. As relevant to the UNCLOS framework, the best available science demonstrates that greenhouse gases constitute pollution of the marine environment under article 1(1)(4). The best available science demonstrates the actual and likely deleterious effects from greenhouse gas emissions under that definition and quantifies the risk and harms of such effects. The best available science provides thresholds and targets that must be reached to avoid such effects on the marine environment and can offer a menu of possible actions to States Parties to achieve that end. And while ultimately the science cannot select among these actions, this is where the legal framework of the Law of the Sea Convention steps in: it makes clear the requirements placed on States Parties as a matter of specific legal obligations, rather than as an exercise of political discretion.

Members of the Tribunal, to elucidate these points, I will proceed in three parts. First, I will address the obligations under article 194 as informed by the science. Second, I will explain how the science informs other obligations under Part XII of the Convention. And third, I will conclude with the Commission’s position on the States Parties’ specific obligations under the Convention in relation to the first question.

In short, the international consensus around the best available science demonstrates that avoiding the worst consequences of climate change on the marine environment requires limiting average global temperature rise to no more than 1.5°C above pre-industrial levels. The Law of the Sea Convention thus requires States Parties to take all measures necessary to do so, and to do so urgently.

Turning to my first point, I start with a basic premise: that the best available science stands as the objective and determinative metric that delineates the specific obligations of article 194. Article 194(1) requires, in strong terms, States Parties to “take . . . all measures . . . necessary” to prevent, reduce, and control marine pollution in the form of greenhouse gas emissions, “using the best practical means at their disposal and in accordance with their capabilities.” And as Professor Thouvenin just went through, what is “necessary” by virtue of the clear text is what is indispensable, and what is indispensable must be determined objectively. That objective basis is supplied by the best available science.

Article 194(2) requires – also in strong terms – that States Parties “shall take all measures necessary” to “ensure” that activities under their jurisdiction or control do not cause damage by greenhouse gases to other States and their environment. Professor Brunnée explained how the due diligence obligations contained in articles 192 and 194(2) require that States Parties exercise diligence depending on the level of risk and foreseeable harm, as measured on an objective basis. And as Professor Thouvenin explained, the wording of

article 194(2) is even more demanding. Here again, it is the best available science that informs the objective measures under article 194(2) necessary to “ensure” that activities do not cause transboundary damage. The measures considered sufficiently diligent, in the words of the Seabed Disputes Chamber’s *Area* Advisory Opinion, may change over time in line with “new scientific or technological knowledge”.¹

You heard yesterday the presentations of Dr Cooley and Dr Maharaj describing in plain language the devastating impacts of anthropogenic greenhouse gas emissions on the marine environment. It bears reminding that when it comes to climate change and the ocean, we are not dealing with a high risk of small harm; or a low risk of grave harm. We are dealing with a high risk of very significant harm as a matter of “high confidence”. And these impacts are current and only intensifying. Importantly, as scientific knowledge develops, those developments inform the obligations under the Convention to do what is “necessary” to prevent, reduce and control pollution under article 194(1) and to “ensure” activities do not cause damage by pollution under article 194(2). This is an aspect of the central and rigorous role played by developments in scientific and technical information in the interpretation of obligations under the Convention more generally, as demonstrated yesterday by Professor Okowa.

For purposes of my first point, I will start by addressing what the science has to say as to how pollution of the marine environment by greenhouse gas emissions links to global temperature rise, as well as the time scale associated with such pollution. I will then turn to the international standard based on that science and its implications for the specific obligations of States Parties under the Convention.

Turning to the link between marine pollution and global temperature rise, the international consensus around the best available science is manifest in the work of the Intergovernmental Panel on Climate Change, or the IPCC. The overwhelming majority of States’ written submissions addressing the merits of the questions before the Tribunal relied on the IPCC’s findings, for good reason. Its assessments reflect the consensus of hundreds of the world’s leading scientists. In granting the Nobel Peace Prize to the IPCC, the Nobel committee memorably acknowledged the critical importance of the IPCC’s work to, in the committee’s words, “build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are *needed* to counteract such change.”²

The reason for this acknowledgement has as much to do with the IPCC’s process and procedures, as with the rigor of its conclusions. The IPCC reviews thousands of scientific papers each year to distil “what is known about the drivers of climate change, its impacts and future risks, and how adaptation and mitigation can reduce those risks.”³ The IPCC makes the first and final drafts of its assessment reports available to the governments of each Member State to review and comment. The IPCC’s findings are thus the consensus not only of the global scientific community, but also incorporate the views of the 195 participating States.⁴

Earlier this year, the IPCC concluded its Sixth Assessment Cycle, which began in 2018 and was concluded this year. In coming to its conclusions, the IPCC speaks in terms of “very high”, “high”, “medium”, “low”, or “very low” confidence. As you heard from Drs Cooley and Maharaj yesterday, careful attention to evaluating uncertainty in the IPCC’s stated scientific conclusions underscores that its reports reflect the highest standards of scientific rigor.

When it comes to the negative impact of greenhouse gas emissions as marine pollution, the underlying problem is continuous, not binary. The IPCC concluded *with high confidence*

¹ *Area* Advisory Opinion, para. 117.

² *Intergovernmental Panel on Climate Change*, The Nobel Prize, <https://www.nobelprize.org/prizes/peace/2007/ipcc/facts/> (emphasis added).

³ *About the IPCC*, IPCC, <https://www.ipcc.ch/about/>.

⁴ https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc_members.pdf.

that “[e]very increment of global warming will intensify multiple and concurrent hazards.”⁵ With respect to the ocean and marine cryosphere in particular, the IPCC has “high confidence” that limiting global warming to 1.5 degrees as opposed to 2 degrees will: reduce increases in ocean temperature as well as associated ... decreases in ocean oxygen levels Consequently, limiting global warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans, as illustrated by recent changes to Arctic sea ice and warm-water coral reef ecosystems (high confidence).⁶

The IPCC also concluded with “high confidence” that the risks to small islands and low-lying coastal areas associated with sea-level rise – including saltwater intrusion, flooding, and damage to infrastructure – “are higher at 2°C compared to 1.5°C”.⁷

With respect to ocean acidification, the IPCC has “high confidence” that the level of ocean acidification due to increasing CO₂ concentrations associated with global warming of 1.5°C is projected to amplify the adverse effects of warming, and even further at 2°C, impacting the growth, development, calcification, survival, and thus abundance of a broad range of species, for example, from algae to fish.⁸

This chart from the IPCC’s Sixth Assessment Report shows the consequences associated with five areas that the IPCC has identified as “Reasons for Concern”, which include the gamut of impacts and risks to ocean ecosystems, including as Dr Cooley detailed yesterday, widespread ecosystem death and biodiversity loss. Generally speaking, as you can see here, for each Reason for Concern, temperature rise above 1.5°C represents a dramatic increase in the risk, moving from moderate to high. For example, with regard to some “unique and threatened systems” such as coral reefs, the IPCC identified, and I quote, “increasing numbers of systems at potential risk of severe consequences at global warming of 1.5°C above pre-industrial levels.”⁹

In fact, what we know is that in a world above 1.5°C, 70 to 90 per cent of tropical corals would disappear as a result of mass bleaching and mortality.¹⁰ This will have devastating effects on marine biodiversity, given that these coral reefs provide habitats for over one million species.¹¹ Framework organisms – that is, those that provide habitats for a large number of marine species – such as kelp forests, seagrass meadows, corals and mangroves will be at high risk of dying off due to increasingly frequent and severe marine heatwaves.¹² There would likely be ice free summers in the Arctic by 2050, risking habitat loss for many species including seals, whales, polar bears and seabirds.¹³ These are but a few examples drawn from the expert evidence of Dr Cooley and Dr Maharaj.¹⁴

I turn now to the timetable for action to mitigate the effects of climate change on the marine environment. The best available science tells us that we are dangerously close to exceeding the 1.5° limit.

⁵ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 12.

⁶ IPCC, *Summary for Policymakers*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 8.

⁷ *Id.*, p. 8.

⁸ IPCC, *Summary for Policymakers*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 9.

⁹ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 253.

¹⁰ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 179, 229–230 (Box 3.4).

¹¹ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 229–230 (Box 3.4).

¹² *Id.*, pp. 225–226.

¹³ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), pp. 205–206; IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 395, 432, Table 3.14.

¹⁴ See generally COSIS Written Statement, Annexes 4, 5.

The IPCC has calculated a “remaining carbon” budget, which estimates the total net amount of carbon dioxide that human activities can still release into the atmosphere while keeping global temperatures to a specified limit above pre-industrial levels.¹⁵

The chart on the screen reflects the IPCC’s assessment of the remaining carbon budget as of 2022. The IPCC found that attaining even a 50 per cent chance of limiting global warming to 1.5°C would require limiting the remaining carbon budget to a cumulative total of 500 billion tonnes of CO₂ in the years from 1 January 2020 onward, which you can see in the lower right hand of the chart.¹⁶ Currently, human activities are emitting around 40 billion tonnes of CO₂ into the atmosphere in a single year.¹⁷ The IPCC’s conclusions thus show that, without dramatic and urgent reductions in greenhouse gas emissions, the world will soon exceed our estimated remaining carbon budget with devastating consequences.¹⁸ That point is shockingly close: it will be reached within this decade.¹⁹

The IPCC has shown, and the vast majority of written statements submitted in this case concur,²⁰ that the only way to do avoid such devastating consequences is by swiftly and sharply decreasing greenhouse gas emissions.²¹ The IPCC assesses that, to achieve at least a 50 per cent chance of limiting warming to 1.5°C, States must reduce greenhouse gas emissions, as measured against 2019 levels, by at least 43 per cent by 2030, 60 per cent by 2035, 69 per cent by 2040 and 84 per cent by 2050.²² And as Dr Cooley explained yesterday, it may be impossible to recover from exceeding the 1.5-degree limit even if the world develops significant carbon-capture technology, which at present does not exist. Indeed, the best available science tells us there is currently no sign that these targeted reductions will be achieved, making the rapid and dramatic action to limit global temperature rise to 1.5°C all the more urgent.

In considering this science, it bears keeping in mind that a notable consequence of the IPCC’s lengthy review process is that its conclusions are based on data that are sometimes several years old. Climate projections have only gotten worse since the findings of the Sixth Assessment Cycle.²³ This fact, combined with the IPCC’s strict criteria for evaluating evidence, means that its findings about the nature or likelihood of climate impacts are often conservative. We have seen this play out, for instance, with respect to the Arctic and Antarctic ice sheets, which have experienced warming and loss at a much higher rate than previously predicted. This is one of the strongest warming trends on Earth, which destroys polar habitats, contributes to sea-level rise, distorts global ocean currents, and reduces the ice albedo effect by reflecting less heat back out of the atmosphere.²⁴

¹⁵ IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 777.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 20–21.

¹⁹ *Id.*

²⁰ See, e.g., African Union Written Statement, paras. 202, 206; Australia Written Submission, paras. 6, 9, 35; Bangladesh Written Submission, paras. 35, 45; Belize Written Statement, paras. 25, 26, Egypt Written Statement, paras. 73–74; European Union Written Submission, paras. 55; International Union for Conservation of Nature Written Statement, paras. 36–37; Mauritius Written Submission, para. 31; Micronesia Written Submission, paras. 50–51; Mozambique Written Submission, para. 3.67; Portugal Written Submission, para. 44, Rwanda Written Submission, paras. 108, 150; Sierra Leone Written Submission, para. 63; United Kingdom, paras. 69, 89(c) fn 234; United Nations Environment Programme Written Statement, paras. 47, 49(a); see also Paris Agreement, articles 2(1)(a), 4(1).

²¹ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 21–22.

²² *Id.*, pp. 12, 21–22.

²³ See International Union for Conservation of Nature Written Statement, paras. 81, 158.

²⁴ International Union for Conservation of Nature Written Statement, para. 141 (citing International Cryosphere Climate Initiative, *State of the Cryosphere 2022: Growing Losses, Global Impacts: We cannot negotiate with the melting point of ice* (2022)).

As a general matter, then, the IPCC has concluded with high confidence that keeping the average global temperature rise to within 1.5 degrees will reduce the risks of harm associated with even greater negative impact on the ocean and marine cryosphere. This is a critical point: in other words, an average global temperature rise of 1.5°C would not be “ok” with respect to pollution of the marine environment; on the contrary, even that increment of warming will likely give rise to serious deleterious effects to humans, fauna and flora. But the risks and magnitude of global, catastrophic harm grow significantly if the world exceeds a 1.5-degree temperature increase.

Although meeting the 1.5-degree threshold would be no panacea, neither is it arbitrary; rather, it is an evidence-based threshold that represents the international standard based upon the best available science around harm mitigation.

Much has been said in the written statements before the Tribunal on the import and relevance of the climate regime and the Paris Agreement. As Professor Mbengue explained yesterday, the question is not one of conflict or competition, or a hierarchy of obligations. Rather, the global climate regime in general, and the Paris Agreement in particular, evince the global consensus around the scientific understanding of climate change. Article 2(1)(a) of the Paris Agreement sets forth that States Parties should “pursue efforts to limit the temperature increase to 1.5°C”, “recognizing that this would significantly reduce the risks and impacts of climate change.”²⁵ Article 4(1) recognizes that in order to reach this temperature goal, States Parties should “aim to reach global peaking of greenhouse gas emissions as soon as possible” and “to undertake rapid reductions thereafter in accordance with best available science”.²⁶ Since the Paris Agreement was adopted, the States Parties to the UNFCCC – which include all States Parties to UNCLOS – have continually reaffirmed the critical importance of keeping to within 1.5°C in their annual Conference of the Parties, including in COP27.²⁷

The Paris Agreement and decisions of the Conference of the Parties to the UNFCCC confirm that the 1.5-degree limit reflects an international, science-backed threshold, and, as such, constitutes an internationally agreed rule, standard and recommended practice and procedure relevant to the interpretation of States Parties’ obligations under the Convention. This is in accordance with article 207(1), which deals with pollution from land-based sources, article 211(1) for pollution from vessels, and articles 212(1) and 212(3) for pollution from or through the atmosphere.

Before leaving this point, a word on the obligation for States Parties to the Paris Agreement to publish nationally determined contributions, or NDCs. A State’s NDC stands as a statement of intention to achieve the 1.5-degree temperature target, reflecting each State’s relative greenhouse gas emissions on a forward-looking basis. Some States, in their written statements before the Tribunal, come close to suggesting that their obligations under Part XII will be satisfied by publishing progressively ambitious NDCs.²⁸ But simply publishing an NDC, on its own, cannot satisfy the obligations under the Convention.²⁹

Indeed, currently NDCs are falling short. The IPCC graphic shown here depicts the existing and significant gap between the sum of current NDCs and the 1.5-degree temperature limit. The right-hand chart shows that to be on track to stay within 1.5°C, States must reduce annual emissions by 43 per cent from 2019 levels before 2030. Published NDCs will only get

²⁵ Paris Agreement, Art. 2(1)(a) (emphasis added).

²⁶ Paris Agreement, Art. 4(1) (emphasis added).

²⁷ COP27, Decision 21/CP.27, UN Doc. FCCC/CP/2022/10/Add.2 (2023), para. 7; UNFCCC-COP27, Decision 2/CP.27 (2022).

²⁸ Australia Written Statement, paras. 36–41, 46, 51; Canada Written Statement, paras. 42, 62; European Union Written Statement, paras. 28, 67–69, 92–94; United Kingdom Written Statement, para. 68–69; Singapore Written Statement, paras. 38–41.

²⁹ COSIS Written Statement, para. 364.

us to a 4 per cent reduction, and the trend from *implemented* NDCs shows that emissions are on track to actually *increase* by 5 per cent.³⁰ Indeed, just this past Friday, the UNFCCC Secretariat issued its first global stocktake on Paris Agreement commitments, which stated, “the window to keep limiting warming to 1.5°C is closing rapidly, and progress is still inadequate based on the best available science.”³¹ Publishing and implementing NDCs that are plainly insufficient to limit global average temperature to within 1.5°C cannot possibly satisfy the obligation under the Convention to take *all necessary measures* to prevent, reduce, and control pollution of the marine environment by greenhouse gas emissions, or to do the utmost in exercising due diligence consistent with the best available science.

In addition, the reality is that some pathways to an average increase limited to no more than 1.5 degrees around the end of the century still involve significant temporary increases above 1.5 degrees with devastating effects on the marine environment – in IPCC terms these are referred to as temperature “overshoot” scenarios.³² NDCs, considered individually and jointly, may thus be compliant with the Paris Agreement, but nevertheless would be inconsistent with obligations under the Convention. For example, even current levels of warming have caused widespread coral bleaching the world over.³³

Now, that is not to say that NDCs are irrelevant to the Law of the Sea Convention in this context: they are an internationally recognized means by which a State could set forth the measures it is taking relevant to mitigating the deleterious effects of climate change, and in so doing potentially meet its obligations under the Convention. They also cast light on what States deem are needed and practicable measures to be taken. But they are neither a ceiling nor a floor for Part XII obligations, and their mere publication cannot suffice, cannot suffice to meet those obligations.

To sum up on this point, it is the best available science that determines what measures are “necessary” with respect to the obligations under Part XII relating to pollution of the marine environment emanating from greenhouse gas emissions. Currently, to fulfil their obligation under the Convention under article 194(1) to take all measures necessary to prevent, reduce and control marine pollution, States Parties must do at least all that is necessary to limit average global temperature rise to no more than 1.5°C, using the “best practical means at their disposal and in accordance with their capabilities.”

Now to be clear, the 1.5°C threshold is set by virtue of a global assessment of aggregate harm that is continuously developing; greenhouse gas emissions constitute “pollution of the marine environment” under article 1(1)(4) because “deleterious effects” result or are likely to result even at thresholds far below the 1.5°C standard. At the same time, what is “necessary” as a general matter cannot entail preventing absolutely every last speck of pollution; but in fact, the 1.5-degree threshold and the associated mitigation timetables are premised upon significantly reducing the risk and impacts of greenhouse gas emissions on the marine environment and preventing catastrophic harm in the higher emissions scenarios.³⁴

³⁰ See UNEP, EMISSIONS GAP REPORT (2022); *CAT Emissions Gap*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/global/cat-emissions-gaps/>; IPCC, *Longer Report*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 25, Figure 2.5.

³¹ UNFCCC Secretariat, Technical dialogue of the first global stocktake: Synthesis report by the co-facilitators on the technical dialogue, FCCC/SB/2023/9 (8 Sep 2023), para. 80.

³² See, e.g., IPCC, Working Group III, *Chapter 3: Mitigation Pathways Compatible With Long-Term Goals*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), pp. 298–299; IPCC, Working Group II, *Annex I: Glossary*, SIXTH ASSESSMENT REPORT: MITIGATION OF CLIMATE CHANGE (2022), p. 1810.

³³ IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 412.

³⁴ See, e.g., Paris Agreement, articles 2(1)(a); IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), pp. 24–25.

For purposes of the Advisory Opinion, the Commission respectfully submits that the specific obligations of States Parties under the Convention must be interpreted consistent with and as informed by the international standard set by the best available science, and currently that means doing all that is necessary to stay at least within the 1.5°C limit. This is even while acknowledging the variable nature of that standard due to, for example, advances in scientific understanding of the impacts of climate change on the marine environment or particular circumstances of “deleterious effects” due to, for example, regional variations.

Likewise, to fulfil their obligation under article 194(2) of the Convention to take all measures necessary to ensure that activities do not cause damage by transboundary pollution and under article 194(5) to protect rare or fragile marine ecosystems and habitats, States Parties must be at least as diligent as necessary to limit average global temperature rise to no more than 1.5°C.

Further, the science also informs what constitutes necessary action by States Parties to meet that global standard, whether such Parties are acting individually or jointly.³⁵ In other words, the measures objectively necessary for an individual State Party to meet that standard under article 194(1) will differ based on the scientific evidence particular to that State, including as to its best practical means and capabilities. In that respect, both the mathematics of climate emissions and differing capabilities show that, to achieve the 1.5-degree temperature limit, high-emitting, high-resource States will have to make more progress in reducing and capturing greenhouse gas emissions than low-emitting, low-resource States.³⁶

Mr President, members of the Tribunal, turning to my second point, article 194 is one of some 30 articles regulating pollution of the marine environment. COSIS set these out in detail in Chapter 7 of its written statement. States Parties’ written statements reveal little controversy about them, and for good reason: these obligations flow directly from express, specific provisions of the Convention.

I will not repeat what is in the written statement³⁷ or what is clearly set out in the Convention. There is simply one core point I wish to emphasize: just as with article 194, the best available science is also key to the interpretation and implementation of States Parties’ other obligations under Part XII to prevent, reduce and control pollution of the marine environment.

To illustrate this, I address four categories of specific obligations.

First, States Parties must follow the best available science in fulfilling their obligations to “adopt laws and regulations to prevent, reduce and control” marine pollution from land-based sources, from or through the atmosphere, and by vessels. Articles 207(1) and 212(1) explicitly require that such laws and regulations with respect to land-based and atmospheric sources of pollution must “take into account internationally agreed rules, standards and/or recommended practices and procedures”. Article 213 further requires States Parties both to “enforce” such laws and regulations and to “adopt” those “necessary to implement applicable international rules and standards ... to prevent, reduce and control” marine pollution from land-based sources. Likewise, under article 211(2) with respect to pollution from vessels, such laws and regulations must “at least have the same effect as that of generally accepted international rules and standards.” Accordingly, internationally agreed scientific standards as set out by the IPCC for example, must supply the content of those laws and regulations in achieving the 1.5-degree temperature limit. States Parties should also draw from the IPCC’s concrete

³⁵ See, e.g., UNCLOS, article 194(1).

³⁶ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 11, 31; UNEP, EMISSIONS GAP REPORT (2022), pp. 7–9.

³⁷ COSIS Written Statement, Ch. 7, § II.

recommendations for reducing GHG emissions through legislation and policy governing energy generation, industry, transportation, agriculture, land use, and other areas.³⁸

Second, States Parties are required to undertake monitoring and environmental assessments on the risks or effects of greenhouse gases on the marine environment in accordance with “recognized scientific methods” under article 204.³⁹ When States Parties have reasonable grounds to believe that planned activities – both at sea and on land – under their jurisdiction or control may cause substantial marine pollution through greenhouse gas emissions, article 206 requires them to assess the potential effects of those activities on the marine environment. To be accurate and effective, that assessment must account for the best available science.

Third, States Parties must also be guided by the science in fulfilling their obligations to provide scientific and technical assistance, as well as funds, to developing States to prevent, reduce, and control marine pollution in the form of greenhouse gases, primarily under article 202.⁴⁰ This includes technical assistance in terms of addressing the comparatively less-developed data on climate change risks and impacts that are already harming small islands.⁴¹ This paucity is due principally to a lack of financial and technical resources for developing States, which implicate both article 202 and the preferential treatment terms of article 203. States Parties must also provide appropriate assistance to developing States in the “preparation of environmental assessments”⁴² and “minimization of the effects of major incidents” arising out of “serious pollution of the marine environment”,⁴³ such as measures for adapting to severe weather events exacerbated by ocean heating.

Finally, States Parties should strive to generate and rely on the science relevant to climate change when fulfilling their obligations to cooperate directly or through international organizations to prevent, reduce and control marine pollution in accordance with articles 197, 198, 199, 200 and 201. Article 200 in particular refers to undertaking relevant “scientific research” and encouraging the exchange of “information and data”.⁴⁴ Article 201 requires States Parties to cooperate to establish “scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures” to prevent, reduce, and control marine pollution.⁴⁵ Many of the relevant international bodies have scientific mandates bearing upon the science of climate change, including the IPCC, the UN Environmental Programme, the International Maritime Organization, the UNESCO Intergovernmental Oceanographic Commission, and the Conferences of the Parties of the UNFCCC and the Convention on Biological Diversity, all of which produce rigorous scientific data relevant to the obligations of States Parties in this important respect. When participating in these international fora, States Parties must make every effort to implement the necessary measures to mitigate climate change impacts on the ocean and marine environment, consistent with the best available science.

Mr President, members of the Tribunal, I turn now to my final point, the Commission’s submission on the answer to the first question before the Tribunal. The Commission requests that the Tribunal declare the following specific obligations of States Parties under the Law of the Sea Convention in relation to marine pollution due to greenhouse gas emissions.

States Parties must, as a matter of urgency:

³⁸ See IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), pp. 27–30.

³⁹ See also UNCLOS, article 205.

⁴⁰ See UNCLOS, article 202.

⁴¹ COSIS Written Statement, Annex 5, Maharaj Report, § II.

⁴² UNCLOS, article 202(c).

⁴³ UNCLOS, article 202(b).

⁴⁴ UNCLOS, article 200.

⁴⁵ UNCLOS, article 201 (emphasis added).

Individually or jointly as appropriate, take all measures necessary to prevent, reduce and control pollution of the marine environment from greenhouse gas emissions,⁴⁶ including from land-based sources,⁴⁷ from vessels,⁴⁸ from or through the atmosphere,⁴⁹ and all measures necessary to protect and preserve rare or fragile ecosystems and habitats of depleted, threatened, or endangered species and other forms of marine life,⁵⁰ using for this purpose the best practicable means at their disposal and in accordance with their capabilities. States Parties must do so on the basis of the best available scientific and international standards, which require, at a minimum, taking all measures objectively necessary to:

(a) limit average global temperature rise to no more than 1.5°C above pre-industrial levels, without overshoot, and taking account any current emission gaps; and reach global peaking of greenhouse gas emissions as soon as possible and undertake rapid reductions thereafter in accordance with the best available science.⁵¹

(b) Take all measures necessary to ensure that greenhouse gas emissions from activities under their jurisdiction or control do not cause damage by pollution to other States and their environment, and do not spread beyond the areas where they exercise sovereign rights under the Convention, as informed by the duty of due diligence and best available scientific and international standards, consistent with the specific temperature goal and timetable noted in (a) above.⁵²

(c) Adopt and enforce laws and regulations to prevent, reduce, and control pollution of the marine environment from greenhouse gas emissions, including from land-based sources,⁵³ from vessels,⁵⁴ from or through the atmosphere,⁵⁵ and from activities in the area,⁵⁶ taking account of best available scientific and international standards, consistent with the specific temperature goal and timetable noted in (a) above. In so doing, States Parties should draw from the IPCC's concrete recommendations for reducing greenhouse gas emissions through legislation and policy governing energy generation, industry, transportation, agriculture, land use, and other areas.

(d) Cooperate directly or through international organizations to prevent, reduce and control pollution of the marine environment from greenhouse gas emissions and protect and preserve the marine environment from climate change as informed by best available scientific and international standards, including by: undertaking programmes of scientific research; encouraging the exchange of information and data; publishing reports on the risks and effects of greenhouse gas emissions on the marine environment; formulating and elaborating international rules and standards to mitigate the drivers and impacts of climate change; and addressing any gaps in such studies and reports, consistent with the specific temperature goal and timetable noted in (a) above.⁵⁷

(e) Provide technical, financial, and other appropriate assistance to developing States, directly or through international organizations, to assess the impacts of greenhouse gas emissions and take all measures to prevent, reduce, and control pollution of the marine

⁴⁶ UNCLOS, article 194(1).

⁴⁷ UNCLOS, article 207(2).

⁴⁸ UNCLOS, article 211.

⁴⁹ UNCLOS, article 212(2).

⁵⁰ UNCLOS, article 194(5).

⁵¹ Paris Agreement, article 4(1); IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 21–22.

⁵² UNCLOS, article 194(2).

⁵³ UNCLOS, articles 207(1), 207(5), 213.

⁵⁴ UNCLOS, articles 211(2), 217–220.

⁵⁵ UNCLOS, articles 212(1), 222.

⁵⁶ UNCLOS, articles 209, 215.

⁵⁷ UNCLOS, articles 197–201, 204(1), 205.

environment from greenhouse gas emissions as informed by best available and international standards, consistent with the specific temperature goal and timetable noted in (a) above.⁵⁸

And (f) Undertake monitoring and assessment of planned activities under their jurisdiction or control, including through environmental impact assessments and contingency plans, to determine whether such activities may cause substantial pollution of the marine environment, as informed by the duty of due diligence and best available scientific and international standards, consistent with the specific temperature goal and timetable noted in (a) above, and publish any such reports.⁵⁹

Simply put, the Convention requires that States Parties at least take these measures because they are what the best available science tells us is necessary to avoid global catastrophe with respect to the world's marine environment.

Mr President, distinguished members of the Tribunal, this concludes my observations before you today. Thank you for your kind attention. May I ask that you please invite Professor Philippa Webb to address you?

THE PRESIDENT: Thank you Ms Amirfar.

I now give the floor to Ms Webb to make her statement. You have the floor, Madam. Ms Webb, I understand that you would wish to complete your statement before we break for lunch; so even if we go beyond 1:00, I will allow you the time.

MS WEBB: Thank you, Mr President, it will be no more than a couple of minutes.

⁵⁸ UNCLOS, articles 202–203.

⁵⁹ UNCLOS, articles 198, 204(2), 205–206.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS WEBB

[ITLOS/PV.23/C31/3/Rev.1, p. 36–43]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you and to represent the Commission of small island States in these proceedings.

I – together with Professor Oral – will address the second question before the Tribunal: What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ... 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?

This question concerns the meaning and scope of article 192, which provides that “States have the obligation to protect and preserve the marine environment.” This provision is an independent basis for imposing specific obligations on States, and it has a broader scope than article 194.

I will make four points. First, there is a very high degree of consensus on the content of article 192 in the written statements of States Parties and organizations. Second, there is some divergence of views of the relationship between the article 192 obligations and commitments that States have made under UNFCCC and the Paris Agreement. COSIS’s firm position, as set out by Professor Mbengue, Professor Brunnée, Professor Thouvenin and Ms Amirfar, is that compliance is to be assessed by reference to the meaning of UNCLOS and the best available science, taking into account the global climate regime.

Third, the obligations to “protect and preserve” go beyond, and add to, the obligation to “prevent, reduce and control.” Fourth, the duty of due diligence to protect and preserve the marine environment gives rise to three types of specific obligations. There is the forward-looking obligation to protect, to act to prevent damage, in the light of the fact that the marine environment is the world’s largest heat and carbon sink; there is the obligation to mitigate the risk of harm, to work to reduce the current and future harmful effects of climate change. Professor Oral will address the third type – the obligation to undertake adaptation measures – recognizing that climate change is here, the damage is being done and we have to build the marine environment’s resilience to climate change, now and into the future.

Turning to my first point: there is almost complete agreement in the written statements on article 192 being both a general obligation and a framework provision with independent legal force. States and organizations agree that it creates a broad substantive obligation to protect and preserve the marine environment, which reflects customary international law.¹ The drafters of UNCLOS decided to emphasize the obligation in article 192 by “codifying it in a single article.”² This broad obligation gains colour when read in the context of the other provisions of Part XII as well as other international rules and standards. They agree that the

¹ See Australia Written Statement, paras. 42–44; Bangladesh, paras. 50–51; Belize, paras. 55–61; Brazil, para. 21; Canada, paras. 64–65; Chile, paras. 43, 48; European Union, paras. 16–27; Micronesia, paras. 33, 60; Mozambique, paras. 4.3–4.10; Nauru, paras. 52–55; Netherlands, paras. 4.1–4.4, 6.2; New Zealand, paras. 32, 79–83; Portugal, paras. 21, 60–64; Republic of Korea, paras. 6–15; Rwanda, paras. 157–208; Sierra Leone, paras. 74–79; Singapore, paras. 62–65; United Kingdom, paras. 44–52; Vietnam, paras. 4.3–4.4; African Union, paras. 247–259; IUCN, paras. 125–129; ACOPS, paras. 5, 23; CIEL/Greenpeace, paras. 28–29; Our Children’s Trust/Oxfam, p. 29; Observatory for Marine and Coastal Governance, p. 15–16; Opportunity Green, paras. 24–27 WWF, paras. 107–114.

² Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß, 2017), p. 1284.

obligation requires States both to take positive action to protect and preserve the marine environment and to refrain from degrading the marine environment.³

Crucially, there is agreement that article 192 goes beyond article 194, and that the second question before you therefore covers a different domain from the first. Article 192 is not limited to marine pollution. It applies to all harm caused to the marine environment – any destruction or alteration or threats from any source.⁴ This includes harm to the living resources and marine life.⁵ As Professor Alan Boyle has stated, it is clear that Part XII of UNCLOS, which article 192 opens, “encompasses protection of ecosystems, conservation of depleted and endangered species of marine life and control of alien species.”⁶ You will recall Dr Cooley’s and Dr Maharaj’s compelling evidence of the catastrophic harm that climate change has caused and risks causing to marine ecosystems, especially those that rely on coral reefs and seagrasses.

Article 192 also has no spatial restriction. It applies to the marine ecosystem, the water column, the seabed, the entire ocean, and the marine cryosphere.⁷ There is no distinction between spaces under and beyond national jurisdiction: internal waters, territorial seas, exclusive economic zones, high seas.⁸ The South China Sea Tribunal noted that “ocean currents and the life cycles of marine species create a high degree of connectivity between the different ecosystems,” meaning that the obligation to protect and preserve the marine environment includes areas that may be indirectly affected by harmful activities.⁹

States and international organizations agree that article 192 reflects an obligation to act with due diligence.¹⁰ As Professor Brunnée has explained, the requirements of due diligence increase with the degree of risk and severity of harm. The relevant standards are objective, specific and particularly severe. States are subject to a stringent obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost.”¹¹ In the context of the marine environment, that means undertaking specific obligations to protect, mitigate and adapt – a point to which I will return.

Mr President, members of the Tribunal, my second point is on the relationship between article 192 and the global climate regime. Certain of the written statements argue that compliance with these instruments establishes compliance with article 192 obligations;¹² that the Paris Agreement “lowers the threshold and the level of discretion that States Parties have under Part XII of UNCLOS”;¹³ that the Paris Agreement is “one of the most important

³ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 941.

⁴ See *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

⁵ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

⁶ Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea*, 22 INT’L J. MARINE & COASTAL L. 369 (2007), 373.

⁷ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 408, 945.

⁸ Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Pröhl, 2017), p. 1280.

⁹ See *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 825; Rwanda Written Statement, para. 165.

¹⁰ See above note 1.

¹¹ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10 (1 February), para. 110.

¹² European Union Written Statement, para. 28; Australia Written Statement, paras. 39–40; Singapore Written Statement, para. 38 (referring to article 194 UNCLOS); Chile Written Statement, paras. 56–60 (referring to article 194 UNCLOS); Egypt Written Statement, paras. 72–73; Portugal Written Statement, para. 93.

¹³ Portugal Written Statement, para. 93.

standards” in assessing the obligation of due diligence under article 192;¹⁴ that implementing Paris is “an important indicator” of the extent to which States are meeting their article 192 obligations.¹⁵

Other States and international organizations, like COSIS, emphasize that what should be taken from the Paris Agreement is not the standard for assessing UNCLOS obligations, but rather the temperature goal of pursuing efforts to limit the global average increase to 1.5°C above pre-industrial levels.¹⁶ As Professor Mbengue and Ms Amirfar have stated, there is no hierarchy of obligations. The global climate change regime is important for expressing consensus around the best available science and an international standard relevant to the interpretation of States Parties’ obligations under UNCLOS. In interpreting article 192, we must therefore also take into account the objective of increasing the ability of States to adapt to the adverse impacts of climate change and to foster resilience. And the obligations in article 192 inform how States should comply with their climate change obligations.

UNCLOS, the “constitution for the oceans”, is the instrument that governs compliance with the obligations to protect and preserve the marine environment. Issuing a Nationally Determined Contribution does not tick the box of compliance with article 192. Ms Amirfar explained that issuing NDCs is neither a floor nor a ceiling for States Parties’ obligations under articles 194; so, too, for article 192. Implementing an NDC may also be insufficient or irrelevant to fulfilling article 192. Protection and preservation of the marine environment is not a required part of the NDC process, which is focused on emission reduction targets and mitigation efforts.¹⁷

My third point is that the obligations to protect and preserve the marine environment go beyond preventing, reducing and controlling marine pollution – and, again, in this way, the second question is broader than the first one.

The duty to “protect” requires States to prevent future damage to the marine environment. It requires them not only to take action to prevent harm to the marine environment caused by their agents but also individuals within their control. As the South China Sea Tribunal explained, quoting the International Court of Justice in the Nuclear Weapons Advisory Opinion:¹⁸ “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’.”

The South China Sea Tribunal found on the facts of that case that article 192 includes a due diligence obligation “to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection.”¹⁹ The Tribunal said that “article 192 imposes a due diligence obligation to take those measures ‘necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life’.” The scope of article 192 therefore covered the direct harvesting of species at risk of extinction as well as “the prevention

¹⁴ Republic of Korea Written Statement (in the context of both articles 192 and 194), para. 16. *See also* New Zealand Written Statement, para. 94(f); United Kingdom Written Statement, para. 69 (in the context of article 194).

¹⁵ Canada Written Statement, paras. 62(viii).

¹⁶ COSIS Written Submission, paras. 357–365; Rwanda Written Statement, paras. 239–240; Nauru Written Statement, paras. 47–50; Federated States of Micronesia Written Statement, para. 50; Bangladesh Written Statement, para. 42; African Union Written Statement, para. 202 (referring to article 194(1)); CIEL/Greenpeace Written Statement, para. 82.

¹⁷ Paris Agreement, Arts. 3, 4.4.

¹⁸ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 941 (citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, para. 29).

¹⁹ *Id.*, at para. 956.

of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat.”²⁰

The duty to “preserve” under article 192 means maintaining or improving the present condition of the marine environment. It goes beyond protection²¹ and includes the duty to restore.²² The plain meaning of “preserve” is to “keep in its original or existing state” and “to make lasting”.²³ The obligation is to restore degraded marine environments and ecosystems. It is “the logical measure” to ensure improvement of the present condition of the marine environment.²⁴ It is closely related to the notion of sustainability – maintaining the marine environment so we can address existing harm as well as future activities.

The duty to restore did not arise as such in the *travaux préparatoires* of UNCLOS, but it has become an important norm in international environmental law. It is linked with the objective of enhancing ecosystem resilience, which, as Dr Cooley has pointed out, is crucial to addressing the impacts of climate change. In a similar vein, Principle 7 of the Rio Declaration provides that “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem.”²⁵ And the 1995 Global Programme of Action speaks of “facilitating the realization of States to preserve and protect the marine environment” by assisting them to take measures to “recover” the marine environment “from the impacts of land-based activities.”²⁶

The 1992 Convention on Biological Diversity, with 196 Contracting Parties, requires States to “[r]ehabilitate and restore degraded ecosystems and promote the recovery of threatened species.”²⁷ According to the Contracting Parties, ecological restoration “refers to the process of managing or assisting the recovery of an ecosystem that has been degraded, damaged or destroyed as a means of sustaining ecosystem resilience and conserving biodiversity”.²⁸

Maintaining and improving ecosystem resilience is also one of the general principles and approaches stipulated in the BBNJ Treaty.²⁹

So the duty to preserve includes reversing degradation and increasing resilience, and it applies to the entire marine environment. This accords with UNCLOS as a “living instrument”, as Professor Okowa has explained yesterday.

Mr President, members of the Tribunal, my last point is that the specific obligations of States to protect and preserve the marine environment in relation to climate change impacts include the obligation to protect marine ecosystems to increase their resilience and enable them to continue to minimize the extent of climate change and the extent to which the effects of climate change are felt in the atmosphere; and the obligation to mitigate emissions. Professor Oral will address adaptation.

²⁰ *Id.*, at para. 959.

²¹ Yoshifumi Tanaka, *Article 1: Use of Terms and Scope*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß, 2017), pp. 23–24.

²² COSIS Written Statement, paras. 389–392, 422; Mozambique Written Statement, paras. 4.17–4.18; Sierra Leone Written Statement, paras. 76–79; WWF Written Statement, paras. 110–111.

²³ *Oxford English Dictionary*, “preserve”.

²⁴ Yoshifumi Tanaka, *Articles 1: Use of Terms and Scope*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß, 2017), p. 24.

²⁵ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 7 (emphasis added).

²⁶ United Nations Environment Programme, *Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities*, UN Doc. UNEP(OCA)/LBA/IG.2/7 (5 December 1995), para. 3 (emphasis added).

²⁷ Convention on Biological Diversity (5 June 1992), Art. 8(f).

²⁸ CBD Conference of the Parties, Decision XIII/5 on Ecosystem Restoration: Short-Term Action Plan, CBD/COP/DEC/XIII/5 (10 December 2016) (Annex), para. 4.

²⁹ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023), Arts. 7(g)–(h), 17(c).

As Dr Cooley explained, and many States and organizations have recognized: the ocean is currently the world’s primary carbon and heat sink, absorbing 26 per cent of all carbon dioxide emissions and over 90 per cent of the excess heat generated by these emissions.³⁰ It is not just the ocean water, but also the seagrass meadows, tidal marshes and mangroves that form “blue carbon” ecosystems capable of sequestering significant amounts of carbon dioxide.³¹

If these sinks are degraded by the effects of climate change,³² it will greatly reduce the ocean’s ability to act as a heat and carbon sink. As Dr Cooley explained, this will cause significant harm to the marine environment and magnify the effects of climate change.

Article 192 therefore requires States to protect the marine environment to enable it to continue to serve its function as a sink and in this way prevent further harm to the marine environment, such as through ocean acidification. Measures include building resilience in marine ecosystems, such as actively protecting tidal marshes, mangroves and sea grasses. COSIS endorses the suggestions of other participants in these proceedings to: protect coral reefs by reducing the effects of coastal runoff, pollution, overfishing, and the presence of invasive species³³ and to address microplastic pollution that inhibits the ability of global phytoplankton populations to absorb carbon in the ocean.³⁴

To this end, States may be required to implement marine protected areas to protect vulnerable ecosystems and species. The Chagos Marine Protected Area Tribunal determined that the protection and preservation of the marine environment is not limited to measures related to pollution control, and extends to the declaration of marine protected areas.³⁵ As States and organizations have recommended in these proceedings: the best available science indicates that States should establish marine protected areas to help prevent sea-level rise and loss of biodiversity;³⁶ marine protected areas may help fulfil the duty of due diligence, in particular for fragile ecosystems.³⁷

The obligation to restore the marine environment entails engaging in sustainable management and active restoration measures of degraded ecosystems, to conserve and enhance the ocean’s carbon cycling services that underpin its role in the global climate system. States should in particular enhance or restore habitats and improve the conservation of species, such as whales, that help sequester large amounts of carbon. States should rebuild overexploited or depleted fisheries.³⁸ These steps would also enhance the ability of those ecosystems to withstand the effects of climate change by enhancing their resilience.

Importantly, this obligation must not be implemented in a manner that exacerbates ocean acidification, such as, through ocean fertilization.³⁹

The obligation to mitigate concerns the impact of greenhouse gas emissions. The IPCC’s concrete recommendations for reducing emissions should be given effect in the light

³⁰ Pierre Friedlingstein et al., *Global Carbon Budget 2022*, 14 EARTH SYSTEM SCIENCE DATA 4811 (2022), pp. 4814, 4834; Mauritius Written Statement, paras. 20, 65; Republic of Korea Written Statement, para. 23; Rwanda Written Statement, paras. 275, 278–279; Singapore Written Statement, para. 62.

³¹ UNESCO, UNESCO MARINE WORLD HERITAGE: CUSTODIANS OF THE GLOBE’S BLUE CARBON ASSETS (2021), p. 3, <https://unesdoc.unesco.org/ark:/48223/pf0000375565>.

³² IPCC, Working Group I, Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), pp. 743–46.

³³ Rwanda Written Statement, para. 280.

³⁴ Rwanda Written Statement, para. 281.

³⁵ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-0, Award (18 March 2015), paras. 320, 538.

³⁶ Chile Written Statement, paras. 97–101; Micronesia Written Statement, para. 62.

³⁷ European Union Written Statement, para. 21; Chile Written Statement, paras. 97–101, 120; Rwanda Written Statement, para. 272(b); Micronesia Written Statement, para. 62; IUCN Written Statement, paras. 128, 148.

³⁸ Mozambique Written Statement, paras. 4.17–4.18.

³⁹ IPCC, Working Group III, *Summary for Policymakers*, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE (2022), p. 36.

of, and in a manner that will fulfil, the obligation to take all measures necessary to protect and preserve marine biodiversity. This includes specific measures to mitigate the intake of carbon dioxide by the ocean resulting in acidification.

Dr Cooley and Ms Amirfar took you to the IPCC's findings regarding mitigation measures that States must adopt to keep global warming within 1.5°C of pre-industrial levels and avoid some of the most devastating consequences of climate change, consequences that will in some instances be felt first and irreversibly by vulnerable and fragile marine ecosystems such as warm-water coral reefs. I will highlight a further concrete step that States should take towards mitigation: substantive, transparent and comprehensive environmental impact assessments.

As Ms Amirfar stated regarding articles 194, if States have reasonable grounds to believe that a development may cause substantial marine pollution, necessary measures include the obligation of a State to conduct an environmental impact assessment under articles 206, including the duty to monitor the effects of such activities under articles 204. It is also an obligation of customary international law, as recognized in the *Area Advisory Opinion*.⁴⁰ In the context of article 192, environmental impact assessments should not be limited to the impact of pollution, but extend to direct and indirect harm to the marine environment.⁴¹ COSIS endorses the suggestion made in the written statements that environmental impact assessments should “become a form of reflex for planned activities” and shared consistently with articles 205 to ensure the public are fully informed;⁴² they should “include the cumulative effects of climate change, ocean acidification, deoxygenation and other related harms [The assessments] need to include socio-economic impacts as well as ecological and physical dimensions.”⁴³

In relation to their article 192 obligations, States are necessarily required to take internal measures, such as the passing of legislation, the making of regulations, and the taking of executive action, to ensure that these obligations are implemented.

In sum, the obligations to protect and preserve the marine environment are broad and substantive. Under article 192, States are under specific substantive and procedural obligations, including a duty of due diligence, to protect and preserve the marine environment from the deleterious effects of climate change, in areas both within and beyond national jurisdiction, and regardless of the vector through which those effects occur.

Mr President, members of the Tribunal, thank you for your kind attention. I ask that you call Professor Oral to the podium to continue the submissions on the second question before the Tribunal.

THE PRESIDENT: Thank you, Ms Webb.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3.00 p.m. The sitting is now closed.

(Lunch break)

⁴⁰ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 145.

⁴¹ Belize Written Statement, para. 77.

⁴² Belize Written Statement, para. 81.

⁴³ IUCN Written Statement, para. 163. *See also* New Zealand Written Statement, para. 91; Belize Written Statement, para. 77; Mauritius Written Statement, paras. 83–84; Portugal Written Statement, para. 64; Rwanda Written Statement, para. 197.

PUBLIC SITTING HELD ON 12 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations: [See sitting of 11 September 2023, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 12 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations : [Voir l'audience du 11 septembre 2023, 10 heures]

THE PRESIDENT: Good afternoon. The Tribunal will now continue its hearing in the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.

I now give the floor to Ms Oral to make a statement.

You have the floor, Madam.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MS ORAL
[ITLOS/PV.23/C31/4/Rev.1, p. 1–9]

Mr President, distinguished members of the Tribunal, it is a distinct honour to appear before you today on a matter of global importance and to do so on behalf of COSIS.

On 4 August 2023, the media headlines read “Ocean heat record broken, with grim implications for the planet.”¹ The latest information from Copernicus, the EU’s climate change service, is that the ocean has hit its hottest ever recorded global average of over 20°C.

There is no doubt that the health of the ocean is facing historic, if not unprecedented, risks of harm due to the activities of humans. The only positive aspect to this grim reality is that the very humans responsible can also take the necessary measures to protect and preserve the ocean from the potentially catastrophic impacts of climate change. In his message on World Ocean’s Day, Sir David Attenborough said, “The ocean’s power of regeneration is remarkable – if we just offer it a chance.”

That is why we stand before this Tribunal seeking guidance on the legal obligations under UNCLOS and international law for States to protect and preserve the ocean.

My learned colleague Professor Webb has just spoken on the scope and nature of the article 192 obligation and the specific obligations to protect and mitigate. I will now present on why States have an obligation to take adaptation measures in response to the adverse consequences of climate change on the marine environment.

In my presentation, I will first briefly lay out the scientific basis as to why States have such obligation. Second, I will detail the specific obligations of States to implement adaptation and resilience-strengthening measures under article 192 and international law, including some key principles, as informed by other sources of international law. Third, I will present my concluding remarks.

As we have heard from Dr Cooley and Dr Maharaj, as well as from Ms Amirfar, the science is clear that climate change is having significant adverse impacts on the marine environment. The science is also clear that the marine environment will continue to suffer in both the high and low greenhouse gas emissions scenarios set out in the IPCC assessment projections. It is now a question of the degree of harm that will result which depends on our future emission pathway.² Unfortunately, our current emission trajectory, if continued, shows a pathway to reach 2.8°C above pre-industrial levels, and not the target, 1.5°C, or even the higher threshold target of “well below 2.0°C” under article 2 of the Paris Agreement.

In truth, even in the best-case scenario, that is the low-emission pathway, climate change will continue to have adverse impacts on the ocean and the marine environment. In projecting the future state of the ocean, the 2019 IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, included the following:

First, over the 21st century, it is virtually certain that the ocean will transition to unprecedented conditions with increased temperatures.³

Second, continued carbon uptake by the ocean by 2100 is virtually certain to exacerbate ocean acidification.⁴

¹ *Ocean Heat Record Broken, with Grim Implications for the Planet*, BBC NEWS (4 August 2023), <https://www.bbc.com/news/science-environment-66387537>

² UNEP, EMISSIONS GAP REPORT: THE CLOSING WINDOW (2022), p. XVI.

³ *Id.*, p. 18.

⁴ *Id.*, p. 19.

Third, with very high confidence, marine heatwaves are projected to further increase.⁵

Fourth, with high confidence, sea-level rise will continue at an increasing rate. By 2050, extreme sea level events that are historically rare – once per century – are projected to occur at least once per year – in low and high emission scenarios, especially in tropical regions.⁶

Fifth, with medium confidence, over the 21st century, there will be a decrease in global biomass of marine animal communities, their production and fisheries catch potential, and a shift in species composition under all emission scenarios. And with high confidence, the rate and magnitude of decline are projected to be highest in the tropics.⁷

And lastly, with high confidence, almost all warm-water coral reefs are projected to suffer significant losses of area and local extinctions, even if global warming is limited to 1.5°C.⁸

While the forecast for the marine environment appears to be one of certain decline, it is critical to recognize that measures can be taken to reduce the negative impacts on the marine environment. Indeed, the IPCC, in addition to presenting the ominous picture of climate change and the ocean, also presents a path forward, observing with high confidence that:

“The far-reaching services and options provided by ocean and cryosphere-related ecosystems can be supported by protection, restoration, precautionary ecosystem-based management of renewable resource use, and the reduction of pollution and other stressors.”⁹

As Dr Cooley and Dr Maharaj explained yesterday, States must pursue adaptation at the same time as mitigation to have any chance of protecting and preserving life in Earth’s most vulnerable marine ecosystems.

Mr President and distinguished members of the Tribunal, having presented the scientific reality of what the future of climate change holds for the ocean and the marine environment, I will now present why article 192 includes the obligation for States to take adaptation and resilience-strengthening measures against the harmful consequences of climate change on the ocean and marine environment.

While the term “adaptation” is not expressly referred to in UNCLOS, the Tribunal may look to other sources for interpreting the Convention, as the tribunal did in the *South China Sea* case in referring to the Convention on Biological Diversity for defining “ecosystem”.¹⁰ In this context and in relation to adaptation, I respectfully draw the Tribunal’s attention to the IPCC Sixth Assessment Working Group II Report on “Impacts, Adaptation and Vulnerability”, which represents one of the most authoritative scientific sources for setting the international standards for taking measures to address climate change.¹¹

The IPCC defines “adaption” as a “response to current climate change in *reducing climate risks and vulnerability*”.¹² Working Group II’s contribution to the Sixth Assessment Report stresses the importance of adaptation in playing a key role in reducing climate-related risks along with the mitigation and sustainable development and “in reducing exposure and vulnerability to climate change.”¹³ By adopting adaptation measures which strengthen the resilience to the adverse impacts of climate change, we reduce the risks and vulnerability of the marine environment.

⁵ *Id.*

⁶ *Id.*, p. 20.

⁷ *Id.*, p. 22.

⁸ *Id.*, p. 25 (emphasis added).

⁹ *Id.*, p. 30 (emphasis added).

¹⁰ *South China Sea* (Philippines v. China), PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 945.

¹¹ IPCC, Working Group II, *Summary for Policymakers*, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), p. 20.

¹² IPCC, Working Group I, Annex VII: Glossary, Sixth Assessment Report: The Physical Science Basis (2021), p. 2216.

¹³ *Id.*, p. 5.

Both the IPCC Special Report on the Ocean and Cryosphere and the Sixth Assessment Working Group II report underscore that “[c]onservation, protection and restoration of terrestrial, freshwater, *coastal and ocean ecosystems*, together with targeted management to adapt to unavoidable impacts of climate change, *reduces the vulnerability of biodiversity to climate change*.”¹⁴

As my colleague Professor Webb has just explained, article 192 creates a broad substantive obligation to protect and preserve the marine environment that reflects customary international law, which also includes protection against present harm and preservation against future harm. In addition, the Tribunal has recognized that the duty to protect and preserve the marine environment is one of an *erga omnes* nature in the high seas and the Area,¹⁵ and applies in all maritime areas.¹⁶

In view of the reality that the impacts of climate change are already harming the marine environment and will continue to, we submit that States have a duty, under article 192 of the Convention, as informed by other rules of international law, to implement adaptation and resilience strengthening measures. That is, that the positive obligation of States to take active measures, as pronounced by the Tribunal in the *South China Sea* case, entails adaptation measures which are necessary to build resilience against present and future harm from climate change. Moreover, recalling that this Tribunal has held “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”,¹⁷ such obligation also applies to the conservation and management of living resources in face of climate change.

Adaptation and increasing resilience to climate change are also core to the global climate regime under the UNFCCC and the Paris Agreement. As my colleague Professor Mbengue explained yesterday, UNCLOS and the climate change regime should not be framed in exclusionary terms. The ultimate goal of stabilizing greenhouse gas concentrations in the atmosphere under article 2 of the UNFCCC is expressly linked to allowing natural ecosystems time to adapt to climate change. However, science strongly indicates that we are at a point that, without human intervention, such adaptation will not be possible.

Under the Paris Agreement, adaptation obligations were strengthened to be on par with mitigation obligations. Article 7 establishes the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.

The Paris Agreement also recognizes the need to support developing countries in meeting their adaptation needs. The adaptation needs for the Member States of COSIS are, and – as the adverse impacts of climate change progress – will be beyond their capacity to undertake. Meeting the needs of developing States in relation to adaptation is also consistent with UNCLOS. The preamble of UNCLOS links the “special interests and needs of developing countries” to the achievement of a “just and equitable international order.” Similarly, in Part XIV of UNCLOS on the development and transfer of marine technology, the needs of developing States are underscored, which are also relevant to providing the means and tools for adaptation.¹⁸

¹⁴ *Id.*, p. 24 (emphasis added). See IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 30.

¹⁵ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 180.

¹⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. (2 April), para. 120 (affirmed in *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 940).

¹⁷ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Case Nos. 3 & 4), Order (Provisional Measures), 1999 ITLOS REP. 280 (27 August), para. 70; *SRFC Advisory Opinion*, paras. 120, 216.

¹⁸ See, e.g., UNCLOS, articles 266, 269, 272.

In recent years, the ocean has garnered greater attention under the UNFCCC. In relation to adaptation, this was highlighted in the UNFCCC Nairobi Work Programme on impacts, vulnerability and adaptation to climate change, which, while established in 2005, only in 2018 included the ocean. Its 2020 report declared that “[u]rgent actions are needed to *scale up adaptation* to climate change in the ocean and coastal zones, and *build resilience* for the ocean, coastal areas and ecosystems.”¹⁹

Professor Mbengue has most eloquently presented the important developments in strengthening the ocean-climate agenda under the UNFCCC. This includes the launching by the COP27 Presidency of the Sharm-el-Sheikh Adaptation Agenda,²⁰ which provides insights into the adaptation measures to be taken. In relation to coastal and ocean systems, the outcome included a financial target of investing some US\$ 4 billion for 15 million hectares of mangroves globally to halt mangrove loss that includes restoring half of recent losses. It also includes the goals of halting loss, protecting and restoring coral reefs to support people in tropical communities, and halting loss, protecting and restoring seagrass, marshes and kelp forests to support people in temperate communities.²¹

The Tribunal may also look to the Convention on Biological Diversity, which has near-universal membership of States, as another source to take into account in assessing the obligation for States to take adaptation measures.²² Article 8, paragraph (d), of the Convention provides for the obligation of States Parties to promote the protection of ecosystems, natural habitats and the maintenance of viable population of species in natural surroundings. This applies equally to the marine environment, as the Convention applies to land and sea.

In addition, and more specifically, article 8, paragraph (f), of the Convention requires States to: “Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies” as far as possible and as appropriate. Again, this applies equally to the marine environment.

In 2010, the parties to the Convention on Biological Diversity adopted DECISION X/29 specifically addressing coastal and marine biodiversity.²³ These decisions are important as they are adopted by consensus by the Parties and can be read as part of the implementation and interpretation of the Convention.²⁴ The Decision expressed its concern on “the adverse impact of climate change on marine and coastal biodiversity” – listing as examples “sea level rise, ocean acidification, and coral bleaching”.²⁵ The decision further stressed the importance of marine and coastal biodiversity for the mitigation of and adaptation to climate change.²⁶

The same decision makes some 20 references to UNCLOS, underscoring the synergistic relationship between the Convention on Biological Diversity and UNCLOS. The decision specifically names UNCLOS as part of the applicable international law “to achieve long-term

¹⁹ UNFCCC – Nairobi Work Programme, Policy Brief on the Ocean (2020), p.1 (emphasis added).

²⁰ COP27, SHARM-EL-SHEIKH ADAPTATION AGENDA (November 2022), p. 8, https://climatechampions.unfccc.int/wp-content/uploads/2022/11/SeS-Adaptation-Agenda_Complete-Report-COP27_FINAL-1.pdf.

²¹ *Id.*

²² The Convention on Biological Diversity, *opened for signature* 5 June 1992, 1760 UNTS 79 (*entered into force* 29 December 1993).

²³ CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/29 (29 October 2010).

²⁴ See ILC, Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, UN Doc. A/CN.4/L/907 (2018), Conclusion 11.

²⁵ CBD, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, UNEP/CBD/COP/DEC/X/29 (29 October 2010), para. 7.

²⁶ *Id.*, para. 8.

conservation, management and sustainable use of marine resources and coastal habitats,” including adaptation to climate change.²⁷ This is an example of the harmonization and systematic integration reflected in article 31, paragraph 3, subparagraph (c), of the Vienna Convention on the Law of Treaties that promotes a single set of compatible obligations.²⁸ In this case, the compatibility is without question.

More recently, States Parties adopted by consensus the Post-2020 Biodiversity Framework under the Convention on Biological Diversity which aims to promote urgent and transformative action by governments and other actors to halt and reverse the loss of biodiversity, which necessarily applies to marine biodiversity. According to Target 8, States Parties are to “[m]inimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions, including through nature-based solutions and/or ecosystem-based approaches, while minimizing negative and fostering positive impacts of climate [change] on biodiversity.”²⁹

The recently adopted BBNJ Agreement,³⁰ which is the first legally binding instrument adopted under UNCLOS to make express reference to climate change, includes among its objectives to “[p]rotect, preserve, restore and maintain biological diversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution.”³¹ The Agreement was adopted by consensus, reflecting the shared understanding by States of the need to take active measures against climate change for the protection and preservation of the marine environment.

It is also important to take into account the Sustainable Development Goals which were adopted by consensus by the General Assembly in 2015.³² The SDG 14 on the ocean underscores the need and obligation for States to undertake adaptation, resilience and restoration measures for the protection and preservation of the marine environment.

Specifically, SDG 14.2 highlights the preventive function of adaptation and sets a target for States to “sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and to take action for their restoration in order to achieve healthy and productive oceans” by 2020.

SDG 14.3 further identifies the target to “[m]inimize and address the impacts of ocean acidification, including through enhanced scientific cooperation at all levels.”

Admittedly, adaptation to climate change is a broad concept that involves various types of responses to climate change ranging from physical measures to biological responses. Many examples of biological adaptation measures especially relevant for the marine environment were listed in the 2019 IPCC Special Report on the Ocean and Cryosphere, such as:

- The establishment of networks of protected areas;
- Terrestrial and marine habitat restoration, and use of an ecosystem management tool;
- Strengthening precautionary approaches, such as rebuilding overexploited or depleted fisheries;
- and restoration of vegetated coastal ecosystems, such as mangroves, tidal marshes and seagrass meadows.³³

²⁷ *Id.*, para. 15.

²⁸ COSIS Written Statement, para. 352.

²⁹ *Ibid.*

³⁰ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023).

³¹ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023), article 17.

³² UNGA, Transforming Our World: the 200 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015).

³³ IPCC, *Summary for Policymakers*, Special Report on the Ocean and Cryosphere in a Changing Climate (2019), p. 30.

Adaptation also includes the application of certain principles that have wide recognition in the international community. These have been referred to in the instruments I have mentioned and others. These principles include the adoption of the precautionary approach and the ecosystem approach. The precautionary approach has been recognized by the Tribunal, dating back to the 1999 *Southern Bluefin Tuna* provisional order. The Seabed Chamber observed in the 2011 *Activities in the Area* Advisory Opinion “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.”³⁴

In relation to the ecosystem approach, as observed by Churchill, Lowe and Sanders, while not expressly referred to in UNCLOS, it is reflected in article 61, paragraph 4, wherein coastal States, in taking measures to maintain or restore species, are required to take into account effects on associated or dependent species.³⁵ The need to protect ecosystems was later expressly recognized by States under Principle 7 of the 1992 Rio Declaration. The ecosystem approach was subsequently adopted in article 5 of the 1995 Fish Stocks Agreement.³⁶

Most recently, the ecosystem approach was adopted in article 7 of the BBNJ Agreement as one of the applicable principles. Moreover, article 5(g) expressly provides for “[a]n approach that builds ecosystems’ resilience, including to the adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon-cycling services that underpin the role of the ocean in [the] climate.”³⁷

The IPCC Special Report on the Ocean and Cryosphere further recognized the importance of nature-based or ecosystem-based adaptation and “[t]he use of biodiversity and ecosystem services as part of an overall adaptation strategy to help people to adapt to the adverse effects of climate change.”³⁸

Mr President, and distinguished members of the Tribunal, in conclusion, while we still have the window of opportunity, and in the light of the overwhelming scientific evidence, we submit that adaptation is a necessary measure together with mitigation for responding to the harmful impacts of climate change on the marine environment and is included in the independent obligations reflected in article 192.

In response to the second question before the Tribunal, and fully incorporating the specific obligations set out by Ms Amirfar and the presentation by Dr Cooley and Dr Maharaj, in answer to the first question, States Parties must, at a minimum and as a matter of urgency:

Take measures necessary to protect the marine environment, including but not limited to, taking action to enable the ocean to continue to serve its function as a carbon sink, and to build resilience through establishing marine protected areas;

To this end, take measures necessary to mitigate the risk of harm to the marine environment, including but not limited to, mitigating greenhouse gas emissions in line with current and best available scientific and international standards. This includes undertaking substantive, transparent and comprehensive environmental impact assessments;

Take measures necessary to preserve the marine environment, including but not limited to, restoring degraded ecosystems and conserving species that help sequester carbon;

³⁴ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 135.

³⁵ R. CHURCHILL, V. LOWE, & A. SANDER, *THE LAW OF THE SEA* (4th ed. April 2022), pp. 537, 617–618.

³⁶ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 7; United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) A/RES/48/194 (adopted 4 August 1995).

³⁷ BBNJ Treaty, articles 7(f), 7(h).

³⁸ IPCC, *Chapter 5: Changing Ocean, Marine Ecosystems, and Dependent Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 525.

In light of the obligations to protect and preserve the marine environment, take measures necessary to adapt to the adverse effects of climate change, including but not limited to, adopting nature-based or ecosystem-based approaches and protecting and restoring coral reefs, seagrass, marshes and kelp forests; and

Assist developing States in meeting their adaptation needs in the face of the adverse impacts of sea-level rise on the marine environment and marine living resources.

Mr President, distinguished members of the Tribunal, that concludes my submissions to you today. May I now ask you to please invite Dr Conway Blake to address you.

THE PRESIDENT: Thank you, Ms Oral.

I now give the floor to Mr Blake to make his statement. You have the floor, Sir.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR BLAKE

[ITLOS/PV.23/C31/4/Rev.1, p. 9–14]

Mr President, honourable members of the Tribunal, good afternoon. It truly a privilege to appear before you today on behalf of COSIS.

Now, the Tribunal has already heard detailed and compelling submissions on States' substantive obligations under articles 194 and 192 of UNCLOS. I will be addressing a fundamental overarching obligation that runs throughout UNCLOS Part XII: the duty of international cooperation.

The stark reality is that no single State acting alone can fix the climate crisis or protect the ocean from the devastation wrought by greenhouse gas emissions. To be sure, the primary duty rests on each State to ensure that it takes all possible measures within its jurisdiction, within its control and within its economic means to address marine pollution from climate change. However, climate change is a quintessentially global problem and therefore it also demands a collective response. International cooperation is therefore necessary if States are to effectively address climate-induced damage to the marine environment.

Now, the duty of States to cooperate in this context is not dependent on the whims of charity or the dictates of political expediency. As I will come on to explain, international cooperation under UNCLOS Part XII is grounded in hard-edged and binding treaty obligations, which mandate that States engage in concrete collective and equitable actions to address the adverse impacts of climate change.

The remainder of my remarks will be dedicated to examining the scope and content of these cooperation obligations.

The duty of international cooperation is a normative pillar of UNCLOS Part XII. The duty is enshrined in, among other provisions, articles 192, 194, 202 and 203 of UNCLOS. And to be more specific, there are over 26 separate references to obligations of cooperation in Part XII. These are all binding obligations. To adopt the terminology used in the *Area* Advisory Opinion – the cooperation obligations under Part XII are “direct obligations” incumbent on all States Parties.¹

At their core, the cooperation obligations under Part XII require that States engage in genuine and meaningful actions on the international level, oriented towards the protection of the marine environment. Like all other international obligations – the duty of cooperation must be carried out in good faith.² Accordingly, UNCLOS requires that States engage with each other with a real intent to protect and preserve the marine environment. It is not sufficient simply to engage in rhetorical or symbolic acts.

Broadly speaking, UNCLOS imposes three categories of cooperation obligations on States Parties: obligations to harmonize laws, policies and procedures; obligations to take cooperative action through international organizations; and finally, obligations to grant assistance to developing States. And I will address each of these in turn.

First, Part XII of UNCLOS mandates that States coordinate and harmonize their policies and laws regarding pollution of the marine environment, including in the context of climate change. Now, this general obligation is found in articles 194 and is further elaborated in articles 207 and 208. Article 194(1) sets down the general obligation of States Parties to

¹ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February), para. 121.

² See e.g., Australia Written Statement, para. 58; France Written Statement, para. 158; United Kingdom Written Statement, para. 84.

“individually or jointly” take all measures necessary to prevent, reduce, and control pollution of the marine environment, and work “to harmonize their policies in this connection.”

This obligation to harmonize requires States to collectively formulate and direct policies to address marine pollution from all possible sources. Thus: article 194(3) makes clear that States Parties must harmonize policies in connection with pollution “through the atmosphere”; article 207(3) requires States Parties to harmonize policies relating to pollution from land-based sources; and article 208(4) requires the same, but in respect of pollution from seabed activities and artificial islands, and installations and structures in the ocean.

The obligation to harmonize policies is crucial for full compliance with UNCLOS Part XII. If States adopt divergent or conflicting standards and regulatory approaches, the international community will fail, will fail to effectively address the problem of climate-induced harm to the marine environment.

Further, as my colleague, Ms Amirfar, explained, UNCLOS dictates that the formulation and harmonization of global policy responses to climate change must be informed by the best available scientific knowledge. Only then can we be assured of the effectiveness of States’ joint efforts to prevent, reduce and control marine pollution.

I want to turn next to the second category of obligations: the obligation to take cooperative action through international organizations.

Now, international organizations are perhaps the most obvious and typical vehicles for inter-State cooperation, and the management of global problems. Against this background, Part XII of UNCLOS requires States to take concrete cooperative steps through competent international organizations to prevent, reduce and control pollution of the marine environment, and minimize its effects.

States are required, for example, to work through international organizations to set environmental norms and standards. Under articles 197, States Parties must cooperate either “directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures . . . for the protection and preservation of the marine environment”.

The obligation to engage in norm and standard setting in international organizations is reflected in other UNCLOS provisions dealing with marine pollution. Article 207(4), for example, provides that, in confronting land-based sources of marine pollution, States Parties must “through competent international organizations or diplomatic conferences, . . . endeavour to establish” rules and practices “taking into account . . . the economic capacity of developing States . . . [.]”

COSIS itself is a manifestation of this form of cooperation. It was formed to promote and develop international law norms concerning climate change.

In addition to norm and standard setting, UNCLOS also requires that States take specific steps through international organizations to prevent, reduce and control pollution of the marine environment, and minimize its impacts.³ Those obligations are elaborated at paragraph 326 of COSIS’s written statement. I do not propose to traverse those submissions today, except to emphasize the point that States are required to deploy necessary means and do their utmost in the context of the various organs and activities within international organizations to achieve the aim of minimizing harm to the marine environment.

I turn now to the third and final set of cooperation obligations: the duty to cooperate with and assist developing States.

In agreeing to the terms of Part XII, the States Parties acknowledged that tackling global environmental problems requires international solidarity, and the need for common but differentiated responsibilities among States.

³ See COSIS Written Statement, para. 326.

Common but differentiated responsibilities are particularly important in the context of climate change, where the evidence shows (i) that advanced economies have historically contributed more to the production of GHG than less advanced economies,⁴ and (ii) that developing States have fewer resources and less technical capacity to contribute to combating the climate crisis.⁵

Consistent with that approach, articles 202 and 203 of UNCLOS impose binding obligations on States Parties to assist developing States in their efforts to protect and preserve the marine environment. For example, article 202(a) mandates that States Parties must “promote programmes of scientific, educational, technical and other resources to developing States for the ... prevention, reduction and control of marine pollution.” It also specifies that the assistance must include, for example, “training of their scientific and technical personnel”, “supplying them with necessary equipment and facilities” and “enhancing their capacity to manufacture such equipment”. The duties of scientific and technological assistance are further reinforced in articles 266, 276 and 277 of UNCLOS. For example, articles 276 and 277 require States to “promote ... the establishment of regional marine scientific and technological research centres, particularly in developing States,” including to promote “study programmes related to the protection and preservation of the marine environment and the prevention, reduction and control of pollution.”

These obligations of scientific and technological assistance are particularly important for small island developing States. For example, Dr Maharaj explained in her expert report that significant gaps in available data severely limit the ability of scientists and policymakers to evaluate, plan for, and adapt to the significant impact of climate change on small islands and their marine environment.⁶

This is only one example of the many areas in which developing States must be assisted, if our collective response to climate change is to be effective.

In addition to technical and scientific assistance, States Parties are also required under Part XII to provide financial assistance to developing States in relation to the preservation and protection of the marine environment.

The provision of financial assistance to developing States is one of the many measures envisaged under article 194(1). It is certainly a measure that is necessary for the achievement of the environmental aims specified in UNCLOS Part XII.

The provision of financial assistance is also expressly contemplated in Part XII. For example, article 203 expressly grants developing States “preference” in “the allocation of appropriate funds.”

Article 202 also clearly envisages financial assistance when requiring States to provide “other assistance” and “appropriate assistance” to developing States, which is separate and distinct from scientific, educational and technical assistance.

The importance of financial assistance to developing States cannot be exaggerated. Such funding can help to fill the debilitating data gaps that I have just mentioned. Dr Maharaj has also explained that developing States need funding to replenish capital resources that are being eroded by, for example, the high costs of rebuilding from extreme weather events.⁷

The economies of small island developing States are characterized by their miniscule size and vulnerability to myriad external shocks. Despite those vulnerabilities, these island States often cannot access certain concessionary finance because of their GNI per capita

⁴ IPCC, Working Group III, Chapter 2: Emissions Trends and Drivers, Sixth Assessment Report: Mitigation of Climate Change (2022), pp. 218–219.

⁵ IPCC, Working Group II, Chapter 15: Small Islands, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), pp. 2047, 2073, 2088–2089.

⁶ Annex 5, Maharaj Report, paras. 10–12.

⁷ *Id.* at paras. 92–95.

ranking.⁸ This ranking results in many small island developing States being ineligible to receive support other than in the form of loans from financial institutions or other developing countries.⁹

This results in a cycle where many small island States are subject to destructive events of the changing climate, and are then required to take punitive loans or rely on the goodwill of other nations to rebuild from the damage.¹⁰ That is not a fair or equitable outcome, particularly given that small islands make only negligible contributions to greenhouse gas emissions and climate change, and are heavily reliant on large ocean spaces.

The obligation to assist must therefore mean that existing methods of climate finance fall to be re-evaluated. As Dr Maharaj explained, large amounts of financial assistance have been provided through high-interest loans, which severely limit the access to finance for recovery and adaptation from climate-related impacts.¹¹ It is far from clear that these financial obligations and arrangements comply with obligations under UNCLOS Part XII.

It is important to note that UNCLOS does not impose a hierarchy of different forms of assistance. States Parties are required – working jointly – to adopt all measures necessary to address the issue of harm to the marine environment. This will require different forms of international assistance, financial and non-financial, as is appropriate in each case.

Now, before drawing to a close, I must briefly address a few written statements which seek to cast some doubt on the robustness of the cooperation obligations under Part XII.

It has been suggested, for example, that the duty to cooperate may dilute the individual obligations of States.¹² That view is, with respect, misconceived. As Professor Brunnée noted, in addition to the duties of cooperation under Part XII, each State remains subject to their individual UNCLOS obligations to adopt rules and measures to protect the marine environment from harm due to greenhouse gas emissions. The duty of cooperation is complementary to the other obligations. Compliance with the duty to cooperate does not and cannot absolve States from their independent, individual duties to adopt measures to prevent, reduce and limit the adverse effects of climate change. And it is a fallacy to put cooperation in opposition to States' binding individual obligations.

It has also been a suggestion, in a small number of written statements, that the duty to cooperate is fulfilled simply through compliance with the UNFCCC or the Paris Agreement.¹³ However, as my colleagues have already explained, while climate change treaties may be relevant to States' obligations under UNCLOS, those instruments cannot displace the Convention's specific obligations for the protection and preservation of the marine environment. Part XII enshrines specific and autonomous obligations with respect to international cooperation, which pertain specially to the marine environment and which go considerably farther than existing climate regimes.

In summary, UNCLOS imposes clear obligations on States Parties to cooperate as to achieve the environmental objectives set out in Part XII.

These duties of cooperation are not based on charity or political expediency; they are binding international obligations.

⁸ UN Off. High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Finance for Development of Small Island Developing States* (2022), p. 42.

⁹ *Ibid.*

¹⁰ *See id.*; IPCC, Working Group II, *Chapter 15: Small Islands*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 2073.

¹¹ Annex 5, Maharaj Report, para. 95.

¹² New Zealand Written Statement, para. 69.

¹³ *See, e.g.*, Australia Written Statement, para. 61; France Written Statement, para. 125; European Union Written Statement, paras. 81–82.

These obligations require, among other things, genuine coordinated legal, scientific and institutional responses from States. They also require appropriate assistance to developing States in their efforts to battle the adverse impacts of climate change.

Cooperation obligations do not operate to dilute the general obligations under Part XII, but instead to complement States' individual duties with respect to climate change. Robust individual and collective action is required to effectively tackle the problem of climate change.

In the *MOX Plant* decision, this Tribunal affirmed that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention. . . [.]”¹⁴ We urge the Tribunal to similarly recognize and affirm the importance of international cooperation within the scheme of UNCLOS relating to climate change.

Mr President, distinguished members of the Tribunal, this concludes my observations. Thank you for your kind attention. I now yield the floor to Ambassador Charles.

THE PRESIDENT: Thank you, Mr Blake.

I now give the floor to Mr Charles to make his statement. You have the floor, Sir.

¹⁴ *MOX Plant Case (Ireland v. United Kingdom)*, Order, 3 December 2001, para. 82 (hereinafter “*MOX Plant*”).

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR CHARLES
[ITLOS/PV.23/C31/4/Rev.1, p. 14–19]

Mr President, members of the Tribunal, good afternoon. I am honoured to address you on matters related to the interpretation of the provisions of the 1982 United Nations Convention on the Law of the Sea, also known as the Montego Bay Convention, on behalf of the Commission of Small Island States on Climate Change and International Law.

My task today is to explain how the present request for an advisory opinion complements ongoing diplomatic efforts to tackle the climate crisis.

I will do so as a lecturer in law at the University of the West Indies and as a former diplomat and international law expert with over 25 years of experience in bilateral and multilateral negotiations, public international law, environmental law and the law of the sea. In particular, and among other functions, I currently serve as the Special Representative of the Secretary-General of the International Seabed Authority for the Enterprise. I am a former Ambassador Extraordinary and Plenipotentiary of Trinidad and Tobago to the United Nations. I was elected Chairman of the Sixth Committee of the United Nations General Assembly for its 70th session. I was appointed by the President of the United Nations General Assembly as the first Chairman of the Preparatory Committee for the conclusion of an international legally binding agreement under the Convention on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. And, as well, I was the Coordinator of the annual omnibus resolution on Ocean Affairs and the Law of the Sea for four years.

My speech will proceed in three parts.

First, I will explain that COSIS is situated within a broader international tradition of multilateral cooperation to resolve global issues, of which climate change is currently the most pressing.

Second, I will demonstrate that advisory opinions have a proven history of advancing diplomatic negotiations.

Third, I will illustrate how an advisory opinion in these proceedings will complement the broader diplomatic efforts on the climate crisis.

Mr President, members of the Tribunal, you have a crucial role to play by providing much needed clarification and guidance on the existing requirements that international law imposes on States with regard to climate change. A precise, concrete and definitive statement of those existing legal requirements from this Tribunal will be of invaluable assistance to the ongoing diplomatic negotiations around the climate crisis.

Since the founding of the United Nations, States have come together on the basis of regional, economic, political and other interests to form groupings to advance their interests within the wider framework of the UN.

More specifically, we have often witnessed over the years Member States working together to negotiate recommendations and devise solutions, which are then brought to the wider table of the UN General Assembly for adoption. This has been observed, for example, in order to bring about global multilateral measures to address multilateral problems, including in the negotiation and adoption of treaties.

There are countless examples of such groupings that I could point to, many of them very large. The Group of 77 and China in particular comes to mind: it consists of over 130 States, which come together within the confines of the UN and other bodies to negotiate

and safeguard their interests without prejudice to bringing about agreement on issues within wider diplomatic entities to which they belong.¹

UNCLOS itself is a framework agreement composed of carefully balanced rights and obligations related to the rule of law and ocean governance. An example of the negotiating history of UNCLOS will show that it was the Group of Latin American and Caribbean States which proposed the creation of the Enterprise as a unique international commercial entity established under the regime of Part XI of UNCLOS, as amended by the 1994 Agreement on its Implementation.²

COSIS is operating within this well-established diplomatic tradition and, with respect to its request for an advisory opinion from this Tribunal, under the auspices of an international agreement that is well-suited to multilateral cooperation.

COSIS, while new, is a fit-for-purpose vehicle to assist Small Island Developing States (SIDS) in seeking multilateral solutions to tackle issues related to the clear and present danger that climate change poses to their sustainable development, and in some cases, their very existence as members of the international community.³

COSIS membership is broad, not narrow. It is open to all members of the Alliance of Small Island States (AOSIS).⁴ So, it builds on existing diplomatic ties. AOSIS, which has a membership of 39 SIDS, is a recognized intergovernmental organization which was established in 1990 during the Second World Climate Conference in Geneva.⁵ AOSIS plays an integral role in carrying out advocacy for small island States and influencing international environmental policy. It has participated in and continues to shape multilateral negotiations on climate change.⁶

COSIS intends to advance the successes of AOSIS,⁷ including by facilitating the urgently-needed clarification on States' international obligations as they relate to climate change and the marine environment through its request for this advisory opinion.

Indeed, and this takes me to my second point, such opinions have proven invaluable in the past.

Mr President, members of the Tribunal, I can say that I have seen firsthand how a clear and well-reasoned advisory opinion can assist in diplomatic negotiations. I recall that in 2010, members of the Council of the International Seabed Authority, while negotiating aspects of the mining code for deep seabed mining, requested an advisory opinion from the Seabed Disputes Chamber relating to responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.⁸

The well-written advisory opinion that resulted from this request proved to be very timely and useful, as it provided much needed guidance to members of the Council of the ISA, who relied on its contents concerning the responsibilities and obligations of States in drafting the exploitation code for minerals in the Area.⁹ The opinion also aided States in drafting national legislation on deep seabed mining.¹⁰

¹ *The Group of 77 at the United Nations*, G77, <https://www.g77.org/>

² U.N. GAOR, 77th Sess., 48th plen. mtg. at 14-15, U.N. Doc. A/77/PV.48.

³ COSIS Agreement, Preamble.

⁴ COSIS Agreement, articles 3(1).

⁵ *Bureau of the AOSIS*, UNITED NATIONS, <https://www.un.org/ohrlls/content/bureau-aosis>.

⁶ *Issues: Climate Change*, ALLIANCE OF SMALL ISLANDS STATES, <https://www.aosis.org/issues/>.

⁷ COSIS Agreement, Preamble.

⁸ *See generally Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February).

⁹ *See generally* International Seabed Authority, *Commentary on Draft Regulations on Exploitation of Minerals in the Area*, U.N. Doc. ISBA/25/C/WP.1 (22 March 2019).

¹⁰ Donald K. Anton, Robert A. Makgill, & Cymie R. Payne, *Seabed Mining Advisory Opinion on Responsibility and Liability*, 41 ENVIRONMENTAL POLICY AND LAW 60 (2011), p. 65.

Similar approaches have been adopted by other intergovernmental bodies related to obligations under UNCLOS.

In this regard, members of the Tribunal, you will recall further that request for an advisory opinion of the Conference of Ministers of the Sub-Regional Fisheries Commission (SRFC).¹¹ This was done in keeping with article 33 of the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC. It should be noted further that the questions put to the Tribunal concerned obligations of States flowing from an international, legally binding instrument without prejudice to diplomatic work being conducted.

As it has proven to be the case in the past, an advisory opinion issued by this Tribunal has the power to assist diplomatic efforts to combat climate change by providing the concrete guidance that is so desperately needed.

Therefore, the suggestion, made in some written statements that COSIS's advisory request risks disturbing a hypothetical equilibrium reached in State negotiations and may impede further diplomatic progress, is profoundly mistaken.¹² In fact, it is precisely the contrary that is the case.

The international need for guidance on climate-related issues could not be clearer. In March of this year, the UN General Assembly adopted its resolution requesting an advisory opinion from the ICJ on the obligations of States with respect to climate change. This resolution had been supported by 105 co-sponsors.¹³

This advisory request is part and parcel of this international consensus that clear answers are required on the legal framework within which diplomatic efforts concerning climate change must move forward.

Many will be guided by this Tribunal's advisory opinion. States, whether States Parties to the Convention or those which have accepted its provisions as rules of customary international law, are required to discharge their obligations under Part XII of the Convention related to the protection of the marine environment.

UNCLOS itself requires States to cooperate, including through international organizations, to, for example, protect and preserve the marine environment.

The duty of cooperation means that an advisory opinion will complement diplomatic relations because the very terms of UNCLOS require such cooperation.¹⁴ Already, members of COSIS, AOSIS, as well as other States Parties to UNCLOS, treat these issues within the rubric of the annual Meetings of States Parties to UNCLOS which take place at UN Headquarters.¹⁵

The advisory opinion, and its request for clarification on the obligations under Part XII of UNCLOS, will expand rather than restrict international discussion around climate change.

And, in fact, States Parties have consistently made statements at the UN General Assembly in support of measures aimed at addressing matters related to but not exclusive to obligations flowing from Part XII of UNCLOS.

For example, the resolution on Ocean Affairs and the Law of the Sea, negotiated and adopted annually by members of the United Nations General Assembly, afforded States the

¹¹ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS Rep. (2 April).

¹² *See e.g.*, France Written Statement, para. 27; Japan Written Statement, p. 3; United Kingdom Written Statement, para. 7.

¹³ UN General Assembly, Resolution 77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/RES/77/276 (29 March 2023).

¹⁴ COSIS Written Statement, Volume I, paras. 316–336.

¹⁵ UNCLOS, *Report of the Thirty-third Meeting of States Parties*, UN Doc. SPLOS/33/15 (2023). *See also Thirty-Third Meeting of States Parties to United Nations Convention on Law of Sea to Be Held at Headquarters, 12-16 June*, UN Press (9 June 2023), <https://press.un.org/en/2023/sea2179.doc.htm>.

opportunity to address issues on the protection and preservation of the marine environment.¹⁶ During the general debate in support of this omnibus resolution, States individually, and also as groupings representing, the Caribbean Community, AOSIS, the G77 and China, and others, made interventions in support of this soft law instrument, which were not viewed as contradictory or in opposition to the diplomatic efforts they pursue during the annual Meetings of States Parties to the Convention.¹⁷

Also, very recently the international community witnessed the adoption by the UN General Assembly of an instrument called the BBNJ Agreement that only addressed an aspect of State obligations under UNCLOS.¹⁸ This, Mr President, is a historic agreement on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. It was borne out of diplomatic efforts to ensure that marine biological resources are conserved and sustainably used for the benefit of all humankind.

The fact that the BBNJ Agreement was adopted by consensus demonstrates the robust ability of multilateral diplomacy to resolve matters confronting the international community, including matters related to the rule of law governing those resources which are not within the national jurisdiction of any State. The negotiation of the Agreement was seen as complementary to and reinforcing of, as well as elaborating on, general provisions of the Convention on matters related to BBNJ.

It is in this context, Mr President and members of the Tribunal, that the COSIS request for an advisory opinion must be viewed.

Here, Mr President, I wish to pause and emphasize an important point. Everyone can read the plain text of Part XII of UNCLOS. We know that Part XII requires States to protect and preserve the marine environment, as stated in article 192. We can all read the language of article 194 and the language of other articles in Part XII.

What is much needed, what is urgently needed from you, is concrete and specific guidance. We need this Tribunal to go beyond the obvious text of UNCLOS and tell us, concretely, specifically, what this all-important text means and how it is to be applied when it comes to climate change.

Such an advisory opinion will guide the conduct of States in complying with their obligations which flow from the Convention and assist them in continuing to negotiate a more ambitious global climate regime, allowing them to make more progress towards meeting international standards. This is not only beneficial to Small Island Developing States, but also to other members of the international community.

Ultimately, therefore, COSIS's request for an advisory opinion is a complementary part of diplomatic efforts to protect and preserve the marine environment. I look forward to reading your opinion in these proceedings.

I wish to thank you, Mr President and member of the Tribunal. I now have the pleasure of handing the floor over to Mr Zachary Phillips. Thank you.

THE PRESIDENT: Thank you, Mr Charles.

At this stage the Tribunal will withdraw for 30 minutes and we will continue the hearing at 4:40, that is 20 minutes to 5:00. Thank you.

(Short break)

¹⁶ See, e.g., UN General Assembly, Resolution adopted by the General Assembly on 30 December 2022, UN Doc. A/RES/77/248 (9 January 2023).

¹⁷ *General Assembly Lauds Success of Law of Sea Convention, But Deplores Sea-Level Rise, Lack of Support for Small Island Nations, Increased Maritime Risks*, UN PRESS (8 December 2022), <https://press.un.org/en/2022/ga12479.doc.htm>.

¹⁸ BBNJ Treaty, A/CONF.232/2023/4* (19 June 2023).

THE PRESIDENT: I now give the floor to Mr Phillips to make his statement. You have the floor, Sir.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR PHILLIPS
[ITLOS/PV.23/C31/4/Rev.1, p. 19–24]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you today on behalf of COSIS.

I am not only here representing COSIS, but as a national of Antigua and Barbuda. I am a native of a small island developing State, a State that was devastated by Hurricane Irma six years ago. I experienced a storm displacing an entire island of people in a single day. 95 per cent of infrastructure on Barbuda was destroyed, including the hospitals and the schools. The marine ecosystems have also been permanently affected by the damage caused by Hurricane Irma. It is with this lived experience and with the knowledge that I am a youth who will inherit an ocean vastly different from the ocean of my forefathers, as a result of the actions or inactions of States, that I will address the Tribunal on the obligation of States to educate current and future generations to create an informed and active citizenry.¹

I will proceed by briefly contextualizing the current discussion on obligations under UNCLOS in terms of the need to promote educational programmes with respect to the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Then I shall highlight the considerations of equity underpinning such education.

As COSIS has already demonstrated during these hearings, Part XII of UNCLOS provides for a number of obligations that States must respect and implement in relation to the climate change crisis, and this Tribunal is called upon to specify these obligations for the purposes of this advisory opinion.

COSIS further submits that ultimately, the full realization of these obligations must involve the “education of current and future generations about environmental matters” as “essential to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.”²

Earlier today, Ms Amirfar demonstrated why UNCLOS requires that States Parties follow the best available science in fulfilling their obligations to prevent, reduce and control pollution, and to protect and preserve the marine environment. A key aspect of these obligations is the requirement to invest in education around the necessary mitigation and adaptation measures that comply with international standards. Indeed, the IPCC concluded with high confidence in its most recent assessment report that “[i]ncreasing education including capacity building, climate literacy, and information provided through climate services and community approaches can facilitate heightened risk perception and accelerate behavioural changes and planning.”³

UNCLOS reflects a commitment to education as a crucial element in fulfilling the objectives of Part XII. Article 202(a) provides that States shall, directly or through competent international organizations . . . promote programmes of scientific, *educational*, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.”⁴ Similarly, the UNFCCC provides that States Parties shall “[p]romote and cooperate in *education*, training

¹ COSIS Written Statement, para. 497.

² COSIS Written Statement, para. 424.

³ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 30.

⁴ UNCLOS, article 202(a) (emphasis added).

and public awareness related to climate change and encourage the widest participation in this process”⁵ – a commitment also reflected in the Paris Agreement and COP decisions.⁶

What must we educate the citizenry about? Mr President, I will not repeat that science matters, or what science says. It has been already addressed during these hearings. I must add here the crucial point that science is not the only driver of the necessity to take climate action. Equity is a further one. I will concentrate on equity.

As Ms Fifita explained yesterday, a global movement driven by youth has spontaneously emerged. A key principle that is colouring this movement is precisely equity. Both intergenerational equity and equity amongst States. They convey the strong idea that the “responsible conduct by individuals, enterprises and communities in protecting and improving the environments...”⁷ cannot be based on a myopic perspective, but rather it must be based on a global perspective incorporating the most responsible and equitable actions for all States and for future generations based on the best available science.

Therefore, education on both what science says about climate change, but also on what equity conveys, is key not only for the citizenry to grasp the obligations that their States are required to meet but also to understand the motivations behind the measures being taken.

In the current era – and this is fortunate – democracy and the rule of law are at the root of good and efficient governance. It follows that States are ultimately the representation of communities of thousands or millions of individuals and companies, and that the actions States endeavour to carry out shall ultimately be either buttressed or thwarted by the compliance of the individuals and their companies within those States.

The obvious requirement for States to align with their UNCLOS obligation is the necessity for them to keep abreast of the most relevant and accurate science to inform the measures they must take to fulfil their UNCLOS obligations, but also to ensure that all persons and companies under their jurisdiction and control fully understand the reasons, motivations, necessity and accuracy of those measures, and accept the burden they might create.

Many understand the concept of equity or fairness innately. However, in this context the inequity is twofold: firstly, there is an inequity between States; and, secondly, an inequity between current and future generations. I will address each in turn.

As early as 2001, experts stated very clearly that “the countries with the fewest resources are likely to bear the greatest burden of climate change in terms of loss of life and relative effect on investment and economy.”⁸

That prediction has come true. For example, some nations are facing a disproportionate amount of extreme weather events and/or slow-onset events. This is particularly true for small island developing States where, despite only contributing to less than 1 per cent of GHG emissions, we are on the front lines of the climate’s wrath, which results in the increase in frequency and severity of extreme weather events such as hurricanes, typhoons, floods and heatwaves, just to name a few.

Those are just the extreme weather events. But as my colleagues have demonstrated, small island States are also facing more pernicious but equally destructive slow-onset events that are threatening economies and, in some instances, the very existence of communities and nations.

Now, Mr President, to complete this dire picture which island nations are experiencing, not only are small island States dealing with the destruction associated with the adverse effects

⁵ UNFCCC, article 4(1)(i) (emphasis added).

⁶ *See, e.g.*, Paris Agreement, article 12; COP27, Decision -/CMA.3.

⁷ COSIS Written Statement, para. 424.

⁸ POVERTY AND CLIMATE CHANGE: REDUCING VULNERABILITY OF THE POOR THROUGH ADAPTATION, AFRICAN DEVELOPMENT BANK (2003), p. 10.

of climate change on their marine environment, but the burden of rebuilding after such catastrophic events rests on these small island developing economies.

This is the reality that I am living in. This is the reality that Antiguan, Barbudan and every SIDS native is grappling with from year to year. We are literally sitting and waiting for the storm to pass hoping that everything will be okay when it is over. However, if you have never sat in your home anxiously listening to the storm as it howls outside, you cannot truly comprehend this concept. This is why education is key. Unfortunately, while this is a reality for us, the global citizenry does not fully grasp what we are facing. With a more complete understanding of the severe ramifications of the adverse effects of climate change, the hope is that the global citizenry will be in a better position to take the drastic steps needed to save our ocean.

Mr President, we have only referenced the immediate damage to highlight this disparity, but indirect effects can be equally as devastating. Using ocean acidification and ocean warming as examples, some migratory species are now changing their migration patterns, which is extremely concerning for States, such as mine, that rely heavily on the fishing industry. Similarly, rising sea levels are causing coastline erosion and, in some cases, the submergence of entire islands that many call home.

There is currently little discussion about viable solutions to these kinds of existential threats and, unfortunately, most island States cannot simply “rebuild inland”. States such as Kiribati, Solomon Islands and Tuvalu are currently dealing with islands within their State completely disappearing. Completely disappearing, I might add, as a result of a phenomenon that these islands have negligibly contributed to.

This segues into the second point; climate change is an inherently intergenerational problem with extremely serious implications for equity between ourselves and future generations and among communities in the present and the future.⁹

Noting the devastating effects on the environment and specifically the ocean, the question then becomes what will our future generations, what will our children, inherit?

On the current trajectory, the children of the small island States will inherit oceans that are too warm and/or too acidic to sustain vibrant coral reefs and fish species. The children will inherit economies that are locked into a cycle of natural disasters that cause damage exceeding their annual GDP. A world of constant rebuilding and constant concern. They may also quite possibly inherit a world where the islands of today do not exist, a world where their culture and people are displaced and have lost their home.

Mr President, reflected in the Rio Declaration is the idea that the special situation and needs of developing countries, particularly the least developed and most environmentally vulnerable, shall be given special priority. International actions in the field of the environment and development must also address the interests and needs of all countries.¹⁰ Unfortunately, the interests and needs of the small island States regardless of their income, are not being given priority.

The question must then be asked, is that equity? But this is not just a question for this distinguished Tribunal. This is a question for the world to answer. Without educating citizens, this possibility will not become a reality. But the fact is many are not aware that this is a reality that several island nations are facing, and it is an outcome that will affect future generations with greater intensity. The actions that can stop it must be actions of today and so, citizens worldwide must be on the same page.

⁹ Edith Brown Weiss, *Climate Change, Intergenerational Equity and International Law*, 9 VERMONT JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW 615 (2008), p. 615.

¹⁰ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Annex I), Principle 6.

It is clear that both intragenerational and intergenerational equity are concepts that are central to addressing the climate problem. Those concepts are also integral to the combined efforts of States to manage, protect and preserve our one shared ocean. That is why education of the entire global citizenry is so important.

To echo the points of Naima Fifita made yesterday, the current generations, and particularly the youth, stand in a position where they are both attuned to the severe gravity of the situation, and yet also are capable of reimagining what climate action looks like so that a sustainable future can be secured. We are seeing great examples of this in the youth of island nations, especially the islands of the Pacific.

But the actions of the citizens of the islands will not be enough to meaningfully address this climate crisis. In fact, without any meaningful cooperation from the citizenry around the world, many small island States will cease to exist in the coming years. This is what education must convey.

The science and the law point to the need for action by all to prevent, reduce and control the pollution of the marine environment and to protect and preserve the marine environment not just for our sustainable use, but for the sustainable use of future generations.

Mr President, distinguished members of the Tribunal, in the words of the International Court of Justice, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”¹¹ Fulfilling the obligation to protect and preserve the environment requires the education of the citizenry.

Climate action is not a high-level theoretical exercise that only involves the leaders, experts and scientists of the world. It is a very real exercise of trying to protect living space, quality of life and the very health of human beings. We are at a stage where the living spaces of some people, my people, are being threatened. And due to the irreversible character of damage to the environment, vigilance and prevention are required¹² on the part of all States.

The island nations have been doing what we can to keep our heads above water and we will never stop that fight. But we acknowledge and accept that the more persons worldwide who are aware of this fight, the more persons will be able to assist. Education is the tool that will spread the message to far corners of the globe. Sharing these truths that I have just shared with you, Mr President, and distinguished members of the Tribunal, painting this picture of the reality we are facing for the world to see is an obligation of all States so that their citizens can make informed decisions and ultimately secure the compliance of their States in fulfilling these obligations to prevent, reduce and control the pollution of the marine environment and to protect and preserve the marine environment.

Mr President, distinguished members of the Tribunal, I now conclude my presentation, and sincerely thank you for your time and attention. If I can be of no further assistance, I ask the Tribunal to invite Mr Vaughan Lowe KC.

THE PRESIDENT: Thank you, Mr Phillips, for your statement.

I now give the floor to Mr Lowe to make his statement. You have the floor, Sir.

¹¹ *Nuclear Weapons Advisory Opinion*, para. 29.

¹² *Gabčíkovo-Nagymaros Judgment*, para. 140.

Statements of the Commission of Small Island States on Climate Change and International Law (continued)

STATEMENT OF MR LOWE

[ITLOS/PV.23/C31/4/Rev.1, p. 24–31]

Thank you, Sir. Mr President, members of the Tribunal, it is a privilege to appear before you and an honour to have been entrusted with the task of bringing the COSIS submission to a close.

The importance of this subject is obvious, and you have heard much about it. Climate change, ocean warming, sea-level rise and ocean acidification are specific aspects of the climate change crisis that the world is now facing. The seas are the ultimate destination of much of the pollution released into the atmosphere and into rivers and coastal waters. Ocean warming deoxygenates the waters and bleaches coral reefs and disrupts marine ecosystems.¹ Heat melts ice and makes water expand, causing sea levels to rise.²

The seas are also a crucial factor in strategies to mitigate the problem. The ocean is the major sink for the heat trapped in the Earth’s atmosphere by greenhouse gases: the top few metres of the ocean store as much heat as the Earth’s entire atmosphere.³ But warm seas can store less heat, and less CO₂, than cold water. As Dr Cooley and Dr Maharaj have explained, continuing emissions of greenhouse gases not only exacerbate the problem of global warming and climate change; they simultaneously undermine the limited capacity of the seas to contribute to mitigation measures.

These are serious problems for all States, but they are particularly serious for small island States, whose interests are “specially affected”, to use the language of the *North Sea Continental Shelf* cases⁴ and the Vienna Convention on the Law of Treaties,⁵ and they are so for three reasons:

First, their geography: they are the States whose territory is mostly coastal, and whose populations live and work closest to the sea, and are most dependent on it;

Second, their topography: they are the States which have the greatest proportion of their territory and populations located closest to sea level and at the most imminent risk from sea-level rise; and

Third, their existence: they are the States that are at this moment facing a literally existential crisis. Some of the island States that currently exist will literally disappear from the face of the Earth as a result of sea-level rise.

Yesterday, the Co-Chairs of COSIS – the Prime Ministers of Antigua and Barbuda and of Tuvalu – told you of the catastrophic impacts of climate change on their nations. Many countries will face such impacts unless States change their behaviour. The Co-Chairs emphasize two points: the extreme gravity of the situation and the urgency of the situation.

¹ *Greenhouse Gases are Depriving our Oceans of Oxygen*, UNITED NATIONS ENVIRONMENT PROGRAMME (10 April 2019),

<https://www.unep.org/news-and-stories/story/greenhouse-gases-are-depriving-our-oceans-oxygen> .

² *Ocean Warming*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA (December 2022), <https://climate.nasa.gov/vital-signs/ocean-warming/> ; *Understanding Sea Level: Thermal Expansion*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA,

<https://sealevel.nasa.gov/understanding-sea-level/global-sea-level/thermal-expansion> .

³ *Ocean Warming*, CLIMATE CHANGE: VITAL SIGNS OF THE PLANET—NASA (December 2022), <https://climate.nasa.gov/vital-signs/ocean-warming/> ; *Ocean and climate change*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/ocean/topics/climate-change-ocean/> .

⁴ *North Sea Continental Shelf*, Judgment, 1969 ICJ Rep. 4 (20 February), para. 73.

⁵ Vienna Convention on the Law of Treaties (23 May 1969), article 60(2). *Cf.*, ILC, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49 (2001), article 42.

That is why this advisory opinion has a real historical importance and why it will be studied throughout the next few, critical years for which the window of opportunity to limit global warming to 1.5°C remains open, as the UNFCCC pointed out last week.⁶

There will be many questions that arise from what is now generally accepted to be the inevitable rise in global sea levels. For example, what happens when base points for the determination of baselines disappear below high-water level? What happens to entitlements to maritime zones? For what acts or omissions that exacerbate or accelerate ocean warming, sea-level rise and ocean acidification is injunctive relief or compensation available?

These are questions of immense importance, but they are not the questions in front of you today. The questions before you are every bit as important, but they are even more urgent. The States specially affected are having to prepare *now* for the consequences of marine pollution due to greenhouse gas emissions. COSIS has therefore focused in this request on the more immediate task of clarifying what UNCLOS States Parties are committed to do *now* to mitigate the inevitable harm resulting from climate change, *before* those problems demand solutions in particular instances.

The request has two aims: *first*, to establish once and for all that climate change, and the deleterious effects for the ocean that result – or are likely to result from it – caused by anthropogenic greenhouse gas emissions into the atmosphere, amount to marine pollution and falls squarely within Part XII of UNCLOS; *second*, to establish and fill out the principle that the duties of UNCLOS States Parties are, in short, to follow the science, to protect and preserve the marine environment, and to take whatever steps are necessary to prevent, reduce and control marine pollution from any source.

Those are the headline points from articles 192 and 194 of UNCLOS, and they are, of course, supported by the other provisions of UNCLOS Part XII, which my colleagues have taken you to yesterday and today.

These points are largely uncontentious. The scientific evidence is clear: anthropogenic emissions of greenhouse gases introduce substances and energy into the marine environment, which result or are likely to result in deleterious effects. That falls within the definition of marine pollution in UNCLOS article 1(4) and it engages UNCLOS Part XII on the protection and preservation of the marine environment.

Part XII is explicit. Starting with article 192, headed “General obligation”, and article 194, Part XII sets out obligations to keep under surveillance and report on marine pollution, and to protect and preserve the marine environment, and to prevent, reduce and control its pollution. The words of UNCLOS articles 192 and 194 are clear and cannot be denied or ignored; and the same is true of other provisions of UNCLOS Part XII that impose additional duties.

I should say at this point that behind the language of particular UNCLOS provisions there are often specific duties, some of which are necessarily implied by those express provisions. For example, the obligation to prevent pollution of the marine environment implies that States must maintain some sort of mechanism for monitoring polluting activities and watching developments in marine science, and in the availability of marine technology, and in maintaining a degree of readiness to use or to augment national resources to control pollution when the need arises.

The very purpose of the COSIS request is to have the Tribunal assist in unpacking the language of UNCLOS and identifying the specific components and implications of such UNCLOS provisions. Whether a particular component of an UNCLOS duty, such as the duty to take necessary measures using the best practicable means at the disposal of the State, is

⁶ UNFCCC, *Technical Dialogue of the First Global Stocktake*, UN Doc. FCCC/SB/2023/9, 8 September 2023, para. 80.

classified as an obligation of conduct or an obligation of result or some other category of obligation and may be open to debate.

And of course it may be both – a duty to keep under surveillance activities under a State’s control and to be aware of new technologies such as improved booms for containing offshore spillages, and then a duty to use that technology to reduce and control pollution when an appropriate case emerges.

Are those elements obligations of conduct or of result? Well, what is clear is that the obligation explicitly set out in UNCLOS has various implications and that those duties or components of those duties cannot simply be put into one or other box, article by article, as conduct or result. That is why COSIS will prepare a written response to questions from the Bench yesterday, to explain its position without oversimplifying it.

Many of these obligations are tied to duties to take into account internationally agreed rules, standards and recommended practices and procedures. You will find examples in articles 207, 211, 212, 213 and 222 of UNCLOS.

Such generally accepted international rules and so on already exist, for example under the 1992 Framework Convention on Climate Change and the Paris Agreement adopted pursuant to it in 2015.

Though I shall generally refer simply to the Paris Agreement as one of the most relevant and archetypal instruments in the present context, it is important to remember that there are many other international instruments that bear on the implementation of UNCLOS obligations in a similar way. For instance, the conventions on marine pollution adopted under the auspices of the IMO⁷ and the Espoo Convention on Environmental Impact Assessment.⁸

All of these internationally agreed rules, standards and procedures inform the interpretation and application of the UNCLOS provisions that address marine pollution, and thus help to define the precise content of UNCLOS obligations.

Well, there is nothing particularly remarkable in any of this, and it’s clear from the written submissions in this case that these points are generally accepted. They are the straightforward consequences of the express provisions of UNCLOS and of the provisions on treaty interpretation reflected in the Vienna Convention on the Law of Treaties.

The written submissions also show wide support for the principle that the UNCLOS obligations on the one hand, and the internationally agreed rules, standards and procedures on the other, should, as far as possible, be interpreted and applied so as to give rise to a coherent set of compatible obligations.

But beyond these points, there are areas where it is less clear that there is a consensus.

And one particularly important point concerns the relationship between UNCLOS and other international instruments, and in particular, in this context, the Paris Agreement.

Some of the written submissions suggest that in the context of climate change, compliance with the UNCLOS provisions can require no more than compliance with the Framework Convention and the Paris Agreement – that compliance with the Paris Agreement *ipso facto* establishes compliance with UNCLOS.

That is, with respect, not what UNCLOS says and it is not what the Paris Agreement says. UNCLOS was concluded more than 30 years before the Paris Agreement and obviously could not refer to it or take it into account. But nor does the Paris Agreement make any reference to UNCLOS or, indeed, specifically to marine pollution.

The Paris provisions are not expressly and literally incorporated into UNCLOS. Nor are they incorporated by reference. There is broad agreement in the written submissions that

⁷ *List of IMO Conventions*, INTERNATIONAL MARITIME ORGANIZATION
<https://www.imo.org/en/about/Conventions/Pages/ListOfConventions.aspx>

⁸ Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”) (10 September 1997).

the 1982 UNCLOS does not simply incorporate the Framework Convention and Paris Agreement obligations, so that when questions of compliance and breach of UNCLOS obligations arise, there is a kind of *renvoi*, and the question becomes, was there a breach of the Framework Convention or of the Paris Agreement?

Of course, those two instruments, and others that bear upon the protection of the marine environment, are of great importance in the interpretation of the obligations of States Parties under UNCLOS. They cast light on some of the points that the international community regards as most urgently requiring action for the protection of the environment, and on some of the actions that States regard as immediately necessary steps towards that end. UNCLOS cannot be interpreted in isolation from the corpus of international environmental law.

But as a matter of law, the fact remains that UNCLOS on the one hand, and the Framework Convention and Paris Agreement on the other, are separate, independent instruments. They impose separate, independent obligations. They have separate, independent dispute settlement procedures, in articles 14 of the Framework Convention and article 24 of the Paris Agreement, and in UNCLOS Part XV. Obligations under UNCLOS are not extinguished or superseded or limited by the provisions of the Framework Convention or the Paris Agreement.

No doubt there will be instances where steps taken pursuant to the Paris Agreement are completely sufficient to satisfy the obligations under UNCLOS. But there may also be instances where such steps do not completely fulfil all UNCLOS obligations.

For example, UNCLOS articles 204-206 contain provisions that require the monitoring of activities in order to determine whether they are likely to pollute specifically the *marine* environment and require States to report periodically on the results. The Paris Agreement contains no such obligation specifically related to the marine environment: only general stocktaking.⁹

On substantive steps, the Paris Agreement is framed primarily in terms of the aims and ambitions of the Parties and things that they “should” (rather than “shall”) do. For instance, Paris article 4 provides that “Parties aim to reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter.” That is an agreed policy, not an obligation. In contrast, UNCLOS States expressly agreed to unequivocal, legal obligations.

So, UNCLOS Parties agreed in article 194(1) to an explicit obligation to “take ... all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.” And they agreed in article 194(3) that these measures must include “those designed to minimize to the fullest possible extent” the release of toxic, harmful or noxious substances from land-based sources and pollution from vessels or installations and devices at sea.

There are no such binding commitments in the Framework Convention or the Paris Agreement.

Of course all these agreements are intended to work towards the same end – the protection of the environment – as, indeed, are other international agreements, global and regional. But that does not mean that the Framework Convention and the Paris Agreement rewrite the UNCLOS Part XII text, substituting their own obligations for those agreed in 1982 and ratified by all UNCLOS States Parties. Nor does it mean that the Parties to the Paris Agreement decided to “undertake to implement UNCLOS Part XII in accordance with this

⁹ Paris Agreement, article 14.

Agreement,” to borrow the words of article 1 of the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS.¹⁰

States know well how to tailor the implementation of UNCLOS provisions to new developments if they so wish. They had done so in the 1994 Implementation Agreement only two years after the Framework Convention was concluded,¹¹ but they have made no such arrangement in respect of the UNFCCC and Paris Agreement and UNCLOS Part XII.

The UNCLOS obligation is simple and unequivocal: “States shall take ... all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source”¹² That is not mere aspiration: UNCLOS Parties did not simply “aim” to take all measures that are necessary, or commit themselves to make “ambitious efforts” to that end, to borrow phrases used in the Paris Agreement.¹³ There is a commitment in UNCLOS, an obligation, to take all measures that are “necessary” to prevent, reduce and control pollution; and the Paris Agreement and Framework Convention and the 1.5 °C limit show what is internationally understood to be ‘necessary’ to that end.

And how is that necessity to be determined in any particular case? Well, the first thing to say is that, as the International Court of Justice put it earlier this year, “whether the measures taken were ‘necessary’ is not purely a question for the subjective judgment of the party.”¹⁴ As my colleagues have already explained, “necessity” is an objective concept, and in the present context it is to be determined on the basis of generally accepted scientific data and analyses.

The science is there. You heard from Ms Amirfar about the work of the IPCC and the breadth of its consultations and its confidence in its conclusions. And the Paris Agreement and Framework Convention and the 1.5 °C limit are clear evidence of what is internationally understood to be “necessary” to that end.

This is not a matter of digging out the small print in the contract that no one read properly before they signed it. UNCLOS was signed in 1982 after more than 10 years of work. Every line was drafted and studied and debated and often amended before it was finally adopted. States then took the text away to consider whether or not to ratify it. It was 12 years later that it eventually entered into force in 1994; and since then, another 100 States have decided to ratify it. States knew what they were taking on, what commitments they were making.

They knew that they were making an explicit and unequivocal commitment to take the measures necessary to prevent, reduce and control marine pollution.

So what is the role of this Tribunal in this emergency? Climate change is a moving target. Predictions need to be updated to take account of new data. Who, 30 years ago, would have predicted the current rate of loss of sea ice? Similarly, the scientific understanding of the adverse impacts of climate change, and the technologies and adaptive mechanisms that might address the problem, develop over time.

This Tribunal cannot arrest those developments. It cannot say today that it is necessary that this or that technology, or this or that limit on emissions of specific greenhouse gases or other pollutants, must henceforth be applied by all States. When States commit to take “all measures ... necessary” using “the best practicable means at their disposal” and “in accordance with their capabilities,” the reference is not to “measures that were considered necessary

¹⁰ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (28 July 1994),

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement>

¹¹ *Id.*

¹² UNCLOS article 194(1).

¹³ Paris Agreement, articles 3, 4(1).

¹⁴ *Certain Iranian Assets (Iran v. United States)*, Judgment, slip opinion (30 March 2023), para. 106.

40 years ago,” when UNCLOS was adopted, or even 20 or 10 years ago. It is not to the “best practicable means available” in 1982, or to the capabilities of the State at that time.

The content of particular obligations in any particular case will depend upon what the need for action is at the time and in the place concerned; and it will be decided in future on a case-by-case basis.

But what the Tribunal can do now is spell out the duty under UNCLOS to take the *necessary* measures, whatever they might be, and say that *necessity* is an objective concept to be determined on the basis of generally accepted scientific evidence; and it can point to the sources of that scientific evidence.

States negotiated hard over the Paris Agreement and the limits on climate change necessary to avert the looming catastrophe. But the duties under UNCLOS are not now matters for negotiation. The question is not what commitments States would now be willing to agree to make: that question was settled in 1982 when the text of UNCLOS was adopted. The question now is: What commitments have UNCLOS States Parties already made? What does UNCLOS say and what does it mean, and what they are legally bound to do *now*?

Earlier today, Ms Amirfar and Dr Oral set out in some detail the specific steps that UNCLOS States Parties are committed to, at a minimum and as a matter of urgency. And they did so in order to address the problem that States are sometimes ready to subscribe to general statements calling for responsible actions in relation to environmental matters, but very reluctant actually to take concrete steps to do anything meaningful about it. COSIS asks you to identify and declare in your advisory opinion the steps identified by Ms Amirfar and Dr Oral as the minimum current obligations of UNCLOS States Parties, to be implemented as a matter of urgency. I will not read out those steps again, but I respectfully invite the Tribunal to refer to those submissions when considering how to frame its opinion.

Life is complicated, and involves difficult choices. We are all familiar with the propensity of governments to explain that their past promises cannot be fulfilled because of unforeseen developments or the need to balance competing demands or to pursue more urgent or important objectives. That is the nature of politics. But we are not politicians.

The duty of the lawyer is to say, honestly and plainly, what the law is. The lawyer, the court, cannot physically compel people actually to do things in accordance with their legal obligations, but they can and must say what those legal obligations are. That is the service to the community that we are all engaged in in these proceedings.

If every State is free to abandon or rewrite its clear and formally made commitments, international cooperation – not only over climate change but over any matter – becomes virtually impossible. If every State is free to decide what its promises actually mean and entail, no matter how far from the ordinary meaning of their words it might take them, the trust and predictability on which international law depends will disappear.

Equally, it is not for courts and tribunals to rewrite the terms of agreements that States have made, or to rebalance the rights and duties of parties. If UNCLOS States Parties see a need for revision, they can amend the Convention, or withdraw from it, or make a new agreement. That is a matter for them, not for courts and tribunals.

And in making this request, COSIS is asking the Tribunal to do what only courts and tribunals can do: to state, clearly and objectively what the current legal duties of States Parties are under UNCLOS in relation to the impact of climate change on the marine environment. What States then do is another matter.

Sir, that brings my submission and the submission of the Commission of Small Island States to a close. I thank you and the distinguished Judges. I thank you for your attention.

THE PRESIDENT: Thank you, Mr Lowe.

REQUEST FOR ADVISORY OPINION – COSIS

This brings to an end this afternoon's sitting and concludes the oral arguments of the Commission of Small Island States on Climate Change and International Law. The Tribunal will sit again tomorrow morning at 10:00 am when it will hear oral statements made on behalf of Germany, Saudi Arabia and Australia. This sitting is now closed.

PUBLIC SITTING HELD ON 13 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

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Mr Jesse Clarke, General Counsel (International Law), Office of International Law, Attorney-General's Department

Ms Lauren Burke, Principal Legal Officer, Office of International Law, Attorney-General's Department

Mr Stephen Donaghue KC, Solicitor-General of Australia

Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex

Mr Greg French, Ambassador to the Kingdom of the Netherlands; Permanent Representative to the Organisation for the Prohibition of Chemical Weapons

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Ms Tania Freiin von Uslar-Gleichen, Legal Adviser, Federal Foreign Office

Ms Wiebke Rückert, Director for Public International Law, Federal Foreign Office

Ms Miriam Wolter, Head of Division 504 (Law of the Sea, Antarctica, Aerospace Law)

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Mr Abdullah Emad Alsahaf

Mr Mohammed Saleh M. Albarrak

Ms Eman Abdullah H. Aman

AUDIENCE PUBLIQUE TENUE LE 13 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

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Mme Wiebke Rückert, directrice chargée du droit public international au Ministère fédéral des affaires étrangères

Mme Miriam Wolter, directrice de la division 504 (droit de la mer, Antarctique, droit aérospatial)

M. Christian Schulz, directeur adjoint de la division 504 (droit de la mer, Antarctique, droit aérospatial)

M. Alexander Proelß, professeur à l'Université de Hambourg

Arabie saoudite

Mme Ahlam Abdulrahman Yankssar

Mme Noorah Mohammed S. Algethami

M. Abdullah Emad Alsahaf

M. Mohammed Saleh M. Albarrak

Mme Eman Abdullah H. Aman

THE PRESIDENT: Good morning. Today we will continue the hearing in the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.

At the outset, I wish to note that due to traffic disruptions affecting the delegation of Germany, the schedule of this morning's sitting has been slightly revised.

As a result, we will hear oral statements from the delegations in the following order: Australia, Germany and Saudi Arabia.

I now give the floor to the representative of Australia, Mr Clarke, to make his statement. You have the floor, Sir.

STATEMENT OF MR CLARKE

AUSTRALIA

[ITLOS/PV.23/C31/5/Rev.1, p. 1–3]

Good morning, Mr President, distinguished members of the Tribunal. It is a privilege to appear before you on behalf of Australia.

Given the centrality of the United Nations Convention on the Law of the Sea to this proceeding, Australia wishes to place on the record the significance of that Convention as setting out the comprehensive legal framework within which all activities in the oceans and the seas must be carried out. Australia signed UNCLOS on the very first day it opened for signature, 10 December 1982. Australia continues to be committed to the proper interpretation and implementation of UNCLOS, including in respect of the protection and preservation of the marine environment. The international organizations and institutions established by UNCLOS, including this Tribunal, have played a critical role in ensuring the success of that Convention.

The marine environment plays an essential role in regulating our climate and providing for energy, economic and food security needs. A healthy and sustainable marine environment is essential not only for all States but for all life on this planet. Australia places particular importance on the protection, preservation, conservation and sustainable use of the oceans, and recognizes the important and ongoing role of the oceans for our region.

Australia is committed to strong oceans governance and robust regimes to ensure the protection and preservation of the marine environment. To that end, Australia recently welcomed the adoption of the new legally binding international instrument, under UNCLOS, on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. This agreement, commonly known as the “BBNJ”, delivers significant environmental benefits at a time when our oceans need them most. It is a timely example of the true value of both the UNCLOS framework and international cooperation in oceans governance.

Australia recognizes the leadership of our Pacific neighbours in global oceans governance, and the important role of Pacific island States in sustainable management and use of the oceans, and responding to its environmental needs. Indeed, Australia acknowledges the importance of the oceans as part of the Pacific identity.

In that context, it is all the more important to recognize that small island States are on the frontline of the adverse impacts of climate change, as powerfully demonstrated by the co-chairs of COSIS on Monday.¹ Those impacts have never been felt so strongly. Australia acknowledges the longstanding leadership of small island States, in particular Pacific island States, on global responses to climate change.

¹ ITLOS/PV.23/C31/1, p. 6, lines 14–19 (Browne) and p. 10, lines 20–22 (Natano).

Australia is taking urgent and ambitious climate action – to reduce anthropogenic greenhouse gas emissions,² decarbonize its economy and strengthen national resilience to the impacts of climate change. Global cooperation is critical to delivering an effective response to climate change. Australia is resolutely committed to achieving the objective of the United Nations Framework Convention on Climate Change and the goals of the Paris Agreement. It is supporting global efforts to accelerate decarbonization and enhance adaptation and resilience, particularly across our Indo-Pacific region, which is home to some of the world’s most climate-vulnerable countries.

Australia’s participation in these proceedings reflects its ongoing commitment to address the existential threat of climate change, including in respect of the protection of the marine environment.

Australia was encouraged to see that, on key aspects of the questions before the Tribunal, there are many areas of broad agreement among the participants in these proceedings.

In particular, there is broad consensus that anthropogenic greenhouse gas emissions are a threat to the marine environment, with the result that the obligations of State Parties under Part XII of UNCLOS to protect and preserve the marine environment include obligations with respect to such emissions.³

Australia was also encouraged to see that, consistently with its own written submissions, written statements of participants in these proceedings highlight that the international community is pursuing a collective response to the immense challenge of climate change through the UNFCCC and the Paris Agreement,⁴ and that these instruments are highly relevant to interpreting and meeting the obligations arising under Part XII of UNCLOS in relation to climate change.⁵

By way of outline of Australia’s submissions:

I will be followed by the Solicitor-General of Australia, Dr Stephen Donaghue, who will address you on obligations under UNCLOS to protect and preserve the marine environment, and to take measures to prevent, reduce and control pollution of the marine environment.

He will be followed by Dr Kate Parlett, who will address you on the obligations under UNCLOS to cooperate, and to adopt and enforce relevant national laws with respect to pollution of the marine environment.

Mr President, that concludes my opening remarks, and I ask you to give the floor to Dr Donaghue.

THE PRESIDENT: Thank you, Mr Clarke.

I now give the floor to Mr Donaghue. You have the floor, Sir.

² Throughout Australia’s oral submissions, any reference to greenhouse gas emissions, or GHGs, is a reference to anthropogenic greenhouse gas emissions, consistently with the scope of the questions referred to the Tribunal.

³ See, for example, Written Statement of Australia, paras. 30–31, Written Statement of Egypt, para. 26, Written Statement of the European Union, paras. 22 and 47, Written Statement of Mozambique, paras. 3.19, 3.49(a), Written Statement of New Zealand, paras. 46 and 79, Written Statement of Rwanda, para. 216, Written Statement of the United Kingdom, para. 42.

⁴ See, for example, Written Statement of Canada, paras. 32, 37, 40, Written Statement of France, paras. 120, 123, Written Statement of New Zealand, paras. 66–67, Written Statement of Singapore, para. 57, Written Statement of the United Kingdom, paras. 7, 79.

⁵ See, for example, Written Statement of Canada, paras. 22–23, 33, 37, Written Statement of the European Union, paras. 26, 28–29, Written Statement of France, para. 98, Written Statement of the Republic of Korea, para. 20, Written Statement of the Republic of Latvia, para. 19, Written Statement of The Republic of Mauritius, paras. 40, 42, Written Statement of Singapore, paras. 37–39, Written Statement of the United Kingdom, paras. 51, 68–69.

STATEMENT OF MR DONAGHUE
AUSTRALIA
[ITLOS/PV.23/C31/5/Rev.1, p. 3–12]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you today.

As Australia’s representative has just pointed out, there is a clear consensus as to the relevance of the UNFCCC and the Paris Agreement to the questions before the Tribunal. For reasons that I will develop this morning, Australia submits that Part XII of UNCLOS should not be interpreted as imposing obligations with respect to greenhouse gas emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.

That submission reflects the fact that UNCLOS is a framework agreement.¹ Its framework nature, which has placed UNCLOS at the centre of the legal order of the seas and the oceans, has allowed it to continue to be fit for purpose as distinct and unforeseen challenges have arisen over time. It achieves that by quite deliberately leaving the development of specific rules and standards on particular topics for the future, including by imposing obligations on State Parties to adopt and enforce laws and regulations,² and to agree and establish international instruments, rules, standards, practices and procedures,³ to give effect to the generalized obligations and objectives set out in Part XII.

Of particular significance, article 197 mandates cooperation between States, including through international organizations, in formulating and elaborating international rules, standards, recommended practices and procedures for the protection and preservation of the marine environment. Climate change is a paradigm example of an issue that can be addressed only through a cooperative response of the kind that article 197 envisages.

Mr President, members of the Tribunal, Australia’s submission is that the framework nature of UNCLOS has important consequence for answering the questions that are the subject of the present request for an advisory opinion, because those questions concern the “specific obligations” of State Parties under UNCLOS, including in particular Part XII.

The Tribunal is therefore asked to identify specific obligations by interpreting the generalized obligations and objectives in Part XII that provide or constitute the framework for the more specific agreements or regulations concerning the protection and preservation of the marine environment that one then sees in Part XII.

The framework nature of UNCLOS strongly supports an interpretation of Part XII that does not cut across or undermine the subsequent agreements of States – which were themselves the product of close negotiation and careful compromise – directed to the particular threat to the environment posed by greenhouse gas emissions.

Australia is resolutely committed to the objective of the UNFCCC and the goals of the Paris Agreement. The obligations of States under those agreements form the core of the specialized international climate law regime, which the preambular language of both treaties describes as “a common concern of humankind”.⁴

In particular, these agreements, having attracted the support of nearly 200 Parties, reflect the response of the international community to the need for individual and cooperative action to address the particular challenges of greenhouse gas emissions. They create a specific framework and process for State cooperation and collective action in response to climate

¹ Australia’s statement, paras. 21–23.

² UNCLOS, articles 213–222.

³ UNCLOS, articles 207–212.

⁴ UNFCCC, preambular paragraph 1; and Paris Agreement, preambular paragraph 11.

change. Under those agreements, States have an obligation to progressively increase their ambition, as is reflected in the annual meetings at Conferences of the Parties.

The ultimate objective of the UNFCCC, as described in article 2, is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.⁵ The “climate system” is broadly defined to include the hydrosphere, and therefore clearly encompasses the marine environment.⁶

In the Paris Agreement, States have agreed to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels” and to pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.⁷ The cooperative efforts necessary to achieve that collective goal are to be achieved through the preparation, communication and maintenance of nationally determined contributions (or NDCs), which are targets for the reduction of emission of greenhouse gases by each State Party.⁸ Each successive NDC is required to reflect a State’s highest possible ambition.⁹ In issuing its advisory opinion, in our submission the Tribunal should not assume that States will not give effect to these commitments.

The UNFCCC and the Paris Agreement focus on State Parties reducing greenhouse gas emissions over time. Further, given the delicate balances involved, the Paris Agreement does not prescribe particular action that must be taken to control or reduce emissions, instead focusing on an obligation to pursue efforts to achieve the overall agreed collective goal. It is a matter for States as to how they achieve reductions of greenhouse gas emissions, with it being open to different States to adopt different approaches, consistent with the ultimate objective of article 2 of preventing dangerous anthropogenic interference with the climate system.

Australia agrees with COSIS that the interpretation of UNCLOS must be informed by the global climate regime I have just summarized.¹⁰ Specifically, Australia submits that the UNFCCC and the Paris Agreement are relevant to the questions before the Tribunal in three complementary ways, each of which we will develop.

First, for the purpose of articles 192 and 194 of UNCLOS, they reflect the measures that the international community has agreed are “necessary” to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions, and they provide a mechanism for identifying the “capability” of each State, using the best practicable means at its disposal, to achieve that prevention, reduction and control.

Second, they constitute the international rules or standards that State Parties to UNCLOS are encouraged to cooperate to formulate and elaborate,¹¹ and which are required to be taken into account in adopting laws and regulations,¹² and implemented,¹³ in order to prevent, reduce and control pollution of the marine environment.

Third, they are the outcome of the cooperative process mandated by article 197 in order to meet the objective of the protection and preservation of the marine environment in respect of greenhouse gas emissions.

I will address the first of those matters, while Dr Parlett will address the second and third.

⁵ UNFCCC, article 2.

⁶ UNFCCC, article 1(3).

⁷ Paris Agreement, article 2(1)(a).

⁸ Paris Agreement, article 4(2).

⁹ Paris Agreement, article 4(3).

¹⁰ ITLOS/PV.23/C31/2, p. 31, lines 11-13 (Mbenge).

¹¹ UNCLOS, articles 197, 207(4), 212(3).

¹² UNCLOS, articles 207(1), 212(1).

¹³ UNCLOS, articles 213, 222.

I turn, then, first to article 192, which underpins the overarching legal framework established by Part XII, and which exemplifies the framework character of Part XII.¹⁴ As is stated in its title, article 192 imposes a “*general* obligation” on States in relation to the protection and preservation of the marine environment. Like many other States,¹⁵ Australia considers that the content of that general obligation can only be determined having regard to the other provisions of UNCLOS and other applicable rules of international law, including, of course, such further rules as emerge from compliance with the duty to cooperate under article 197. That interpretation of article 192 is supported by leading commentators, and it also reflects the evident intent of the drafters of UNCLOS, who understood that the general obligation in article 192 was to be given content by subsequent provisions, including article 194, and by other, more detailed provisions, rules and standards which then might be agreed within the framework of UNCLOS.¹⁶

In the context of greenhouse gas emissions, Australia’s submission is, therefore, that the UNFCCC and the Paris Agreement specify the standards against which compliance with the general obligation imposed by article 192 must be assessed. For that reason, the Tribunal should not interpret article 192 as imposing “specific obligations” to protect and preserve the marine environment, over and above those that apply under the UNFCCC and the Paris Agreement. Any “specific obligations” under UNCLOS must be found elsewhere.

Turning next, then, to article 194, it imposes an obligation to take measures to prevent, reduce and control pollution of the marine environment. Australia agrees with the general consensus reflected in the written statements to this Tribunal that greenhouse gas emissions are a source of “pollution of the marine environment” within the definition in article 1(1)(4) of UNCLOS,¹⁷ and therefore that the obligations imposed by article 194 are centrally relevant to the questions before the Tribunal.¹⁸

That said, like the rest of UNCLOS, article 194 clearly was not drafted with a view to addressing pollution in the nature of greenhouse gas emissions in particular. Rather, it is apparent that article 194 was formulated to address more conventional cases of pollution. That is clear from the references in article 194(3) to pollution from vessels, installations and devices, or from “the release of toxic, harmful or noxious substances” from land-based sources or through the atmosphere.

It is also clear from article 194(2), which is addressed to the conventional case of transboundary pollution. Greenhouse gas emissions present a new and different type of challenge to these conventional cases, not least because of the diffuse temporal and geographic sources of such emissions, the cumulative nature of their impact and the fact that the environmental impacts may occur in locations far removed from the source of the emissions that contribute to those impacts.

¹⁴ Written Statement of Australia, paras. 42–44.

¹⁵ See, for example, Written Statement of Egypt, para. 84, Written Statement of the European Union, paras. 23–24, Written Statement of France, paras. 141–142, Written Statement of Rwanda, para. 176, Written Statement of Singapore, para. 65.

¹⁶ See, for example, Alan Boyle, “Litigating Climate Change under Part XII of the LOSC” (2019) 34 *International Journal of Marine and Coastal Law* 458, 464, and Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982, Volume IV: A Commentary* (Martinus Nijhoff Publishers, 1991) 43 (“It is clear from the Convention as a whole (and not merely from Part XII) that the obligation of article 192 and with it the right of article 193 is always subject to the specific rights and duties laid down in the Convention”).

¹⁷ Written Statement of Bangladesh, paras. 29–30, Written Statement of the European Union, paras. 42–43, Written Statement of the Republic of Mauritius, para. 72, Written Statement of Nauru, para. 40, Written Statement of the United Kingdom, paras. 30, 42.

¹⁸ Written Statement of the European Union, para. 47, Written Statement of the Republic of Mauritius, para. 72, Written Statement of Nauru, paras. 37–39, Written Statement of the United Kingdom, paras. 30, 42.

For all of those reasons, whilst greenhouse gas emissions are a form of pollution to which article 194 applies, Australia submits that it would be a serious error to analyse the obligations arising under article 194 with respect to such emissions as if what was involved was an ordinary case of transboundary harm. At a minimum, that would fail to account for the extremely complex questions of causation that would arise, which are such as to render notions of individual State responsibility entirely inapt in the context of damage to the marine environment that results from greenhouse gas emissions.

That, Mr President, members of the Tribunal, brings me to the first of four points Australia emphasizes with respect to the text and effect of paragraph (1) of article 194.

The *first* point is that article 194(1) requires States to take certain measures “individually or jointly as appropriate”. The word “jointly” is of particular significance in the context of greenhouse gas emissions, because, for the reasons already mentioned, climate change is a global challenge that requires States to cooperate in pursuit of collective solutions. The obligation that is imposed by article 194(1) concerning pollution of the marine environment resulting from greenhouse gas emissions is perhaps the paradigm example of an obligation that it is “appropriate” to be discharged by States “jointly”, because the environmental consequences of such emissions result from a complex and diffuse causal chain, the links in which comprise not just the actions of many different States and private actors spread all over the globe, but those actions that have occurred over a period of many decades. The result is that it is only through joint action that global levels of greenhouse gas emissions in the atmosphere, and pollution of the marine environment, can be prevented, reduced and controlled. The importance of joint action in the operation of article 194(1) is underlined by the final phrase in article 194(1), which requires States to use their “best efforts”¹⁹ in an “endeavour to harmonize their policies” to prevent, reduce and control pollution of the marine environment.

The second point in relation to article 194(1) is that the obligation to “take ... measures” is an obligation of conduct rather than result. That follows because article 194(1) gives content to States’ obligations by reference to the practicability of conduct directed to achieving the specified result, rather than by reference to the achievement of the result itself. Thus, article 194(1) refers to States using “the best practicable means at their disposal and in accordance with their capabilities”. That is also consistent with article 194(3)(a) which, in seeking to give specific content to article 194(1), directs attention to articles 207(1) and 212(1), both of which plainly create obligations of conduct rather than result.

Where an international obligation is an obligation of conduct rather than result, compliance with that obligation is assessed against the standard of due diligence. As the Seabed Disputes Chamber of this Tribunal has previously observed, an obligation of due diligence is not “an obligation to achieve ... Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.”²⁰ Those observations were endorsed by the Tribunal in its advisory opinion to the Sub-Regional Fisheries Commission.²¹ Similarly, the International Court of Justice considered in *Pulp Mills* that an obligation of due diligence requires a State to adopt appropriate rules and measures, and to exercise vigilance in enforcing those rules and measures within its jurisdiction.²²

The content of the standard of due diligence is variable and context-dependent. That, too, was recognized by the Seabed Disputes Chamber of the Tribunal in its advisory opinion

¹⁹ See *Chagos Marine Protected Area Arbitration*, para. 539.

²⁰ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* (Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February 2011) 41 [110].

²¹ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) 38 [125], 39 [128] – 40 [129].

²² *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Rep 2010, [197].

in *Responsibilities and obligations of States with respect to activities in the Area*, which described due diligence as a “variable concept” and said that “[t]he content of ‘due diligence’ obligations may not easily be described in precise terms”.²³

My third point concerns the type of measures that are contemplated by article 194(1). That paragraph contains a single obligation to take measures directed towards three interrelated ends. By providing that States must take measures to prevent, reduce and control pollution, article 194(1) reflects an understanding that it may not be practically possible to prevent all pollution all the time. It recognizes the fact that pollution of some types, at some points in time, may occur, and requires States to mitigate its impact if it does occur. It also reflects the fact that because UNCLOS is a framework agreement, specific rules and standards will be continuously developed over time, through coordination and cooperation between States, to address new and unforeseen challenges, including those for which the best available science continues to evolve.

Greenhouse gas emissions being, as almost all the written statements agree, a form of pollution of the marine environment, article 194(1) requires States Parties to take measures to prevent, reduce and control those emissions, provided such measures are possible and practicable. Under the auspices of the UNFCCC and the Paris Agreement, States have committed to take increasingly ambitious measures to address climate change in respect of greenhouse gas emissions. Those measures, of course, focus on the reduction and control of greenhouse gas emissions.

That is entirely consistent with article 194(1) which, by imposing an obligation to take measures to “prevent, reduce and control” pollution of the marine environment, requires States to take measures to reduce and to control such pollution as has not been prevented. The reduction and control aspects of article 194(1) would have no content unless UNCLOS is interpreted as reflecting an understanding that, in particular periods in time and for some forms of pollution, States are required take measures to reduce and control pollution that has not been prevented. That interpretation of the reduction and control aspects of article 194(1) plainly aligns with the commitments that States have made under the Paris Agreement.

Mr President, distinguished members of the Tribunal, that is not to deny the present significance of the prevention aspect of article 194(1). It is merely to say that the interpretation of article 194(1) must recognize – as the Paris Agreement recognizes – that the pathway to prevention of pollution by greenhouse gas emissions is for States to exercise best possible efforts within their capacity to *reduce* and *control* those emissions until that pollution is *prevented*. In that way, UNCLOS accommodates the reality that underpins the Paris Agreement: that, at present, the global economy (including food and energy infrastructure) is structured in such a way that it is not currently practicable nor within the capacity of States entirely to prevent further emissions. As such, the prevention aspect of article 194(1) requires States *jointly* to exercise best possible efforts to reduce and control greenhouse gas emissions, using the best practicable means at their disposal and in accordance with their capabilities, until the prevention of pollution of the marine environment from that source is achieved.²⁴

It follows that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of UNCLOS to take measures to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions.

My fourth and final point in relation to article 194(1) is that the scope of the due diligence obligation it imposes is informed by the specific terms of article 194(1). That article

²³ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (Seabed Disputes Chamber, International Tribunal for the Law of the Sea, Case No 17, 1 February 2011)* 43, [117]. See also *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion) (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015)* 41 [132].

²⁴ ITLOS/PV.23/C31/3, p. 17, lines 27-45 and p. 18, lines 1-2 (Thouvenin)

imposes an obligation on States to take “all measures ... necessary” to prevent, reduce and control pollution, using “the best practicable means at their disposal and in accordance with their capabilities”. Those words explicitly recognize that the standard of conduct required to prevent, reduce and control marine pollution varies between States Parties. It also varies over time, with the measures that are “necessary” and “practicable” being informed by a range of factors, including relevant scientific, technical and economic considerations, as well as an ongoing requirement to re-evaluate those measures in light of new scientific, technical and economic information. The standard of conduct required is further informed by the evolving circumstances of the individual State over time, which will, of course, have a bearing on the capabilities of the State to prevent, reduce or control greenhouse gas emissions. Article 194(1) therefore involves a dynamic and variable standard, which is informed by evolving circumstances and capacities within each State.

Drawing those points together, Australia’s submission is that article 194(1) imposes a specific obligation on States to exercise due diligence in order to *prevent, reduce and control* pollution of the marine environment arising from greenhouse gas emissions, the content of that obligation varying between States Parties, and over time, depending on the capabilities of individual States and the best practicable means at their disposal.

In practice, the content of that obligation is best identified through the comprehensive and evolving framework of obligations imposed by the UNFCCC and the Paris Agreement, pursuant to which States have agreed upon the measures “necessary” to address environmental impacts arising from greenhouse gas emissions, including with respect to the pollution of the marine environment. That process is based on a global collective and evolving understanding of the science relevant to climate change. In particular, as I have already noted, article 2(1)(a) of the Paris Agreement provides that States will collectively hold the increase in global temperatures to well below 2°C above pre-industrial levels and pursue efforts to limit temperature increases to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change. That is all directed to giving effect to the ultimate objective identified in article 2 of the UNFCCC, being the stabilization of atmospheric concentrations of greenhouse gases “at a level that would prevent dangerous anthropogenic interference with the climate system”. There is no disagreement as to that objective. But the global climate regime recognizes that the path to achieving that objective will differ from State to State. The temperature goal from Paris should not be imported into UNCLOS in a way that eliminates the choice of means as to the specific measures to be taken to achieve the agreed goal. That choice of means is central to the Paris Agreement and it cannot be bypassed in the interpretation of UNCLOS.

The very variability in the obligations of different States, which is inherent in the terms of article 194(1) itself, is also recognized in the UNFCCC and the Paris Agreement. In particular, the Paris Agreement contains a carefully negotiated mechanism, the product of which should be understood, for the purposes of article 194(1), as identifying what individual States must do to prevent, reduce or control greenhouse gas emissions, having regard to the best practicable means at their disposal and in accordance with their capacities.

Article 4 of the Paris Agreement, as the Tribunal has heard, provides for States to prepare, communicate and maintain successive NDCs, and provides that “[e]ach Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution”. Further, the progression required of States under the Paris Agreement will be informed by the global stocktake that takes place under the framework of the Paris Agreement, which will inform States as they update and enhance their actions and support for climate action.

The provisions of the Paris Agreement that I have just described allow States, taking into account scientific, technical and economic factors which underscore the problem of

reducing greenhouse gas emissions, to identify the measures that, using the best practical means available at their disposal, are within “their capacities” to “prevent, reduce and control” greenhouse gas emissions. That being so, in Australia’s submission, the Tribunal should answer Question (b) by holding that, in the case of States that are party to the Paris Agreement and that have achieved their NDCs under that Agreement, such compliance also satisfies the standard of due diligence required to comply with the specific obligation that arises from article 194(1). It is not suggested that the mere publication of an NDC would discharge a State’s obligation under article 194(1);²⁵ a State must pursue with due diligence the achievement of its NDC.

Turning now, and much more briefly, to article 194(2), it is apparent from the terms of this provision that it was formulated by reference to a conventional case of transboundary pollution. It is directed to minimizing the extent to which activities within the jurisdiction of one State cause damage to “other States and their environment” (rather than to “pollution of the marine environment” more generally). It also requires States to ensure that pollution arising from activities within their jurisdiction or control does not spread to areas beyond national jurisdiction.

Mr President, members of the Tribunal, having regard to the length of time that greenhouse gas emissions remain in the atmosphere, and to the fact that article 194(1), and, indeed, the Paris Agreement, requires States to take measures to reduce or control greenhouse gas emissions rather than to prevent them entirely at the present point in time, article 194(2) cannot sensibly be interpreted as requiring States to ensure that such emissions do not “spread” to the territory of another State or on to the high seas. If it were interpreted in that way, article 194(2) would impose an obligation with which it would be impossible for any State to comply, given that greenhouse gas emissions emitted from the territory of one State will contribute to volume of emissions in the atmosphere for decades to come. For that reason, Australia’s primary submission is that greenhouse gas emissions are not activities of the kind to which article 194(2) is directed.

If the Tribunal considers that article 194(2) does capture greenhouse gas emissions, Australia submits that the measures necessary to “ensure” that such emissions do not cause damage to the environments of other States, and that pollution does not spread beyond national jurisdiction, go no further than the measures necessary to prevent, reduce or control pollution pursuant to article 194(1). That follows because, like that article, article 194(2) imposes an obligation of conduct, compliance with which is assessed against a standard of due diligence, the content of which is variable and context-specific.

Further, the interpretation of article 194(2) must accommodate the practical reality that the diffusion of greenhouse gas emissions does not respect national boundaries and cannot be made to do so. For that reason, the acts and omissions of any one individual State can only reasonably be judged by reference to the totality of steps that it takes in pursuit of the global temperature goal, in cooperation with other States, and over time. In those circumstances, in the case of States that are parties to the Paris Agreement and that have achieved their NDCs under that Agreement, such compliance also satisfies the standard of due diligence required to comply with any specific obligation that arises from article 194(2) with respect to greenhouse gas emissions. Of course, this does not in any way diminish Australia’s recognition of the impact greenhouse gas emissions may have on other States. Rather it is our submission that, due to the nature of greenhouse gas emissions, the most appropriate way for States to ensure that such emissions do not cause damage to the environment of other States is by addressing that pollution at the source.

Mr President, members of the Tribunal, that now concludes my statement. I now ask you to give the floor to Dr Parlett, to conclude Australia’s submissions.

²⁵ Cf. ITLOS/PV.23/C31/3, p. 30, lines 16-18 (Amirfar)

THE PRESIDENT: Thank you, Mr Donaghue.

I now give the floor to Ms Parlett to make her statement. You have the floor, Madam.

STATEMENT OF MS PARLETT
AUSTRALIA
[ITLOS/PV.23/C31/5/Rev.1, p. 12–17]

Mr President, members of the Tribunal, it is an honour to appear before you today and a privilege to have been asked to present Australia’s submissions on Sections 5 and 6 of Part XII, and article 197.

As is anticipated by article 194(3)(a), Sections 5 and 6 of Part XII relevantly impose specific obligations with respect to pollution of the marine environment from land-based sources, and from or through the atmosphere. Australia considers that greenhouse gas emissions may fall within either category, depending on the particular factual circumstances.

By reason of articles 207(1) and 212(1), States must adopt laws and regulations at the national level to prevent, reduce and control pollution of the marine environment from land-based sources, or from or through the atmosphere. In doing so, they must “take into account” internationally agreed rules, standards and recommended practices and procedures. The UNFCCC and the Paris Agreement are particularly relevant here, as they establish rules and standards of the kind that States must “take into account” when adopting national laws and regulations to prevent, reduce and control pollution from greenhouse gas emissions.

Articles 207(1) and 212(1) allow States Parties to adopt national measures that derogate from international rules or standards; however, States must take the relevant rules or standards into account, in good faith.

Articles 207(4) and 212(3) require States Parties, acting especially through competent international organizations or diplomatic conferences, to endeavour to establish global and regional rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere. These provisions are consistent with the duty of cooperation imposed by article 197, to which I will turn shortly.

To the extent that greenhouse gas emissions fall within article 207, as pollution from land-based sources, States Parties are required to make best efforts to endeavour to harmonize their policies at the “appropriate regional level”, which in the context of greenhouse gas emissions, is necessarily global.

Again, to the extent that these emissions fall within article 207, the laws, regulations, measures and practices that States Parties are required to adopt or take by the other paragraphs of article 207, must be designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances into the marine environment, in accordance with article 207(5). In the context of greenhouse gas emissions, what is “possible” depends on the complex interplay of considerations that underpin the agreements reached in the UNFCCC and the Paris Agreement. Thus, States Parties will comply with their obligations under article 207(5) if they adopt laws and regulations, take other measures, establish global and regional rules, standards and recommended practices and procedures that are consistent with the UNFCCC and the Paris Agreement.

Section 6 of Part XII addresses enforcement, including of laws and regulations adopted in accordance with Section 5. Articles 213 and 222 provide that States shall enforce their national laws and regulations adopted in accordance with articles 207(1) and 212(1), and that they shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards to prevent, reduce and control pollution of the marine environment from land-based sources and from or through the atmosphere. These provisions do not prescribe the particular means for such enforcement, and thus accord a degree of discretion to States. Australia considers that articles 213 and 222 would be satisfied where States can show that they are able to enforce their relevant national laws and regulations, and where they have adopted measures to give effect to applicable international rules and standards,

in good faith. So far as the questions referred to the Tribunal are concerned, the relevant international rules and standards are the rules and standards agreed under the UNFCCC and the Paris Agreement, for the reasons we have explained.

Through these provisions, and in particular by imposing requirements to take account of relevant international rules and standards in domestic law, and for those domestic laws to be enforced, UNCLOS has a particular role to play in giving concrete effect to international obligations concerning protection of the marine environment, including in relation to greenhouse gas emissions. It effectively operates to encourage States to implement and to enforce the rules and standards that they have agreed at the international level in and through their domestic law.

UNCLOS thereby provides a bridge between international rules and standards and their enforcement at the domestic level. In this way, and given the progress that has been made at the international level to agree relevant rules and standards relating to greenhouse gas emissions, in particular through the UNFCCC and the Paris Agreement, UNCLOS assumes particular significance in relation to climate change.

Turning then to cooperation, which underscores numerous provisions of Part XII and is the particular focus of article 197. That article requires States to “cooperate on a global basis and, as appropriate, on a regional basis, ... in formulating and elaborating international rules, standards and recommended practices and procedures consistent with” UNCLOS, for the protection and preservation of the marine environment.

The duty of cooperation in article 197 is reinforced by other provisions of Part XII that also contemplate that States will cooperate to prevent and control pollution of the marine environment. These provisions include articles 207(4) and 212(4), which oblige States Parties to endeavour to develop global and regional rules and standards, including through formal multilateral processes, to address marine pollution, and article 194(1), which requires States Parties to “endeavour to harmonize their policies” in connection with measures to prevent, reduce and control pollution.

The duty of cooperation in article 197 requires States to make meaningful and substantial efforts with a view to adopting effective measures in pursuit of the goal of protecting and preserving the marine environment.¹ That said, a duty to cooperate is, of its nature, one of conduct rather than result. As such, it is inherent in such a duty that compliance is judged by reference to the efforts States make to coordinate their actions, rather than the particular means they have chosen for doing so, or the outcomes of those efforts.

With respect to greenhouse gas emissions, those efforts have been considerable and they have been pursued with increasing urgency and priority. States have made, and are continuing to make detailed, meaningful and substantial efforts to address the full range of issues associated with such emissions and climate change impacts under the auspices of the UNFCCC and the Paris Agreement. These include the negotiation and adoption of rules, practices and procedures in pursuit of climate change mitigation and adaptation, including through climate technology development and transfer, and climate finance and capacity-building. Alongside the UNFCCC and the Paris Agreement, States have been and are pursuing a range of cooperative efforts through other international organizations and before international fora addressing sector-specific greenhouse gas emissions. In Australia’s view, the steps collectively taken in respect of these emissions meet States’ obligations under article 197.

The conclusion that States are complying with article 197 of UNCLOS with respect to greenhouse gas emissions goes a long way to demonstrating compliance with Part XII more generally. Global cooperation in relation to these emissions is not only desirable, but practically

¹ See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion) Case No. 21, 2 April 2015, ITLOS Reports 2015, 60 [210]*.

necessary, given that climate change can only be addressed through sustained and coordinated efforts by the community of States. The UNFCCC and the Paris Agreement reflect that reality. The very first paragraph of the preamble of the UNFCCC acknowledges that the “adverse effects” of climate change “are a common concern of humankind”, and its sixth paragraph acknowledges that “the global nature of climate change calls for the widest possible cooperation by all countries”.

The importance of cooperation in addressing environmental problems has been emphasized both by this Tribunal and by the ICJ. In its provisional measures order in *MOX Plant*, this Tribunal described the duty to cooperate as “a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.² To the same effect, the ICJ has recognized, in relation to environmental harm generally, that “it is by co-operating that States ... can jointly manage the risks of damage to the environment.”³ That is particularly true in relation to climate change, given the collective character of both the causes and the challenges in addressing impacts of greenhouse gas emissions.

Going forward, a key aspect of the cooperation of States, in a form that meets their specific obligations under article 197 of UNCLOS, is the Conference of the Parties, or COP, that is established by article 7 of the UNFCCC.⁴ The COP is tasked with keeping the implementation of the UNFCCC and related instruments under regular review, and with making “the decisions necessary to promote the effective implementation of the Convention.”⁵ It is specifically required to “[p]eriodically examine the obligations of the Parties and the institutional arrangements under the [UNFCCC], in the light of [its objective], the experience gained in its implementation and the evolution of scientific and technological knowledge”.⁶ The COP is further required to promote and facilitate the exchange of information on measures adopted by different States;⁷ to facilitate the coordination of measures that have been adopted, at the request of States;⁸ and to assess the implementation of the Convention, the overall effects of the measures taken pursuant to it, and the extent to which progress towards the objective of the Convention is being achieved.⁹

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (which is also referred to as the CMA) meets annually at the same time as the COP. In particular, the outcome of the first “global stocktake”,¹⁰ which is due to take place in November and December this year, will inform Parties in updating and enhancing the actions they are taking at the national level and will, to use the language of article 14(3) of the Paris Agreement, “enhanc[e] international cooperation for climate action”.¹¹

The principle of cooperation also underpins the mechanism in article 4 of the Paris Agreement for assessing the progress that individual States are making towards reducing their greenhouse gas emissions. Article 4 of the Paris Agreement provides for States to nominate,

² *MOX Plant (Ireland v United Kingdom) Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, [82].

³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Rep 2010, [77].

⁴ UNFCCC, article 7(1).

⁵ UNFCCC, article 7(2).

⁶ UNFCCC, article 7(2)(a).

⁷ UNFCCC, article 7(2)(b).

⁸ UNFCCC, article 7(2)(c).

⁹ UNFCCC, article 7(2)(e).

¹⁰ Paris Agreement, article 14(1).

¹¹ While a report entitled “Technical dialogue of the first global stocktake” was published on 8 September, that report is not the outcome of the stocktake, but is a part of the stocktake which will conclude at COP28 in November and December 2023: see <https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/why-the-global-stocktake-is-a-critical-moment-for-climate-action#What-happens-next>; cf ITLOS/PV.23/C31/1, p. 23, lines 10-12 (Akhavan); ITLOS/PV.23/C31/3, p. 30, lines 27-30 (Amirfar).

over time, progressively ambitious targets for the reduction of greenhouse gas emissions through NDCs.¹² In communicating their NDCs, States are to provide “the information necessary for clarity, transparency and understanding”.¹³ In this way, States have and are continuing to coordinate, with the objective of pursuing their collective global temperature goal, and reducing and controlling the impact of greenhouse gas emissions, including on the marine environment.

Consistently both with its framework nature and the fact that climate change was not in the contemplation of States when UNCLOS was negotiated, UNCLOS should be interpreted as responding to the enormous challenge posed by climate change principally through its requirements for cooperation in the formulation of agreements addressing particular or future problems. Australia considers that the UNFCCC and the Paris Agreement reflect agreements reached through cooperative processes that amply discharge the obligation imposed by article 197 to cooperate in order to meet the objective of the protection and preservation of the marine environment in respect of greenhouse gas emissions. Further, through their ongoing participation in the COP provided for by these agreements, States Parties to UNCLOS continue to meet their obligations to cooperate under Part XII of UNCLOS.

Mr President, this brings me to my concluding remarks. In summary, Australia makes five points to assist the Tribunal in answering the questions before it.

First: Greenhouse gas emissions are capable of constituting “pollution of the marine environment” within the meaning of article 1(1)(4) of UNCLOS.

Second: Article 192 of UNCLOS imposes a general obligation to protect and preserve the marine environment, the content of which can only be determined having regard to other provisions of UNCLOS, or to other applicable rules of international law, including, in the context of climate change, the UNFCCC and the Paris Agreement.

Third: Article 194(1) of UNCLOS imposes a specific obligation on States Parties to take measures to prevent pollution of the marine environment by exercising best possible efforts within their capacity to reduce and control greenhouse gas emissions until the prevention of pollution of the marine environment from that source is achieved. In the case of States that are parties to the UNFCCC and the Paris Agreement, compliance with those agreements satisfies the specific obligation under article 194 of UNCLOS.

Fourth: Sections 5 and 6 of Part XII of UNCLOS impose specific obligations in respect of prevention, reduction and control of pollution of the marine environment. They require States Parties to take into account internationally agreed rules and standards in domestic law, to enforce that domestic law, and to endeavour to establish global rules and standards. So far as the questions referred to the Tribunal are concerned, the relevant international rules and standards are the rules and standards agreed under the UNFCCC and the Paris Agreement.

Fifth: Article 197 imposes a specific obligation on States to cooperate, which requires them to make meaningful and substantial efforts with a view to adopting effective measures in pursuit of the goal of protecting and preserving the marine environment. Significant efforts have been made and effective measures have been adopted, principally through the UNFCCC and the Paris Agreement. Through those agreements, and through their ongoing participation in the development and implementation of those agreements, States have met, and continue to meet their specific obligation to cooperate under UNCLOS.

Mr President, distinguished members of the Tribunal, that concludes the oral statement of Australia in these proceedings and I thank you for your kind attention.

MR PRESIDENT: Thank you, Ms Parlett.

¹² Paris Agreement, article 4(2).

¹³ Paris Agreement, article 4(8).

I now give the floor to the representative of Germany, Ms von Uslar-Gleichen, to make a statement. I am glad that you were able to make it.

STATEMENT OF MS VON USLAR-GLEICHEN
GERMANY
[ITLOS/PV.23/C31/5/Rev.1, p. 17–22]

Thank you. Mr President, distinguished members of the Tribunal, it is an honour for me to appear before this Tribunal today and to present to you the comments of the Federal Republic of Germany.

I am joined today by Professor Proelß as our counsel, and by my colleague, Christian Schulz, Deputy Head of the Law of the Sea Division. I will start with presenting our statement and Professor Proelß would be happy to answer any possible questions from the Bench. Germany is of the view that this case is of high importance for international law, both from a procedural and from a substantive perspective.

On procedure, this is only the second request for an advisory opinion of the Tribunal as a full court.

On substance, the questions submitted by COSIS concern a defining challenge of our time. To specify the legal obligations of the States Parties to UNCLOS regarding the marine environment is a crucial task in the context of the unprecedented and grave consequences of climate change.

We have listened carefully to the remarks by the distinguished representatives of several COSIS Member States during the first two days of these hearings. Small island States are especially impacted by climate change and its devastating consequences on the marine environment. It is therefore no surprise that they took the initiative for this request.

Their request gives us the opportunity now to reflect upon and to obtain the Tribunal's view on how UNCLOS, the Constitution for the Ocean, must be applied and interpreted. This is an opportunity to clarify how UNCLOS must be read in light of our current knowledge of the adverse impacts of climate change on the ocean. Germany is thankful for this opportunity.

As all States Parties to UNCLOS have committed to protect the marine environment, the ocean is one of our most important allies in the fight against the climate crisis and its protection is our common concern. Germany is therefore of the view that to obtain the guidance sought from this Tribunal will help all States Parties to UNCLOS to fulfil our common task.

Given the considerable weight of an advisory opinion by this Tribunal, we would like to fully support the Tribunal in carrying out its important task: the task of giving us guidance on how our UNCLOS obligations need to be interpreted and applied with regard to the impacts of climate change.

Mr President, it is well known that Germany is supportive of the Tribunal's competence to issue advisory opinions as a full court, once the pertinent prerequisites are met.

Germany expressed this view already in the proceedings in Case No. 21. Germany fully endorses the Tribunal's findings in that case. Germany agrees that article 21 of the Statute of the Tribunal constitutes the basis for issuing an advisory opinion, if and when such a matter is "specifically provided for in an international agreement which confers jurisdiction on the Tribunal".

In Case No. 21, Germany also expressed its firm belief that requests for an advisory opinion could be used more regularly. They have great potential to strengthen the law of the sea and international law more generally. In contrast to contentious proceedings, these are non-adversarial in character. They allow all parties to voice their opinions on the interpretation of the Convention with a view to clarifying the obligations arising from its provisions.

We therefore believe that this Tribunal, with its specific competence concerning UNCLOS, will make an important contribution by issuing an advisory opinion. Please allow me to mention that the same will be true, in our view, for the International Court of Justice concerning the extent and status of relevant obligations of all States on the basis of the current

state of international law with regard to future development of climate change. Germany, together with many other States, has supported and carried forward those proceedings on the initiative of Vanuatu.

In the case before us, Germany is of the view that the requirements of article 21 of the Statute are met. The COSIS Agreement confers advisory jurisdiction on the Tribunal. It authorizes and empowers the Commission to request advisory opinions from this Tribunal. The matters on which advisory opinions can be sought by COSIS are specifically provided for in the COSIS Agreement: they are defined as “any legal question within the scope of UNCLOS”. The questions submitted to the Tribunal in the present case are also sufficiently connected with the purposes and principles of the COSIS Agreement.

A few States are still questioning the advisory jurisdiction of this Tribunal in general. They affirm that they read the words “all matters” in article 21 of the Statute as referring only to “disputes”, thus expressly excluding any requests for advisory opinions. Some quoted documents from the negotiating history of UNCLOS to support their interpretation. Germany does not agree with those views.

As the Tribunal pointed out in its advisory opinion in Case No. 21, “all matters” should not be interpreted as covering only “disputes”. Because if that were to be the case, article 21 of the Statute would simply have used the word “disputes”.

However, article 21 speaks of “all disputes and all applications submitted [...] in accordance with this Convention AND ALL MATTERS specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” Consequently, “all matters” must mean something more than only “disputes” and that something more includes advisory opinions, if specifically provided for in an international agreement which confers jurisdiction on the Tribunal.

This understanding of article 21 of the Statute is confirmed when we look at its French and Spanish versions, which are phrased in an equally open manner, going beyond mere disputes. The French version, for example, speaks of “*toutes les fois que cela est expressément prévu*”.

The objective meaning of the third alternative of article 21 of the Statute is thus quite clear and unambiguous. It cannot, in our view, be interpreted as restricting “all matters” to only disputes.

While article 21 of the Statute, together with the COSIS Agreement, constitutes a substantive legal basis for the Tribunal’s advisory opinion, article 138 of the Rules of the Tribunal furnishes the prerequisites for the Tribunal to exercise its advisory jurisdiction. Germany holds that the present request meets these prerequisites.

The questions which are presented to the Tribunal are of a legal character when measured against the standards established by the Tribunal’s 2015 Advisory Opinion.

Germany further holds that the COSIS Agreement is an “International agreement related to the purposes of the Convention” in the sense of article 138 of the Rules of the Tribunal. Its Preamble and articles 1 and 2 contain broad references to UNCLOS and to the need to take immediate action to protect and preserve the marine environment. The COSIS Agreement therefore is – at least partly – related to the purposes of UNCLOS.

Furthermore, Germany holds the view that the Tribunal should exercise its discretion pursuant to article 138, paragraph 1, of the Rules in such a manner as to admit the request for an advisory opinion submitted by the COSIS.

In fact, as the Tribunal confirmed in its 2015 Advisory Opinion, a request for an advisory opinion should not in principle be refused except for “compelling reasons”.

None of the three possible grounds to regard a request as inadmissible that were discussed in the 2015 case is relevant in the present case.

However, the present proceedings may be a good opportunity for the Tribunal to provide even more clarity as to the criteria that it will be applying when requested for an advisory opinion in the future. Germany, as a firm supporter of the competence of the Tribunal as a full court to issue advisory opinions, would welcome such a development.

Germany is of the view that the questions submitted by COSIS are neither too vague nor too unclear. They also do not require the Tribunal to act as a lawmaker instead of a judicial body. The Commission clearly seeks answers regarding the status of current international law, not future international law.

The third category of “compelling reasons” that were discussed in Case No. 21 concerned the test of whether the questions presented to the Tribunal would necessarily involve a pronouncement on the rights and obligations of third States. As far as this test is concerned, it is true that COSIS does not limit itself to seeking guidance in respect of its own actions. The request is, rather, seeking a clarification of the obligations of a much larger group of States, namely the States Parties to UNCLOS in their entirety. Germany holds, however, that this situation should not be regarded as a reason to refuse the Commission’s request for an advisory opinion.

All States are affected by climate change. And due to the fundamental role of the ocean as a carbon sink and its importance for global biodiversity and food security, also all States are affected by the decreasing state of the marine environment. To protect and preserve the marine environment has been allocated a central role under international law. The obligation codified in article 192 of UNCLOS, the “constitution for the ocean”, is applicable to all maritime zones under the international law of the sea. This legal situation is also reflected in the preamble, according to which “problems of ocean space can closely interrelate and need to be considered as a whole”.

Germany submits that this common concern of the States Parties of UNCLOS for the marine environment should indeed be considered a good reason for the Tribunal to exercise its discretionary power in favour of the requested advisory opinion. In this respect, it should also be noted that the Tribunal, as well as 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 for an advisory opinion.

Germany has full confidence that the Tribunal will continue to handle its advisory jurisdiction prudently and with utmost responsibility and conscious of the wider context, such as the parallel request by the UN General Assembly for an advisory opinion of the International Court of Justice.

Mr President, I would now like to come to the issues of applicable law.

To answer the questions submitted to it, the Tribunal will have to apply the Convention and, in particular, its Part XII on the protection and preservation of the marine environment. It will also have to apply other applicable rules of international law, to the extent that such a recourse is covered by its jurisdiction *ratione materiae*. This includes those rules that are explicitly or implicitly mentioned or referenced by the provisions of Part XII of UNCLOS. For the purposes of replying to the questions submitted to the Tribunal by the COSIS, the most relevant of these rules are codified in the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, to which all States Parties to UNCLOS are also Parties. These sets of applicable rules are interlinked, and their relation is key when replying to the questions submitted. My following remarks refer to this interrelation.

First, the Tribunal should, pursuant to article 293, paragraph 1 of the Convention, refer to “other rules of international law” where necessary, in order to substantiate, or inform respectively, the meaning of the terms of the Convention. This follows from the rules of interpretation codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties as well as from article 237, paragraph 1, of UNCLOS.

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 here as an illustrative example of such an integrated reading of the Convention. In the *South China Sea* arbitration, the Annex VII Tribunal interpreted UNCLOS in line with international agreements such as CBD and CITES.

In the present case, the UNFCCC and the Paris Agreement are the most relevant “other international agreements” that the Tribunal is called upon to make use of when interpreting the provisions of UNCLOS. The precautionary principle, as reflected notably in the Rio Declaration on Environment and Development, is another important cornerstone for the interpretation of Part XII of UNCLOS.

Secondly, where the Convention refers to, or incorporates the content of certain “external” instruments, 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 to be no less effective, or to give effect to, external rules, the Tribunal may need to determine the standards established by these rules. For example, the Convention does so with regard to marine pollution from vessels in article 211. On the other hand, in provisions like articles 207, paragraph 1, and article 212, paragraph 1, States are required to act “*taking into account internationally agreed rules, standards and recommended practices and procedures*”. Here, the Tribunal may need to address the legal scope of these references and of the obligations arising from them.

Germany considers that, with regard to the application and interpretation of Part XII of the Convention, the scope of the applicable law under article 293, paragraph 1, extends to all international legal rules dedicated to the protection and conservation of the marine environment. These include “special Conventions and agreements” in terms of article 237 of UNCLOS, and any rules and regulations that concern the specific source of pollution which is being governed by the relevant *renvoi* provisions in the Convention.

Mr President, let me now turn very briefly to the substance of the questions submitted.

As a Member State of the European Union, Germany fully endorses and aligns itself with the written statement filed by the European Union on the substance of the questions submitted to the Tribunal. I would therefore like to here merely highlight some points that are, while being reflected in the European Union’s statement, of particular importance to Germany. And as the questions put to the Tribunal reflect the language used in articles 192 and 194 of UNCLOS, my remarks are centred around those articles, beginning with the more general obligation.

Article 192 of UNCLOS contains a legal due diligence obligation of a dual nature. It entails the positive obligation to take active measures to protect and preserve the marine environment. It also contains the negative obligation not to degrade the marine environment. It has a broad character: it obliges the Parties to take measures to protect and preserve the marine environment from any kind of harm. This includes harm caused by climate change, such as ocean warming, sea-level rise and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere.

It should also be noted that article 192 of UNCLOS covers both current and future impacts on the marine environment.

Article 194 of UNCLOS lays down further and more precise obligations for States as regards the prevention, reduction and control of pollution of the marine environment. In Germany’s view, the current advisory proceedings provide an opportunity to make clear: greenhouse gas emissions should be considered as falling within the definition of “pollution of the marine environment” under article 1, paragraph 1, subparagraph 4, of UNCLOS.

I would like to highlight in this context that effects of greenhouse gas emissions introduced into the marine environment result, *inter alia*, in ocean acidification. Ocean

acidification should clearly be considered as a “deleterious effect” for the purposes of the definition of “pollution of the marine environment” in article 1, paragraph 1, subparagraph 4, of UNCLOS.

Mr President, I will at this stage refrain from going into more detail on the substance of the questions submitted. As representative of a Member State of the EU, I will leave this to my distinguished colleagues who will speak on behalf of the European Union.

Mr President, Germany hopes that the requested advisory opinion will contribute to further strengthening international cooperation and coordination in ocean governance.

International cooperation and coordination will also be key to effectively implement the future BBNJ Agreement with a view to reaching the 2022 Kunming-Montreal Global Biodiversity Target. We are looking forward to being amongst the first signatories of the BBNJ Agreement next week in New York. Germany welcomes that the new BBNJ Agreement also contains a provision conferring advisory jurisdiction on this Tribunal.

To close, let me stress once again: Germany is supportive of the Tribunal’s competence to issue an advisory opinion. We support this competence also in the present case, which was brought before the court by the island States that are members of COSIS. The present proceedings are a welcome opportunity to further specify our obligations under UNCLOS – for the health of our ocean and of our planet.

This concludes our remarks.

Thank you very much, Mr President.

THE PRESIDENT: Thank you, Ms von Uslar-Gleichen.

We have now reached 11:20. At this stage, the Tribunal will withdraw for a break of 30 minutes.

We will continue the hearing at 11:50.

(Short break)

THE PRESIDENT: Please be seated.

I now give the floor to the representative of Saudi Arabia, Ms Noorah Mohammed Algethami, to make a statement. You have the floor, Madam.

STATEMENT OF MS ALGETHAMI
SAUDI ARABIA
[ITLOS/PV.23/C31/5/Rev.1, p. 23–34]

Mr President, members of the Tribunal, it is an honour to appear before you, and to do so on behalf of the Kingdom of Saudi Arabia.

The Kingdom attaches great importance to a multilateral approach to the protection of the global climate system, including in relation to adverse effects of greenhouse gas emissions. In particular, the Kingdom is committed to mitigation and adaptation under the United Nations Framework Convention on Climate Change and the Paris Agreement.

Mr President, members of the Tribunal, as you know, the difficult negotiation of the UNFCCC and Paris Agreement (which I shall refer to as the “specialized regime on climate change”) resulted in a highly nuanced set of treaty provisions which contain a specialized mechanism to ensure compliance with States’ climate obligations and responsibilities. It is not within the Tribunal’s advisory function to intervene in this mechanism and reach its own, autonomous interpretation of States’ climate obligations.

Mr President, as you will have seen, some written statements urge the Tribunal to conclude that, by virtue of UNCLOS, States are legally bound to achieve their Nationally Determined Contributions. Further, some seek to portray the Paris Agreement commitment of pursuing efforts to limit the temperature increase to 1.5°C or 2°C above pre-industrial levels as having somehow imposed a legally binding obligation on the part of States Parties to UNCLOS to achieve that objective. Such submissions have no basis in the law, either under the specialized climate regime or UNCLOS.

Many participants in these proceedings have rightly stressed the overwhelming importance of past and ongoing negotiations on climate change.¹ This is another important reason for the Tribunal to exercise great caution. It will be recalled that the International Law Commission was similarly cautious when adopting guidelines on the “Protection of the atmosphere”, which I quote here, “were elaborated on the understanding that they were not intended to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein.”²

Mr President, members of the Tribunal, my task this morning is to assist the Tribunal by setting out some legal considerations that, in our respectful submission, should be taken into account when responding to the Request from the Commission of Small Island States on Climate Change and International Law.

I say “some” of the legal considerations because the Tribunal already has the benefit of extensive written statements from States and international organizations. Some go into considerable scientific and textual detail; however, the Kingdom believes that a second round of written submissions should be allowed in this proceeding, as in the previous ITLOS proceedings which led to the Advisory Opinion of 2015.

Mr President, my statement will be in six parts: first, I shall address the role of the Tribunal in the present advisory proceedings; second, I consider the scope of the questions put by COSIS; third, I shall briefly look at the design of Part XII of UNCLOS; fourth, I shall explain the interaction between UNCLOS obligations and international obligations external to UNCLOS; fifth, having regard to the questions before the Tribunal, I shall consider how the

¹ Written statement of Australia, 16 June 2023, paras. 59-61; written statement of Canada, 16 June 2023, paras. 51-52; written statement of the Republic of Chile, 16 June 2023, para. 59; written statement of France, 16 June 2023, para. 27; written statement of Japan, 15 June 2023, para. 2; written statement of the Republic of Korea, 16 June 2023, para. 31; written statement of the United Kingdom, 16 June 2023, para. 7.

² UN General Assembly resolution 76/112 of 9 December 2021; ILC Annual Report 2021 (A/76/10), pp. 13, 20, Guidelines, eighth preambular paragraph and commentary (10).

obligations under Part XII of UNCLOS should be approached; sixth, I shall address certain issues of procedural fairness and soundness; finally, I shall offer some brief conclusions.

I turn my first statement to the Tribunal’s jurisdiction to give the advisory opinion and the propriety of doing so. The Tribunal has already held in 2015 that it has advisory jurisdiction over a request submitted under an international agreement meeting the requirements of Rule 138. The important issue in the proceeding is how the Tribunal should exercise its jurisdiction.

It will be noted that the questions we are addressing here are limited to legal questions “within the scope of the United Nations Convention on the Law of the Sea”.³ It does not extend to other questions.

It seems appropriate to call for the Tribunal to take this opportunity to offer clear guidance to States on what is allowed and what is not allowed under article 21 of the Statute and article 138 of the Rules.

It is also essential that the Tribunal responds to these questions with balance, within the limits of its jurisdiction as well as the four corners of UNCLOS, and faithful to its role as a specialized judicial body. In particular, as the Tribunal noted in its 2015 Advisory Opinion, and as recalled in the written statements,⁴ the Tribunal must “not take a position on issues beyond the scope of its judicial functions”.

Mr President, members of the Tribunal, I now turn to the scope of the questions put by COSIS. I shall make six observations.

First, the questions rightly concern only the obligations of States Parties to UNCLOS, and are limited to obligations under UNCLOS. This follows from the terms of the questions posed by the Commission, which limits the questions to “the specific obligations of States Parties to UNCLOS”. It also follows from the text of the COSIS Agreement, under which the Commission is authorized to request an opinion “on any legal question within the scope of [UNCLOS], consistent with article 21 of the ITLOS Statute and article 138 of its Rules.”⁵ And it follows from the Tribunal’s case law, according to which the Tribunal, being a body of UNCLOS, exercises its advisory jurisdiction in order to “contribute to the implementation of [UNCLOS]”.⁶

Second, the questions do not extend to interpreting obligations external to UNCLOS, even if such obligations are relevant to the interpretation or implementation of UNCLOS obligations. This is especially important because, as I shall discuss later, the ICJ and other authorized climate change treaty bodies are in the process of interpreting those other obligations.

Third, the questions focus on Part XII of UNCLOS, the Part which concerns the protection and preservation of the marine environment.

Fourth, it follows that the questions cannot and do not ask the Tribunal to opine on obligations other than those found in UNCLOS, and not at all on the obligations of non-States Parties. There are, in fact, some 30 non-Parties, including major players in the climate change field. The Tribunal must bear this in mind, especially since the obligations under UNCLOS concern collective action and international cooperation (as may be seen in articles 194 and

³ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).

⁴ Written statement of the Republic of Guatemala, 16 June 2023, para. 21.

⁵ Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Art. 2(2).

⁶ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, *ITLOS Reports 2011*, 10 (1 February), p. 24, para. 30; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Judge Cot, Declaration, *ITLOS Reports 2015*, p. 25, para. 77.

197).⁷ Cooperation is central in Part XII (including the whole of its Section 3), as the Tribunal held as early as its *MOX Plant Order*⁸ and several times since.⁹

Fifth, the questions ask about the law as it stands at the present: “What are the specific obligations of States Parties”, not the law as it might have been in the past, or may be in the future if States so decide?¹⁰

Sixth, the questions concern substantive obligations under UNCLOS. The Tribunal is not requested to assess allegations of past or ongoing breaches of such obligations, still less to enter into questions of dispute settlement or State responsibility.

In short, the Tribunal’s jurisdiction in these proceedings is limited to interpreting the obligations of States under UNCLOS.

Mr President, members of the Tribunal, I now briefly turn to the design of UNCLOS Part XII. Its basic provisions are well known. They include (1) general provisions, (2) provisions concerning the establishment of international rules and domestic legislation, and (3) provisions of enforcement.

Section 1 of Part XII is entitled “General Provisions”. It opens with the general obligation of States under article 192 “to protect and preserve the marine environment”. This must be read together with article 193, which provides that: “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”

Article 194 then sets out, in more specific but still broad terms, what might be expected of a State to protect and preserve the marine environment, including:

an obligation to take all measures necessary to prevent, reduce, and control pollution of the marine environment,¹¹ including an obligation for States to use best practical means at their disposal;¹² an obligation for States to act in accordance with their capabilities;¹³ an obligation to endeavour to harmonize policies with other States;¹⁴ an obligation for States to ensure activities under their control or jurisdiction do not cause damage by pollution to other States and their environment; and¹⁵ an obligation to prevent pollution from spreading to areas outside of the State’s jurisdiction of control.¹⁶

It will be noted that article 194(3) provides that these measures are to include measures “to minimize [releases and pollution] to the fullest possible extent”. The remaining provisions of Section 1 give more detail but remain general.

⁷ Written statement of COSIS, 16 June 2023, para. 321.

⁸ *MOX Plant (Ireland v United Kingdom), Provisional Measures*, Order of 3 December 2001, *ITLOS Reports 2001*, para. 82; see also written statement of the Republic of Sierra Leone, 16 June 2023, para. 59; written statement of the United Kingdom, 16 June 2023, para. 82; written statement of France, 16 June 2023, para. 155; written statement of New Zealand, 15 June 2023, para. 60; written statement of the International Union for Conservation of Nature and Natural Resources – World Commission on Environmental Law Ocean Law Specialist Group (“written statement of IUCN”), 13 June 2023, para. 131; written statement of the Republic of Mozambique, 16 June 2023, para. 4.20; written statement of the Republic of Mauritius, 16 June 2023, para. 76; written statement of Australia, 16 June 2023, para. 57; written statement of the Republic of Korea, 16 June 2023, para. 11, fn. 7; statement of the Federative Republic of Brazil, 15 June 2023, para. 102; written statement of COSIS, 16 June 2023, para. 316.

⁹ Written statement of New Zealand, 15 June 2023, para. 60; written statement of the Republic of Sierra Leone, 16 June 2023, para. 59; written statement of the Republic of Korea, 16 June 2023, para. 11, fn.7; written statement of the Federative Republic of Brazil, 15 June 2023, para. 102, fn.86; written statement of the Republic of Mozambique, 16 June 2023, para. 4.20.

¹⁰ Written statement of France, 16 June 2023, para. 15.

¹¹ UNCLOS, Art. 194(1).

¹² UNCLOS, Art. 194(1).

¹³ UNCLOS, Art. 194(1).

¹⁴ UNCLOS, Art. 194(1).

¹⁵ UNCLOS, Art. 194(1).

¹⁶ UNCLOS, Art. 194(2).

In addition to the general obligations, Part XII includes an obligation for States to act individually or jointly as appropriate.¹⁷ Articles 207 and 212 set out the expectation that States will establish more specific “rules” and “standards” to prevent, reduce, and control pollution. In that regard, it is necessary to consider the precise terms of UNCLOS to see how it relates to external international obligations.

Article 207 provides that: “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.”

Article 212 provides: “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures”

These subsequent laws and regulations thus regulate the implementation of a State’s obligation to prevent, reduce and control specific types of pollution. This is precisely what States have been doing in negotiating the specialized treaty regime on climate change.

Part XII of UNCLOS also requires that States enforce domestic laws and regulations adopted in accordance with these provisions.¹⁸

Mr President, members of the Tribunal, I now turn to the relationship between Part XII and obligations external to UNCLOS.

There seems to be some common ground among the participants in these proceedings in this respect. In particular, there is general agreement that Part XII of UNCLOS is essentially a framework agreement, such as is common in international environmental law. As a framework agreement, Part XII contemplates the subsequent development of global and regional internationally agreed standards and recommended practices and procedures. These may, and in fact have often taken the form of international or regional conventions external to UNCLOS that impose specific obligations on the parties thereto and contain their own carefully negotiated provisions for implementation and dispute settlement.

A central issue dealt with in many of the written statements¹⁹ is the interaction between obligations of States Parties under UNCLOS and other international legal obligations, in particular the UNFCCC and Paris Agreement.

This specialized treaty regime sets out the relevant “conventions and agreements” with respect to preventing, reducing and controlling pollution and protecting and preserving the marine environment as it relates to climate change. In that respect, it is *lex specialis* and *lex posterior* in respect of the obligations of States Parties under the more general provisions of UNCLOS.

UNCLOS does not seek to regulate climate change impacts on the marine environment in isolation from, or in a manner that is inconsistent with the specialized treaty regime. UNCLOS itself is silent on climate change. The drafters of UNCLOS, establishing its Part XII as a framework convention, anticipated that obligations formulated in general terms in Part XII would be specifically addressed in separate subsequent treaties and agreements to be negotiated to address specific aspects of pollution of the marine environment, the “internationally agreed rules ... standards and recommended practices and procedures” that articles 212(1) and 222 require. Thus, the obligations relating to climate change, like other specific aspects of pollution of the marine environment, are specifically addressed in other treaties and agreements that were

¹⁷ UNCLOS, Arts. 197, 207(4), 212(3).

¹⁸ UNCLOS, Arts. 213, 222.

¹⁹ Written statement of the Federative Republic of Brazil, 15 June 2023, para. 20; written statement of Canada, 16 June 2023, para. 61; written statement of France, 16 June 2023, para. 18.

carefully negotiated subsequent to and apart from UNCLOS. The specialized treaty regime on climate change is what States have agreed in order to address their commitments, contributions and obligations on the issues before the Tribunal today.

However, that does not mean that the rules set forth in the specialized treaty regime on climate change have become part of UNCLOS.

Three processes may be noted. First, where there is a direct reference to external rules, their role within UNCLOS depends on the precise wording used in the specific provisions of UNCLOS. Second, while the rules set forth in the specialized treaty regime are not incorporated in UNCLOS, they may assist in the interpretation of the general obligations under Part XII, to the extent such rules and standards are already binding on other States. Third, as part of the “general rule of interpretation” reflected in article 31 of the Vienna Convention on the Law of Treaties and applicable to UNCLOS, and as stated in its paragraph 3, subsequent agreements and subsequent practice may, under certain circumstances, be taken into account together with the context when interpreting UNCLOS, as may other relevant rules of international law applicable in the relations between UNCLOS States Parties²⁰ for the purposes of interpreting the conventional rules.

Nevertheless, as stated before Your Honour, the Tribunal is not called upon to interpret the obligations set forth in the specialized treaty regime. As article 293 of UNCLOS states, the Tribunal may apply “other rules of international law not incompatible with [UNCLOS]”. But the case law rightly makes clear that article 293 is an applicable law provision: it is not a basis for jurisdiction, or for reading into the Convention rules which are not contained therein.²¹ As the Arbitral Tribunal said in *Arctic Sunrise*, article 293 “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 the Convention”.²²

Brazil rightly explained in its written statement before the Tribunal: “The interpretation of UNCLOS ... should be guided by the basic principles underpinning the multilateral climate regime. This is not to say that ITLOS should interpret the climate change treaties, which would go beyond its jurisdiction.”²³

Canada likewise explained this important point in its written statement. I quote: “[...] the Tribunal does not have jurisdiction to determine the specific measures that must be taken under these treaties. Determinations of the content of the obligations under the UNFCCC and Paris Agreement, for example, would fall outside the scope of the Tribunal.”²⁴

Some written statements make much of article 237 and article 311 of UNCLOS, which address the interaction between UNCLOS and external rules and standards. While no doubt important in their own right, these provisions say nothing about obligations under UNCLOS itself.

Article 237(1) is a “without prejudice” clause for specific obligations under certain other special conventions and agreements. As we have seen, the question put by COSIS is limited by the terms of the COSIS Agreement to legal questions “within the scope of the United Nations Convention on the Law of the Sea”. It does not extend to other legal questions, that is, other than UNCLOS. Article 237(2) of UNCLOS is a statement about the manner in which

²⁰ VCLT, Art 31.3(a), (b) and (c).

²¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, Judge Cot, Declaration, ITLOS Reports 2015*, p. 27, paras. 80-84; Norstar, 2019, p. 47, para. 136.

²² Written statement of the Federal Republic of Germany, 14 June 2023, fn 53; “*Arctic Sunrise*” (*The Netherlands v. Russia*), Case No. 22, Order (Provisional Measures), *ITLOS Reports 2013*, 230 (22 November), para. 192.

²³ Written statement of the Federative Republic of Brazil, 15 June 2023, para. 2020. *See also* written statement of France, 16 June 2023, para.18.

²⁴ Written statement of Canada, 16 June 2023, para. 61.

specific obligations under certain special conventions external to UNCLOS shall be carried out, that is, consistent with UNCLOS.

Likewise, article 311(2), which is also relied on in some written statements, says nothing about obligations under UNCLOS. It provides only that UNCLOS “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with [UNCLOS] and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under [UNCLOS]”.

Indeed, accepting that UNCLOS and the specialized treaty regime on climate change are separate regimes that can be interpreted to be consistent with one another, but are not part of one another, preserves the integrity both of UNCLOS and the specialized treaty regime. Doing so is also consistent with the applicable rules of treaty interpretation and ensures respect for international law.

Finally, I would recall that the ICJ is already tasked with rendering an advisory opinion on the legal obligations of a State with respect to climate change. The consensus request by the UN General Assembly to the ICJ (which my Government expressly joined as well) calls on the ICJ to have particular regard to UNCLOS, among other sources of law, in determining these obligations. Therefore, there is a material overlap between the issues already under consideration by the ICJ and the question put to ITLOS by COSIS. As the principal judicial organ of the United Nations, the ICJ is uniquely placed to advise on the correct interpretation of States’ climate-related obligations and, in particular, to the complex interaction between the specialized regime on climate change, UNCLOS and other relevant international agreements and regimes. If ITLOS were to render an advisory opinion which goes beyond the strict confines of UNCLOS, this will lead to the risk of conflicting judgments, resulting in incoherence, fragmentation and uncertainty.

I now turn to the application of the obligations of States Parties under Part XII. As I have explained, Part XII sets out for UNCLOS States Parties general obligations with respect to preventing pollution and protecting the marine environment. And it allocates States’ jurisdictional rights and obligations (to legislate and enforce) in various zones. These include land territory, the territorial sea, and the exclusive economic zone, the continental shelf and the high seas, and the powers are based on the degree to which States have sovereignty, sovereign rights, flag State or port State authority or enjoy high seas freedoms.

The UNCLOS obligations do not address greenhouse gas emissions. In this respect, they leave regulation of the duty of States to prevent, reduce and control pollution of the marine environment to the specific conventions and agreements, here, the specialized treaty regime on climate change. Nevertheless, the majority of participants, sometimes after thorough analysis,²⁵ conclude that GHG emissions may fall within the definition of “pollution of the marine environment” in article 1 of UNCLOS. I would only note at this stage that humans introduce greenhouse gases into the marine environment when certain activities emit greenhouse gases into the atmosphere and some of those anthropogenic greenhouse gas emissions are absorbed into the ocean. A broad range of activities is involved, including the burning of fossil fuels, deforestation, livestock production, fertilization, waste management and industrial processes.²⁶

²⁵ Written statement of France, 16 June 2023, para. 96.

²⁶ Written statement of the United Kingdom, 16 June 2023, para. 39; written statement submitted by the Government of the Republic of Indonesia, 15 June 2023, paras. 58-64; written statement of Australia, 16 June 2023, paras. 26-29.

The obligations in Part XII are obligations of due diligence. Numerous States have noted this in their written statements, and ITLOS itself recognizes the same with respect to article 192²⁷ and the obligation “to ensure” set out in article 194(2).²⁸

They are obligations of conduct rather than obligations to achieve a particular result. As explained by the Seabed Disputes Chamber, a due diligence obligation “to ensure” “is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.”²⁹

A due diligence obligation requires States to take measures that are “reasonably appropriate.”³⁰ In that sense, the due diligence standard should be adjusted to the abilities of the State carrying the obligation.

While articles 192 and 194 of the Convention do not create a legal obligation to implement the specialized treaty regime on climate change, that regime is important in examining the standard and content of the due diligence obligation under the Convention in relation to climate change, as other States agree.³¹

The specialized treaty regime on climate change, at its core, emphasizes a balancing of environmental protection against the need for “economic development to proceed in a sustainable manner” and “on the basis of equity and in the context of sustainable development and efforts to eradicate poverty.”³²

As other States Members have recognized, the specialized treaty regime on climate change further recognizes the principles of common but differentiated responsibilities (“CBDR”), which means that countries listed in Annex I to the UNFCCC have made a larger historical contribution to climate problems because they industrialized early, have greater resources to address climate change and, therefore, have a different responsibility to address climate change.³³

Accordingly, the standard of due diligence under articles 192 and 194 is not to be applied uniformly across States Parties. Rather, the standard of due diligence with respect to climate change, a standard of conduct, is fluid and requires interpretation in light of different levels of responsibility due to varying historic greenhouse gas emissions that occurred within the borders of different States, the need for economic development to be taken into account, as well as the economic status, capacity and technical capabilities of States. This must respect the principle of common but differentiated responsibilities. As affirmed by the Seabed Disputes Chamber, the due diligence obligation requires States to take measures that are “reasonably

²⁷ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, *ITLOS Reports 2015*, 1, 63 para. 219 (Apr. 2). See also *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016 paras. 956, 959, 964 (acknowledging that the obligations in Art. 192 of UNCLOS are due diligence obligations).

²⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, *ITLOS Reports 2011*, 43 para. 117 (1 Feb. 2011).

²⁹ *Ibid.*, p. 41, para. 110.

³⁰ *ITLOS, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, *ITLOS Reports 2015*, p. 1, para. 120.

³¹ Written statement of the Republic of Korea, 16 June 2023, para. 16.

³² UNFCCC, Art. 2; Paris Agreement, Art. 2.2.

³³ Paris Agreement, Art. 4.1; see also written statement of New Zealand, 15 June 2023, fn. 105; written statement of the People’s Republic of China, 15 June 2023, para. 27-29; written statement of Australia, 16 June 2023, para. 36; written statement of the Federative Republic of Brazil, 15 June 2023, paras. 13, 22; written statement of France, 16 June 2023, para. 113; written statement of the Republic of Sierra Leone, 16 June 2023, para. 62; written statement of the Republic of Djibouti, 16 June 2023, para. 57; written statement of Vietnam, 16 June 2023, para. 5.3; written statement of COSIS, 16 June 2023, para. 329; AU, para. 173; written statement of IUCN, 13 June 2023, para. 194.

appropriate.” What measures are “reasonably appropriate” depends on the facts and circumstances.

In the context of climate change, States have operationalized the obligation of due diligence by adopting various regulations in the framework of the UNFCCC and the Paris Agreement, which provide the obligations of conduct for States in respect of GHG emissions. This framework is based on a bottom-up approach that recognizes differentiated national circumstances through Nationally Determined Contributions (NDCs).

The Paris Agreement requires States Parties to identify and publish NDCs, which are to be balanced, fair and ambitious in light of a State’s national circumstances. In its NDC, each State defines its own level of ambition towards climate change mitigation in terms of amount and means under respective national circumstances. It is through an NDC that a State articulates the extent to which the State can prevent, reduce and control pollution of the marine environment from the State’s own greenhouse gas emissions. This is because the NDC is where the State sets out its ambition to reduce greenhouse gas emissions that occur within its own national borders based on its national circumstances.³⁴

Further, as a consequence of careful negotiation to achieve realistic objectives, States are required to “aim” at achieving the objectives of their NDCs through domestic measures. The Paris Agreement, in its article 4(2), provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it *intends* to achieve. The Parties shall pursue domestic mitigation measures, with the *aim* of achieving the objectives of such contributions.”³⁵ In other words, States are not legally bound to meet targets or goals set forth in their NDCs.³⁶

I have already drawn attention to article 193 of UNCLOS, which reflects General Assembly resolution 1803, declaring by consensus that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”.³⁷

Like UNCLOS, the UNFCCC in its preamble recognizes the sovereign right of States to exploit their own resources in accordance with the Charter of the United Nations,³⁸ which indicates the need for a flexible approach and the need to have regard to the differentiated positions of States.³⁹

Consistent with article 193 of UNCLOS, article 4.8 of the UNFCCC requires Parties to consider actions necessary to meet the specific needs and concerns of States not listed in Annex I to the UNFCCC and affected by response measures to climate change, including States whose economies are highly dependent on fossil fuel production and export.

Article 4.15 of the Paris Agreement likewise requires the Parties to “take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.”

UNCLOS, like the specialized treaty regime on climate change, underscores that efforts to mitigate climate change must be balanced with national circumstances, ending energy poverty, geographic and resource constraints and the rights of States, and particularly States not listed in Annex I to the UNFCCC, to develop and use their natural resources and pursue sustainable development.

³⁴ Lavanya Rajamani, *Due Diligence in International Climate Change Law*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 163, 169 (2020).

³⁵ Paris Agreement, Art. 4(2) (emphasis added).

³⁶ Lavanya Rajamani, *Due Diligence in International Climate Change Law*, DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 163, 169 (2020).

³⁷ G.A. Res. 1803 (XVII), 14 December 1962, op. para. 1.

³⁸ See UNFCCC eighth preambular paragraph.

³⁹ See e.g., UNFCCC sixth, tenth, twentieth preambular paragraphs; Arts. 3.1, 3.2, 3.3, 4.1, 4.2.

Your Honour, members of the Tribunal, I now turn to the fifth part of my statement. As I noted at the outset, the Tribunal ruled in 2015 that it has advisory jurisdiction where the requirements of Rule 138 are met. Nonetheless, a number of States in the current proceeding either contest the existence of the Tribunal’s advisory jurisdiction, argue that it should not be exercised in the very different circumstances of this case, or at least ask for clarification of the reasoning underlying the Tribunal’s jurisdictional holding. Jurisdictional issues occupy considerable portions of the first-round written submissions of many States.

This leads me to two alternative procedures. I suggest, for the Tribunal’s consideration, one is to bifurcate these proceedings: for the Tribunal to rule first on jurisdiction, clarifying its rationale and the scope of its exercise in this case, and thereafter to invite States to weigh in on the substance of the questions presented. In this manner, States would first receive helpful guidance on the scope of the issues on which they should focus before addressing the merits, and would not waste the Tribunal’s time or their time covering irrelevant or marginal issues, while omitting or underemphasizing the most important issues. This approach would be fairer to States and sounder for the Tribunal than attempting to wrap up all the issues in a single, inadequately briefed round, in which States are not certain which issues are material.

Alternatively, the Tribunal might invite a second round of written submissions, as was done in the prior proceeding, and encourage States to focus their second-round submissions on substance, considering that issues of jurisdiction have already been extensively addressed by the States in the first round and in these oral hearings.

Either of these alternative approaches would also give States the opportunity to coordinate their second-round submissions before this Tribunal with their separate submissions in the ICJ advisory proceeding on climate change. The result would be beneficial to all concerned. The information and arguments States present to both tribunals would be more coherent and consistent, and more useful to the judges.

Mr President, members of the Tribunal, to summarize. The Tribunal has been asked to provide an advisory opinion on the specific obligations of States to UNCLOS, particularly under Part XII, in relation to preventing pollution and protecting the marine environment from climate change effects like ocean warming, sea-level rise, and ocean acidification due to anthropogenic greenhouse gas emissions.

It is to be hoped that the Tribunal will take the opportunity to provide guidance on the appropriate use of its advisory function in relation to legal matters within its purview.

If the Tribunal decides to give an opinion, it will need to approach the questions asked with considerable caution. It will need to interpret the scope of the questions asked within defined boundaries, focusing only on obligations under UNCLOS and deferring to those bodies and judicial organs with primary responsibility for determining questions of interpretation relating to the specialized regime on climate change. Its opinion must also be based on interpretation of existing law.

The specialized treaty regime on climate change (consisting of the UNFCCC and the Paris Agreement) specifically addresses States’ commitments to protect the environment from climate change caused by greenhouse gas emissions, including with respect to the marine environment.

The Paris Agreement requires States Parties to identify and publish NDCs.⁴⁰ NDCs are designed to allow for differentiated treatment of States, reflecting, among other considerations, the different levels of historic greenhouse gas emissions that occurred within the borders of different States, and the position of high greenhouse gas emitting States that industrialized early and are listed in Annex I to the UNFCCC.

⁴⁰ Paris Agreement, Art. 4(2) provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. The Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”

If UNCLOS were to be interpreted to impose climate change-related obligations additional to the UNFCCC and Paris Agreement (*quod non*), such interpretation could open the door to the potential of compulsory third-party dispute settlement under UNCLOS concerning obligations under the UNFCCC and Paris Agreement, even though States Parties to the specialized treaty regime have not consented to compulsory third-party dispute settlement. Such an interpretation of UNCLOS would go beyond what States Parties ratifying UNCLOS, the UNFCCC and the Paris Agreement agreed to. It would amount not only to a significant jurisdictional overreach, it would risk fragmentation in the international legal system, creating incoherence and uncertainty.

Accordingly, UNCLOS could not be interpreted to include specific greenhouse gas emissions reduction targets and certainly not those going beyond those of the specialized treaty regime on climate change. The Kingdom is acutely aware that an effective response to climate change will only be achieved through political decisions. The role of courts, if they are to remain within their jurisdictional function, is to apply the existing law to the facts. The development of a new law is a political matter, requiring often difficult negotiations. This is especially true for effectively combating the global phenomenon of climate change, which requires active participation, cooperation and, thus, agreement by a substantial majority of States. Many differentiated interests are at stake.

The obligations under UNCLOS should be interpreted so that they are consistent with, not additional to, the obligations under the UNFCCC and the Paris Agreement. No sound legal basis exists for imposing new obligations that go beyond those which States have agreed to in the UNFCCC and the Paris Agreement; to do so would undermine those instruments, and it would undermine progress in the negotiation process that is ongoing within the framework of those instruments.

Mr President, members of the Tribunal, one final word. As we are all aware, although advisory opinions are not binding, we believe in this important role of the Tribunal and trust that it will take utmost care when considering the questions put to it.

Mr President, members of the Tribunal, that concludes the submissions of the Kingdom of Saudi Arabia. I thank you for the opportunity to address you this morning and for your kind attention.

THE PRESIDENT: Thank you, Ms Noorah Mohammed Algethami.

And this brings us to the end of this morning's sitting. The hearing will resume at 3:00 p.m. The sitting is now closed.

(Lunch break)

PUBLIC SITTING HELD ON 13 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

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Mr Mariano Pagliettini, Third Secretary, General Consulate of the Argentine Republic to Hamburg

Bangladesh

Mr Md. Khurshed Alam, Rear Admiral (Retd.), BN, Secretary, Maritime Affairs Unit, Ministry of Foreign Affairs

Mr Payam Akhavan, SJD OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto; member, Permanent Court of Arbitration; associate member, Institut de droit international; member, Bar of New York; member, Law Society of Ontario

Ms Catherine Amirfar, Debevoise & Plimpton LLP; member, Bars of New York and of the Supreme Court of the United States; Immediate Past President, American Society of International Law

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AUDIENCE PUBLIQUE TENUE LE 13 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

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Mme Maite Fernandez Garcia, Ministre et Consule générale de la République argentine à Hambourg

M. Mariano Pagliettini, troisième secrétaire au consulat général de la République argentine à Hambourg

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M. Md. Khurshed Alam, contre-amiral (en retraite) de la marine bangladaise et secrétaire du service des affaires maritimes au Ministère des affaires étrangères

M. Payam Akhavan, SJD, OOnt, FRSC, professeur de droit international (chaire des droits de l'homme) et collaborateur émérite au Collège Massey de l'Université de Toronto ; membre de la Cour permanente d'arbitrage ; membre associé de l'Institut de droit international ; membre du barreau de New York ; membre du barreau de l'Ontario

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Mme Alix Meardon, cabinet Debevoise & Plimpton LLP ; membre du barreau de New York

THE PRESIDENT: Good afternoon. We will continue the hearing in the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.

At the outset, I wish to note that we have been informed by Bolivia that they will not be able to participate in the hearing. The schedule of this afternoon's sitting has been revised to take this into account. Accordingly, we will hear oral statements from two delegations: Argentina and Bangladesh.

You have the floor, Sir.

STATEMENT OF MR HERRERA

ARGENTINA

[ITLOS/PV.23/C31/6/Rev.1, p. 1–12]

Mr President, Mr Vice-President, honourable members of the Tribunal, it is a great honour for me to appear before this distinguished Tribunal representing the Argentine Republic.

With your permission, I will be presenting to you the comments of the Argentine Republic with regard to the Request for an Advisory Opinion submitted to the Tribunal *en banc* by the Commission of Small Island States on Climate Change and International Law ("COSIS") (Case No. 31), in response to the invitation to do so circulated to the United Nations Convention on the Law of the Sea ("UNCLOS") States Parties by Order 2023/4 dated 30 June 2023, of the President of the International Tribunal for the Law of the Sea.

Mr President, distinguished members of the Tribunal, my presentation will be structured in four parts, as follows. Firstly, I will be sharing Argentina's views and comments on the jurisdictional matters of this Request; secondly, I will be considering the applicable law; thirdly, I will be presenting Argentina's views and comments on the two questions posed by COSIS to the Tribunal; and, finally, I will be summarizing Argentina's conclusions and submissions.

Before that, allow me to briefly make some preliminary remarks, considering that Argentina did not take part in the written phase of this Request. First of all, Argentina would like to hereby ratify, once again, its full support to the International Tribunal for the Law of the Sea and its judicial functions. The Argentine Republic firmly believes that ITLOS is a fundamental institution of the contemporary Law of the Sea and we attach utmost importance to its functions.

Secondly, the impacts and adverse effects of climate change on oceans represent one of the most urgent challenges in particular for developing States, including Small Island Developing States, with serious economic, social and environmental consequences that must be considered in the appropriate contexts. In this regard, Argentina, being a coastal and a developing State, shares the concern of the Member States of COSIS. Argentina is convinced that if we do not take immediate action as international community to mitigate and adapt to climate change, the lives of people all around the world, especially in developing countries, will be deeply impacted.

Argentina is fully committed to combating and mitigating climate change and its adverse effects, as well as adapting to them: we have adopted internal policies in this regard and we actively participate in the existing multilateral climate change regime as a State Party to its conventions, such as the United Nations Framework Convention on Climate Change (UNFCCC, 1992), its Kyoto Protocol (1997) and its Paris Agreement (2015). We believe that international cooperation is paramount and, particularly, we are committed to continuing our cooperation with the Small Island Developing States on this common challenge of climate change and the protection and preservation of our oceans.

Having made those preliminary remarks, I would like to turn now to the consideration of the aspects related to the advisory jurisdiction of the full Tribunal in this Request.

According to the letter dated 12 December 2022, signed by the Co-Chairs of the Commission of Small Island States on Climate Change and International Law, the Request bases the Tribunal’s jurisdiction on article 21 of the Statute of the Tribunal; article 138 of the Rules of the Tribunal; and article 2(2) of the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law.

Let us recall that in Case No. 21 *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Argentina expressed the view that no clause in the Convention nor in the Statute of the Tribunal explicitly provides for an advisory jurisdiction of a general scope for the Tribunal as a full court. Advisory opinions are only mentioned in the Convention as procedures that may take place in accordance with the relevant provisions of Part XI under the competence of the Seabed Disputes Chamber.¹

We also state that we did not consider article 21 of the Statute as providing for an advisory jurisdiction of a general scope for the Tribunal as a full court applicable to all States Parties to UNCLOS² but that the rule specifically allowing for the possibility of an advisory jurisdiction to be given by the Tribunal as a full court was article 138 of its Rules, restricted to those cases in which “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”.³ We also add that if article 138 of the Rules were to be considered as “a legitimate interpretation of article 21 of the Statute”, then the request must necessarily relate to “matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.⁴ Finally, in our oral statement we expressed the view that if the Tribunal concludes that it had advisory jurisdiction, it should decide on the conditions under which such jurisdiction should be exercised.

Mr President, honourable members of the Tribunal, Argentina takes note on how the Tribunal interpreted articles 16 and 21 of the Statute and article 138 of its Rules in its advisory decision of 2 April 2015 and how it came to the conclusion that they give the full Tribunal advisory jurisdiction under certain conditions.

In such Advisory Opinion, the Tribunal found that, and I quote, “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.”⁵ It also asserted that “when 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’.” And it clarified that article 138 of the Rules does not afford alone the legal basis for establishing the full Tribunal’s advisory jurisdiction as it only

¹ ITLOS, Case No. 21 “*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*”, Argentina’s Written statement, November 28, 2013, para. 12.

² ITLOS, Case No. 21 “*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*”, Argentina’s Written statement, November 28, 2013, para. 12 *in fine*.

³ ITLOS, Case No. 21 “*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*”, Argentina’s Written statement, November 28, 2013, para. 13.

⁴ P. Chandrasekhara Rao and Philippe Gautier, *The Rules of the International Tribunal for the Law of the Sea*, Martinus Nijhoff Publishers, p. 394.

⁵ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 58.

“furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction”.⁶

Then it recalled that requests for an advisory opinion may be submitted to it only if three prerequisites are satisfied, namely, and I quote, “(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 opinion may be given on ‘a legal question’.”⁷

Mr President, distinguished members of the Tribunal, in this context, Argentina will not object to an advisory jurisdiction of the full Tribunal in this particular case in light of the provisions of UNCLOS, the ITLOS Rules, the COSIS Agreement and the precedent set by ITLOS in the *SRFC* Advisory Opinion.

Notwithstanding that, in order to ensure the integrity of its judicial functions, the Tribunal will have to proceed with caution with regard to the basis, the personal and material scope, and the exercise of such jurisdiction as well as the framework of its discretionary power to render the advisory opinion.

In fact, taking into account Member States’ statements in the written phase of this case, it is evident that different interpretations about the legal basis and scope of the advisory jurisdiction of the Tribunal as a full bench still subsist, mainly related to the interpretation of article 21 of the Statute and its term “matters”, and on the parameters of the exercise of its discretionary power.

In this framework, it is important to recall that, as the Tribunal held in its Case 21, the exercise of the advisory function consists in enlightening the applicant “*as to [its] course of action*” by providing it with “guidance in respect of its own actions” and the opinion “is given only to” the applicant.⁸

Besides, as it was recognized by the International Court of Justice (ICJ) in its case on *The Legality of threat or the use of nuclear weapons* (Advisory Opinion, 1996) – and by ITLOS itself – it is clear that the Tribunal, when answering to the questions, cannot legislate, and I quote: “Rather, its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules (...) it states the existing law and does not legislate”.⁹

Furthermore, it should be recalled as well that the rights of third States must be guaranteed and respected: States’ consent to jurisdiction is a fundamental principle.¹⁰ As the Tribunal is aware, the Argentine Republic is not a party to the “Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law”. That instrument is *res inter alios acta* concerning Argentina. According to the well-established rule of general international law reflected in article 34 of the Vienna Convention on the Law of the Treaties *pacta tertiis nec nocent nec prosunt*, the above-mentioned convention “does not create either obligations or rights for a third State without its consent.”

⁶ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 59.

⁷ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 60.

⁸ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 76.

⁹ Cf. ICJ, *Legality of threat or the use of nuclear weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 237, para. 18; ICJ, *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, 12, para. 33; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 73-74. (Para. 74: “The Tribunal also wishes to make it clear that it does not take a position on issues beyond the scope of its judicial functions.”)

¹⁰ ICJ, *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, para. 33.

Mr President, distinguished members of the Tribunal, having considered the jurisdictional aspects of the Request, I will now succinctly refer to the applicable law. Article 2(2) of COSIS Agreement provides that, and I quote:

The Commission shall be authorized 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 (...).

The questions posed to the Tribunal in this Request refer to specific obligations of States Parties “to UNCLOS, including under Part XII.”

ITLOS’ jurisdiction in this Request is restricted to obligations due “under UNCLOS”, and, in particular, its Part XII.

UNCLOS provides the legal framework within which all activities in the oceans and seas must be carried out. As stated in its preamble, UNCLOS establishes “a legal order for the seas and oceans”.

Bearing that in mind, Article 293, paragraph 1, of UNCLOS provides that, and I quote:

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. (...)

It is important to recall that in Case 21, ITLOS relied on article 293 of UNCLOS, article 23 of its Statute, and articles 130 and 138, paragraph 3, of its Rules, to determine that it is empowered in advisory proceedings to apply UNCLOS and other rules of international law not incompatible with this Convention.¹¹ That is to say, article 293 enables ITLOS to apply in this Request not only UNCLOS but also other rules of international law not incompatible with the Convention pertaining to the protection and preservation of the marine environment that may shed light on the States Parties’ obligations under the Convention.

Besides, article 237 of UNCLOS, related to “Obligations under other conventions on the protection and preservation of the marine environment”, provides that, and I quote:

1. The provisions of this Part [Part XII] are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

The role of the Tribunal in this Request is the interpretation and application of UNCLOS. Part XII of the Convention refers to the protection and preservation of the marine environment and, taking into account the fact that Part XII contains environmental obligations, and the provisions set forth in articles 293 and 237 cited above, as well as the principle of systemic integration established by article 31 of the 1969 Vienna Convention on the Law of

¹¹ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, paras. 55; 80-84; 143.

Treaties, these obligations under UNCLOS need to be considered in light of the broader international environmental law.

In light of the fact that the questions posed refer specifically to climate change, and that UNCLOS refers in general terms to the protection and preservation of the marine environment in a broader sense, it is necessary to specifically take into account the existing multilateral climate change regime, comprised primarily – as mentioned by many States Parties in the written phase – of the United Nations Framework Convention on Climate Change (UNFCCC, 1992), its Kyoto Protocol (1997) and its Paris Agreement (2015).

That is to say that the interpretation of UNCLOS provisions in relation to the potential adverse effects of climate change in the oceans and the States Parties' obligations under UNCLOS need to be guided by the basic principles of the multilateral climate change regime. We concur with the views exposed by Brazil in its written statement in this regard.¹² This does not mean nor imply that ITLOS should directly interpret climate change treaties, but, rather, that the principles underpinning the climate change regime shed light on the relevant obligations contained in UNCLOS, under the principle of systemic integration contained in article 31 of the 1969 Vienna Convention on the Law of Treaties.¹³ Due regard must be given, however, to the fact that not all States are parties to the same treaties.

Mr President, distinguished members of the Tribunal, I will proceed now with the Argentine Republic's views and comments on the two questions submitted to the Tribunal by COSIS.

Concerning the first question on the States Parties' obligations to prevent, reduce and control pollution of the marine environment, article 1(1)(4) of the Convention provides that, and I quote,

(4) "pollution of the marine environment" means 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;

Allow me to provide some brief comments about this article: it applies only to pollution of anthropogenic origin; potential pollutants are an extremely wide category; and any substance or form of energy introduced by humans into the marine environment will constitute pollution within the meaning of UNCLOS and be regulated by it if it has, or is likely to have, a "deleterious effect" of the kind referred to in that article.¹⁴

The Convention then identifies six sources of marine pollution: pollution from land-based sources; pollution from seabed activities subject to national jurisdiction; pollution from activities in the Area; pollution by dumping; pollution from vessels; and pollution from or through the atmosphere.

Part XII, headed "Protection and Preservation of the Marine Environment", establishes the obligation for all UNCLOS States Parties to protect and preserve the marine environment. Indeed, it provides the framework for tackling marine pollution by calling on States Parties to adopt international rules and standards to address pollution from each source; by requiring States to legislate to implement such rules and standards and to enforce that legislation; by

¹² ITLOS, *Request for an Advisory Opinion submitted to the Tribunal en banc by the Commission of Small Island States on Climate Change and International Law (COSIS) (Case No. 31)*, Federative Republic of Brazil's Written statement, 15 June 2023, para. 20.

¹³ ICJ, *Case concerning Oil Platforms (Iran v United States of America)*, 42 ILM 1334 2003, para. 41.

¹⁴ Cf. Robin Churchill, Vaughan Lowe, Amy Sander, *The Law of the Sea*, Fourth Edition, Manchester University Press, 2022, p. 621.

setting the jurisdictional parameter for individual States to regulate marine pollution going beyond international rules and standards; and by briefly addressing questions of liability and compensation.¹⁵

Article 194 of UNCLOS provides in this regard that:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

This article sets forth the obligation for all States Parties to prevent, reduce and control pollution of the marine environment from any source. The recognition that States must act with “the best practicable means at their disposal” and “in accordance with their capabilities” determines that this is an obligation of conduct and “due diligence” and not of result.¹⁶

Besides, since it allows for a differentiation between States based on their national capabilities, this is in line with a fundamental principle that must be considered by the Tribunal: the principle of common but differentiated responsibilities. This principle, as it was already mentioned by many States Parties in the written phase of these proceedings, is a cornerstone within the multilateral climate change regime, and it serves as a guiding principle when analysing State environmental obligations under UNCLOS. This principle was first expressed as one of the principles of the Rio Declaration (principle 7), and was expressly included in the UNFCCC (Art 3.1) and its Paris Agreement (Art 2.2), along with the recognition of the special circumstances of developing countries in the face of climate change (Principle 6 of the Rio Declaration, article 3.2 of the UNFCCC and article 2.2 of its Paris Agreement).

Notwithstanding the clear fact that all States Parties have the obligation to prevent, reduce and control pollution of the marine environment, there is a clear distinction between the obligations of developed countries and developing countries within the multilateral climate change regime. While all countries must take ambitious action to combat climate change, the level of ambition will be determined by the different level of responsibilities, and respective capacities, in light of different national circumstances.

In this sense, given the recognition that the largest share of historical and current global greenhouse gas emissions originated in developed countries, the latter have the obligation to take the lead in the efforts to reduce emissions and to provide the necessary means of implementation to developing countries, including financial resources, technology transfer and capacity-building (articles 9, 10 and 11 of the Paris Agreement). This principle is also reflected in other articles of UNCLOS like article 207(4) that provides that in the case of pollution from land-based sources, any international rules and standards adopted shall take “into account characteristic regional features, the economic capacity of developing States and their need for economic development”; articles 202 and 203 that call for the provision of financial and technical assistance to developing States for the protection and preservation of the marine environment; and in its Part XIV that provides for the development and transfer of marine technology.

Mr President, allow me to go back to article 194 and to continue with its consideration. According to its paragraph 2, States shall also take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or

¹⁵ Cf. Robin Churchill, Vaughan Lowe, Amy Sander, *Op. Cit.*, p. 624.

¹⁶ ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, ITLOS Seabed Chamber, February 2011, paras. 110-112.

activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with the Convention. This is in line with the “no harm principle” recognized by the ICJ¹⁷ and by ITLOS itself.¹⁸ In addition to that, paragraph 3 of that article provides that, and I quote, “[t]he measures taken pursuant to this Part [Part XII] shall deal with all sources of pollution of the marine environment” and paragraph 5 makes a special emphasis on the importance of protecting and preserving rare or fragile ecosystems, and the habitat of threatened marine species.

On the other hand, just like in the global efforts to combat climate change, international cooperation has a capital importance in the protection and preservation of the marine environment.¹⁹ Indeed, article 197 of the Convention provides that, and I quote:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with [the] Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Along those same lines, ITLOS recognized, in the *MOX Plant* case that, and I quote, “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.” This was recalled by the Tribunal in its Case 21²⁰ and the ICJ had expressed in the *Pulp Mills* case that, and I quote, “(...) it is by co-operating that the States concerned can jointly manage the risks of damage to the environment (...)”²¹

In addition to that, Part XII contains numerous calls for cooperation in relation to specific matters, for example, in relation to scientific research concerning protection of the marine environment (articles 200, 201 and 202) and the development of international rules and standards to prevent marine pollution (like in article 212 (3)).²² As we underlined a few moments ago, these obligations are reinforced by the principle of common but differentiated responsibilities that call for cooperation between developed and developing countries in their efforts to protect and preserve the marine environment, and by similar compatible obligations under the multilateral climate change regime for developed countries.

Other obligations include those of articles 198 and 199. According to article 198 of the Convention, when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations. And article 199 of UNCLOS provides that in the cases referred to in article 198, States in the area affected, in accordance with their capabilities, and the competent international organizations shall cooperate, to the extent possible, in eliminating the

¹⁷ ICJ, *Legality of threat or the use of nuclear weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997, para. 53.

¹⁸ ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean*, Order of 25 April 2016, *ITLOS Reports 2016*, para. 71: (“Considering further that: [t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment (...)”).

¹⁹ Principles 7 and 27 of the Rio Declaration also set this principle.

²⁰ ITLOS, *MOX Plant* (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at p. 110, para. 82. ITLOS also cited this para. 82 in its Advisory Opinion, 2 April 2015, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, *ITLOS Reports 2015*, para. 140.

²¹ ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, *I.C.J. Reports 2010*, para. 77.

²² Cf. Robin Churchill, Vaughan Lowe, Amy Sander, *Op. Cit.*, pp. 618-619.

effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.

According to article 206, there is also an obligation, as far as practicable, to assess the potential effects on the marine environment of planned activities under their jurisdiction or control. And I quote:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

In this regard, we should recall that in the multilateral climate change regime, particularly in the Paris Agreement, States have recognized the need to respond to the urgent threat of climate change on the basis of the best available scientific knowledge and that this criteria should be considered when analysing the standard of “reasonable grounds” in article 206 of UNCLOS, as well as the basis of all climate action.

Particularly relevant to this first question is also the provision of article 212 of the Convention that concerns pollution from or through the atmosphere. Article 212(3) of UNCLOS calls on States, acting especially through competent international organizations or diplomatic conference, to endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution from or through the atmosphere. Articles 212(1), (2) and 222 of UNCLOS provide that States shall adopt and enforce laws, regulations and other measures to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation. Under article 194(3)(a), such laws, regulations and measures shall be designed to minimize to the fullest possible extent emissions of “toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping.”

Summarizing, Mr President, it is clear from these articles that UNCLOS, in particular its Part XII, does provide for a series of obligations for States Parties in regards to climate change, aiming at the prevention, reduction and control of pollution of the marine environment from all activities that contribute to exacerbating the effects of climate change, in accordance with their capabilities, within a framework of cooperation, and in light of the principle of common but differentiated responsibilities; and that this interpretation is compatible with other obligations within UNCLOS, its principles and objectives.

Concerning the second question posed to the Tribunal, article 192 of UNCLOS imposes a general obligation on all States Parties in the following terms, and I quote: “States have the obligation to protect and preserve the marine environment.”

Indeed, article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligations to take active measures to protect and preserve the marine environment, and, by logical implication, entails the negative obligation not to degrade the marine environment.

The 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.

According to ITLOS, a State's obligations under article 192 apply not only within its own maritime zones (including internal waters) but also to areas within the jurisdiction of other States and to areas beyond national jurisdiction.²³ Moreover, in the *SFRC* Advisory Opinion (2015), ITLOS stated that the reference to the "marine environment" in article 192 included the conservation of the living resources of the sea and other marine life.²⁴ In the *Southern Bluefin Tuna Cases*, the Tribunal observed that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment."²⁵

There is also an obligation on States to exercise due diligence to prevent their nationals from violating article 192. That obligation includes a duty to enact rules and measures to prevent such violations, and to "maintain a level of vigilance in enforcing those rules and measures".²⁶

In summary, article 192 of UNCLOS establishes a general substantive obligation to protect and preserve the marine environment which is widely regarded to reflect customary international law. As with article 194, this obligation also needs to be interpreted in light of the principle of common but differentiated responsibilities, and with other obligations contained in UNCLOS, its principles and objectives.

Closely related to it, article 193 provides that, and I quote, "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." This means that the right of States to exploit the natural resources of their maritime zones is subject to the obligation set forth in article 192 to protect and preserve the marine environment.

Mr President, honourable members of the Tribunal, Argentina would like to briefly refer now to the written statement submitted to the Tribunal in these proceedings by the Republic of Nauru, dated 15 June 2023.²⁷

In footnotes 90 and 93 of its written statement,²⁸ the Republic of Nauru included a reference to a letter dated 28 September 2010 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, addressed to the President of the General Assembly (A/65/513), 14 October 2010.

Argentina objects to the inclusion of that letter in both footnotes and any applicability of it to these proceedings. Indeed, that letter included by Nauru concerns the question of the Malvinas Islands. This question is a special and particular colonial situation involving a sovereignty dispute recognized by the United Nations General Assembly in

²³ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 120. Cf. Robin Churchill, Vaughan Lowe, Amy Sander, *Op. Cit.*, p. 618-619.

²⁴ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, paras. 120 and 216.

²⁵ ITLOS, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at p. 295, para. 70.

²⁶ ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, paras. 120, 124, 131 and 136.

²⁷ ITLOS, *Request for an Advisory Opinion submitted to the Tribunal en banc by the Commission of Small Island States on Climate Change and International Law (COSIS) (Case No 31)*, Republic of Nauru's Written Statement, 15 June 2023.

²⁸ ITLOS, *Request for an Advisory Opinion submitted to the Tribunal en banc by the Commission of Small Island States on Climate Change and International Law (COSIS) (Case No 31)*, Republic of Nauru's Written Statement, 15 June 2023, pages 19-20.

Resolution 2065 (XX) and subsequent resolutions. In that context, and concerning the exploration and exploitation of natural resources in the disputed area, the United Nations General Assembly resolution 31/49 called upon Argentina and the United Kingdom to refrain from taking decisions that would imply introducing unilateral modifications in the situation while the Islands are going through the negotiation process recommended by the General Assembly. Finally, in accordance with the United Nations General Assembly resolutions, the sovereignty dispute should be settled through negotiations between the two parties, bearing in mind the interests of the population of the Islands; therefore, the principle of self-determination of peoples is not applicable to this colonial case.

For all these reasons, Argentina objects to the inclusion of such reference and any applicability of it to these proceedings, and requests the Tribunal not to consider it in this case.

In conclusion, Mr President, Mr Vice-President, distinguished members of the Tribunal: Argentina does not object to the advisory jurisdiction of the full Tribunal in this particular case in light of the provisions of UNCLOS, the ITLOS Rules, the COSIS Agreement, and the precedent set by ITLOS in the *SRFC* Advisory Opinion. However, further clarifications and precisions on the basis, personal and material scope of this advisory jurisdiction and a procedural framework on the exercise of the Tribunal's discretionary power should be provided, taking into account Argentina's comments in this regard.

Concerning the applicable law, in accordance with article 23 of ITLOS Statute, articles 130 and 138, paragraph 3, of its Rules, and UNCLOS article 293, the Tribunal should apply UNCLOS, in particular its Part XII, and may also rely on other rules of international law not incompatible with the Convention pertaining to the preservation of the marine environment that may shed light on the States Parties' obligations under the Convention, including the other special conventions and agreements that were referred to, in accordance with article 237 of the Convention. Moreover, obligations under UNCLOS need to be considered and interpreted in light of the broader international environmental law that contains key principles and conventions, such as the principle of common but differentiated responsibilities.

States Parties to UNCLOS do have specific obligations under the Convention, particularly under its 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, in particular in accordance with their national capabilities, within a framework of cooperation, and in light of the principle of common but differentiated responsibilities, as it was described in this presentation.

Finally, Argentina requests the Tribunal to not consider the referred letter contained in the Republic of Nauru's written statement, footnotes 90 and 93, as applicable to these proceedings.

Mr President, Mr Vice-President, distinguished members of the Tribunal, with this, the Argentine Republic concludes its oral statement in these proceedings. Argentina is grateful for having had the possibility of addressing the Tribunal in this case. I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Herrera.

I now give the floor to the representative of Bangladesh, Mr Khurshed Alam, to make his statement. You have the floor, Sir.

STATEMENT OF MR ALAM
BANGLADESH
[ITLOS/PV.23/C31/6/Rev.1, p. 12–18]

Mr President, distinguished members of the Tribunal, ladies and gentlemen, *Assalamu Alaikum* and good afternoon to you all.

My name is Rear Admiral Md Khurshed Alam, and I am the Secretary of the Maritime Affairs Unit at the Ministry of Foreign Affairs of Bangladesh. It is my great privilege to represent the Government of the People’s Republic of Bangladesh in these historic proceedings.

Today, I appear before you on behalf of my country and my people because we are victims of a grave injustice.

Despite our negligible contribution to global emissions,¹ we are ranked as the seventh-most climate-affected country in the world, when accounting for fatalities, economic losses and number of climatic events.²

Mr President, we are a nation of 170 million people, situated on the Bengal Delta, where the mighty Ganges and Brahmaputra rivers have flowed into the sea for countless millennia, sustaining the ancient civilizations that we have inherited in the modern world. We are a resilient people who have survived many hardships in our long history, but today we are faced with catastrophic climate change that threatens our very existence.

My opening statement today will cover three topics: first, the vulnerability of Bangladesh to the negative impacts of climate change on the ocean; second, our response to the negative impacts of climate change as well as in mobilizing global support for climate justice; and, third, our confidence in this Tribunal delivering a strong advisory opinion commensurate with the immense scale and gravity of the climate crisis.

At the outset, I wish to express my most sincere appreciations to the Commission on Small Island States on Climate Change and International Law for initiating these advisory proceedings. We fully support the Commission’s position in these proceedings. And we stand in solidarity with Small Island Developing States as our fates are linked in the face of constant and increasingly devastating impacts of climate change.

Bangladesh as a climate-vulnerable State:

Mr President, I come from a beautiful land, bordered by the majestic Himalayas to the north and the Bay of Bengal to the south; and crisscrossed by many rivers. This geography, while making for an idyllic landscape, also exacerbates our vulnerability to climate change.

The Ganges Delta, the world’s largest river delta, makes up over half of our territory, including our entire southern coast on the Bay of Bengal. At its highest points, the Ganges Delta is no more than five metres above sea level.

The satellite photograph on the screen shows the Ganges Delta, with rivers flowing from the Himalayas to the Bay of Bengal. Two of these rivers, the Ganges and the Brahmaputra, are among the largest in the world.

Because of our low elevation and susceptibility to flooding, we suffer the worst consequences of the deleterious effects of climate change, including sea-level rise, coastal flooding, tropical cyclones and storm surges.

From 1973 to 2009, the land surface affected by encroaching seawater grew from 833,000 to 1.056 million hectares.³ By 2100, we estimate that sea-level rise will submerge

¹ Statement of H.E. Sheikh Hasina, COP26 (1 November 2021).

² See National Adaptation Plan of Bangladesh (2023–2050), p. i (citing Germanwatch, *Global Climate Risk Index 2021: Who Suffers Most from Extreme Weather Events?* (2021), p. 13).

³ “Great Distress”: Bangladesh Bears Brutal Cost of Climate Crisis, AL JAZEERA (3 November 2021).

between 12 and 18 per cent of our coastal areas.⁴ Sea-level rise will nearly double asset risks, currently about US\$ 300 million per annum, while threatening agricultural production, water supplies and coastal ecosystems.

Already, we are experiencing more severe flooding due to sea-level rise, as well as more frequent and intense storms. The map on your screen shows our regions which are most vulnerable to flooding, drought and erosion. You will notice that the majority of our territory is affected. The World Bank estimates that severe flooding could cost Bangladesh's GDP to fall by as much as 9 per cent,⁵ causing further economic hardships for everyday people. For instance, flash flooding during the heavy rains in the August 2017 pre-monsoon season inundated some 200,000 hectares of harvestable crops, leading to a 30 per cent rise in rice prices.⁶

We are also suffering more frequent cyclones, such as Cyclone Mocha in May 2023, which brought heavy rains and winds of up to 115 kilometres per hour.⁷ Bangladesh faces an estimated annual loss of approximately US\$1 billion (0.7 per cent of GDP) from tropical cyclones. These losses have profound impacts on individual Bangladeshis. For example, following Cyclone Sidr in 2007, two million people lost their sources of income, and poverty rates were higher in the areas affected by the cyclone than the national average.⁸

One critical and foreseeable impact of sea-level rise is seawater intrusion into cultivable coastal territories. This will affect the livelihoods of coastal agricultural populations, up to as much as one third of agricultural GDP by 2050. Scientific experts have already noted high salinity levels in the Ganges Delta, with corresponding effects on agriculture and freshwater fish.

Coastal flooding and weather events have also had serious impacts on critical infrastructure. The photograph on the screen was taken in Sharaitala in 2018. It shows two children playing in what remains of their former school, which once stood in the middle of the village. A cyclone wiped away most of the village in 1991 and repeated flooding led the remaining residents to abandon it entirely in 2015.

The World Bank estimates that weather-related coastal destruction, like this one, cost Bangladesh over US\$3 billion from 1994 to 2013, equal to 1.2 per cent of Bangladesh's gross domestic product ("GDP").⁹

Another significant impact of sea-level rise and flooding is population displacement. More than half of Bangladesh's 170 million residents live in the delta, and virtually all rely on it for survival; furthermore, around 35 million people, which accounts for 29 per cent of the population, live in coastal areas with an average elevation under 1.5 metres.¹⁰

In 2019 alone, climate disasters displaced around 4.1 million persons in Bangladesh, at least temporarily.¹¹ The number of internal climate change migrants in Bangladesh may shoot up 13.3 million by 2050.

⁴ MINISTRY OF ENVIRONMENT, FOREST, AND CLIMATE CHANGE, CLIMATE CHANGE INITIATIVES OF BANGLADESH: ACHIEVING CLIMATE RESILIENCE, p. 2.

⁵ WORLD BANK, COUNTRY CLIMATE AND DEVELOPMENT REPORT: BANGLADESH (October 2022), p. 52.

⁶ IPCC, *Chapter 6: Extremes, Abrupt Changes and Managing Risks*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 601.

⁷ UNITED NATIONS, *As Cyclone Mocha Damages Rohingya Refugee Camps, Aid and Support Is Urgently Needed* (15 May 2023).

⁸ THIRD NATIONAL COMMUNICATION OF BANGLADESH TO THE UNFCCC, p. 137.

⁹ Lia Sieghart & David Rogers, *Why Climate Change Is an Existential Threat to the Bangladesh Delta*, WORLD BANK BLOGS (21 October 2015).

¹⁰ Hafez Ahmad, *Bangladesh Coastal Zone Management Status and Future Trends*, 22 J. COASTAL ZONE MANAGEMENT 1 (30 January 2019), p. 1; see also Sowmen Rahman & Mohammed Ataur Rahman, *Climate Extremes and Challenges to Infrastructure Development in Coastal Cities in Bangladesh*, 7 WEATHER & CLIMATE EXTREMES 96 (March 2015).

¹¹ WORLD BANK, COUNTRY CLIMATE AND DEVELOPMENT REPORT: BANGLADESH (October 2022), p. 16.

But it could be much worse. According to one study, a further increase of a single degree Celsius in average global temperature above today's levels could lead to sea-level rise that would displace 40 million residents of Bangladesh by 2100.¹² Mr President, this is more than the entire population of Canada, or Morocco, or Saudi Arabia or Ukraine.

As the honoured members of the Tribunal are aware, Bangladesh is currently hosting approximately 1.2 million Rohingya refugees in temporary shelters in Cox's Bazar, a coastal district which is already vulnerable to climate change, natural disasters and the related hazards. Already victims of violent persecution in Myanmar, these Rohingya families face double jeopardy owing to the impacts of climate change in the coastal areas of Bangladesh.

Bangladesh as a leader in the global fight against climate change:

Mr President, I assure you that we have not sat idle in the face of this crisis. Under the leadership of the Honourable Prime Minister Sheikh Hasina, Bangladesh has become a leader in the fight against climate change both on the international stage and at home.

Since Bangladesh ratified the UN Framework Convention on Climate Change in 1994,¹³ we have played a key role in negotiations on behalf of climate-vulnerable States. From 2005 to 2006, we led negotiations for the group of Least Developed Countries at UNFCCC and continue to play a vital role as a top-tier negotiator of that group. We ratified the Kyoto Protocol in 2001¹⁴ and signed the Paris Agreement in 2016.¹⁵

Bangladesh is a member of the Climate Vulnerable Forum. This partnership of 58 States particularly vulnerable to climate change works to “build cooperation, knowledge and awareness on climate-change issues” and aims “to achieve maximal resilience and to meet 100% domestic renewable energy production as rapidly as possible.”¹⁶ We chaired this forum twice: from 2011 to 2013 and again from 2020 to 2022.

Bangladesh is also a member of the Vulnerable Twenty Group of Ministers of Finance, which was created in 2015 to “strengthen economic and financial responses to climate change.”¹⁷ Bangladesh chaired the V20 from 2020 to 2022.

At home, we have initiated a whole-of-government and whole-of-society approach to strengthen our climate resiliency.¹⁸ This approach includes a number of forward-looking policies and investments.

In 2009, we became among the first countries in the world to create a national programme to determine how to adapt to climate change when we launched the Bangladesh Climate Change Strategy and Action Plan. Since then, we have adopted the Bangladesh Renewable Energy Policy, the National Disaster Management Plan and Act, and other sectoral policies and strategies. These are widely recognized as some of the world's leading strategic plans for adaptation to climate change.

Most recently, we launched the Mujib Climate Prosperity Plan, which will guide the country's development trajectory to a strategic low carbon pathway during the next decade.¹⁹

¹² See *Climate Change*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF BANGLADESH TO THE UNITED NATIONS (citing data from the Ministry of Environment, Forest, and Climate Change), <https://bdun.org/bangladesh-priorities-at-the-un/climate-change/>.

¹³ UN Treaty Collection, UNFCCC Status List.

¹⁴ UN Treaty Collection, Kyoto Protocol Status List.

¹⁵ UN Treaty Collection, Paris Agreement Status List.

¹⁶ CVF, Establishment, <https://thecvf.org/about/>.

¹⁷ V20, Establishment, <https://www.v-20.org/about>.

¹⁸ *Statement by H.E. Dr. A. K. Abdul Momen, M.P., Hon'ble Foreign Minister of Bangladesh at the High-level Thematic Debate by the President of the General Assembly on “Delivering Climate Action: for People, Planet & Prosperity”, 26 October 2021*, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF BANGLADESH TO THE UNITED NATIONS (26 October 2021),

<https://bdun.org/2021/10/26/statement-by-h-e-dr-a-k-abdul-momen-m-p-honble-foreign-minister-of-bangladesh-at-the-high-level-thematic-debate-by-the-president-of-the-general-assembly-on-delivering-climate-action-for/>

¹⁹ MUJIB CLIMATE PROSPERITY PLAN DECADE 3020 (September 2021).

We have also made substantial financial investments in our mitigation efforts. From 2016 to 2021, we invested more than US\$ 6 billion in climate change adaptation activities.

But the fight against climate change is not something that we can win by fighting alone.

Despite our significant global and local efforts, we remain hostage to polluting States that have not done nearly enough to address the negative impacts of anthropogenic climate change.

Lack of political will on their part have often paralyzed the intergovernmental processes, leading to repeated failures in adopting the most ambitious climate actions at the global level. Furthermore, whatever commitments have so far been made, have remained mostly unmet.

As such, we see these proceedings as an important means to redress the injustice and to protect our present and future generations from the impending climate catastrophe.

ITLOS' role in addressing this climate crisis:

This is why Bangladesh has taken the opportunity to participate in these proceedings.

The science is clear: the ocean plays an outsized role as one of the largest global sinks for both heat and carbon. Evident too are the devastating impacts of climate change already felt by vulnerable States. Consequently, ITLOS – as the guardian of UNCLOS, the constitution of the ocean – has a special role to play in combating climate change.

We strongly believe that the Tribunal has the authority and the ability to provide meaningful guidance on the obligations of States to protect and preserve the marine environment, and to prevent, reduce and control greenhouse gas emissions in a way that reflects scientific consensus and international agreement. Such obligations must inform the conduct of States in the years ahead so that practical solutions are adopted consistent with international law. The situation is now so alarming that Bangladesh cannot accept that States have unlimited discretion in respect of addressing climate change. This applies in particular to the major polluters who bear the greatest share of responsibility.

Mr President, in 2009, Bangladesh placed its confidence in this Tribunal for delimitation of its maritime boundary in the Bay of Bengal. In doing so, we became the first State to ask this Tribunal to exercise jurisdiction in a maritime delimitation case. It is with that same confidence that we stand in front of you once again in this landmark proceeding.

Mr President, the time has come for this Tribunal, through a strong advisory opinion, to establish a historic precedent of lasting significance for the protection and preservation of the marine environment. The future survival of Bangladesh and of all of humankind depends on it.

Now, with your permission, I will leave the floor to our distinguished counsel team: Ms Catherine Amirfar and Professor Payam Akhavan who will address the need for mitigation and adaptation to protect and preserve the marine environment from climate change.

I thank you for your attention and have the honour to hand the podium to Ms Catherine Amirfar, Bangladesh's co-representative in these proceedings. Thank you, Sir. Thank you very much.

THE PRESIDENT: Thank you, Mr Khurshed Alam.

I now give the floor to Ms Amirfar to make her statement. You have the floor, Madam.

STATEMENT OF MS AMIRFAR
BANGLADESH
[ITLOS/PV.23/C31/6/Rev.1, p. 18–24]

Mr President, distinguished members of the Tribunal, it is an honour and a privilege to appear before you again and to do so on behalf of the People’s Republic of Bangladesh. I have the privilege to open Bangladesh’s legal submissions in these historic proceedings.

Bangladesh is one of the States most affected by climate change. As you just heard from Rear Admiral Alam, Bangladesh’s nearly 170 million residents live between the world’s largest delta and its biggest stores of non-polar mountain ice. Rising seas and melting glaciers make most of the country a giant floodplain. Large parts of Bangladesh will become uninhabitable without drastic mitigation of greenhouse gas emissions and assistance in adapting to the impacts of climate change. Bangladesh welcomes these proceedings as an opportunity for the Tribunal to deliver specific, authoritative guidance on States Parties’ legal obligations in respect of climate change.

I will begin by taking stock of where we stand on several key issues in these advisory proceedings after the written phase. I will then turn to three points: first, I will analyse the scope of the marine environment under Part XII of the Convention; second, I will describe the deleterious effects on Bangladesh that result or are likely to result from greenhouse gas emissions; finally, I will describe States Parties’ specific obligations to mitigate greenhouse gas emissions, and, in particular, with respect to rare and fragile ecosystems and habitats of depleted, threatened or endangered species and other forms of marine life.

Professor Payam Akhavan will then address States Parties’ specific obligations relating to adaptation of the marine environment to climate change and its impacts.

I begin, Mr President, with taking stock on five critical points in these proceedings.

First is jurisdiction and admissibility. The overwhelming majority of the written statements concur that the Tribunal has jurisdiction and that the request is admissible.¹ The isolated instances to the contrary do not comport with the Tribunal’s settled holding on the nature and scope of its advisory jurisdiction.² Bangladesh submits that the Tribunal’s jurisdiction is clear, and it is clear that it should be exercised in this case.

The second critical point is whether greenhouse gas emissions constitute “pollution of the marine environment” under article 1(1)(4) of the Convention. Again, there is an overwhelming consensus here. Bangladesh joins the chorus of States and international organizations confirming that the heat and carbon introduced by greenhouse gas emissions into the marine environment clearly meet that definition.³

¹ See Belize Written Statement, paras. 11–14; Chile Written Statement, paras. 9–22; Djibouti Written Statement, paras. 12–23; Democratic Republic of the Congo Written Statement, paras. 15–39; Germany Written Statement, ch. II § A; Indonesia Written Statement, § II; Latvia Written Statement, paras. 4–9; Mauritius Written Statement, § II; Micronesia Written Statement, paras. 4–10; Mozambique Written Statement, paras. 2.1–2.13; Nauru Written Statement, paras. 8–23; New Zealand Written Statement, paras. 14–25; Poland Written Statement, paras. 5–16; Rwanda Written Statement, paras. 32–53; Sierra Leone Written Statement, § II; Vietnam Written Statement, paras. 2.1–2.8; and the African Union Written Statement, § III.

² *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) (“SRFC Advisory Opinion”), paras. 54–58; cf. Brazil Written Statement paras. 5–9; China Written Statement § I; United Kingdom Written Statement paras. 13–25; India Written Statement, § II.A.

³ See African Union Written Statement, paras. 152–159; Australia Written Statement, paras. 24–30; Bangladesh Written Statement, paras. 29–30; Belize Written Statement, paras. 48–52; Canada Written Statement, paras. 13–16; Democratic Republic of the Congo Written Statement, paras. 173–182; Egypt Written Statement, paras. 20–26; European Union Written Statement, paras. 42–52; France Written Statement, paras. 49–95; Germany Written Statement, para. 41 (referring the European Union’s position); International Seabed Authority Written Statement, paras. 19, 52; International Union for the Conservation of Nature Written Statement, paras. 52–65; Latvia Written

Not only is the consensus on this point overwhelming; the science is, too. The ocean has absorbed over *90 per cent* of the heat that greenhouse gases have trapped in the atmosphere since the pre-industrial era.⁴ That has amounted to 345 zettajoules of heat energy from 1955 through 2022; in that same period, all of the world’s nuclear power plants *combined* produced only around *one quarter* of 1 zettajoule.⁵ The ocean also has absorbed around one quarter of the carbon dioxide that has been emitted by human activities since 1850, or about 640 gigatonnes.⁶ To give you some context, that’s 32 million times the weight of Hamburg’s Elbphilharmonie concert hall.⁷

Third, it is also clear that States Parties have an array of specific obligations under the Convention with respect to greenhouse gas emissions in articles 192 and 194 of the Convention, and indeed that run through the entirety of Part XII. Bangladesh concurs with the number of States and international organizations that States Parties must be guided by the best available science in complying with these specific obligations.⁸ That is to say, the precise scope of the specific obligations under Part XII must be informed by the best available science.

Fourth and finally, there is near universal agreement on the main, most authoritative source of the best available science: the conclusions of the Intergovernmental Panel on Climate Change (IPCC), the leading UN body on climate science, as expressed in their periodic assessment reports, and in light of the input of over 195 Member States. Bangladesh agrees that the current and best available science demonstrates that States Parties have the obligation under articles 192, 194 and other provisions in Part XII relating to the marine environment, to take all measures necessary to limit average global temperature rise to no more than 1.5°C above pre-industrial levels. This threshold is agreed by the 195 States Party to the Paris Agreement⁹ and constitutes an agreed international standard relevant under articles 197, 207(4), 212(3) and 213 of the Convention.

Mr President, members of the Tribunal, now that I have set out the state of play, I will turn to several discrete issues that, in Bangladesh’s submission, merit particular attention.

One such issue is the meaning of “marine environment” under the Convention. The definition is a critical gateway in two respects. The general obligation to “protect and preserve” under article 192 applies to “the marine environment.” And a number of core obligations in Part XII, including the strong obligation to take “all measures ... necessary” under article 194(1), reference “pollution of the marine environment.”

The text of the Convention makes clear that the term “marine environment” is broadly inclusive. The conclusion follows from the ordinary meaning of the term, as well as the context.

Statement, paras. 15–18; Mauritius Written Statement, § V.A; Micronesia Written Statement, paras. 30–32; Mozambique Written Statement, paras. 3.7–3.19; Nauru Written Statement, paras. 37–38; the Netherlands Written Statement, paras. 4.6–4.7; New Zealand Written Statement, ch. 3, § II; Rwanda Written Statement, ch. 5, § I; Sierra Leone Written Statement, paras. 29–48; Singapore Written Statement, ch. 3; United Kingdom Written Statement, ch. 2, § II; and Vietnam Written Statement, § III.

⁴ IPCC, *Summary for Policymakers*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 9 (“It is virtually certain that the global ocean has warmed unabated since 1970 and has taken up more than 90% of the excess heat in the climate system (*high confidence*). Since 1993, the rate of ocean warming has more than doubled (*likely*).”).

⁵ WolframAlpha, “zettajoule”; *Vital Signs: Ocean Warming*, NASA: GLOBAL CLIMATE CHANGE (December 2022), <https://climate.nasa.gov/vital-signs/ocean-warming/>.

⁶ IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedback*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021) p. 777–778.

⁷ See *Key Figures Elbphilharmonie*, ELBPILHARMONIE <https://cdn.archilovers.com/projects/78e9fc7e-72d6-4db6-b0d4-56e6609c33e1.pdf>.

⁸ See e.g., Mauritius written statement, para. 91; Sierra Leone Written Statement, paras. 24–27; COSIS Written Statement, para. 398; International Union for the Conservation of Nature Written Statement, paras. 9, 15.

⁹ Paris Agreement, article 2(1)(a); COP27, Decision 21/CP.27, UN Doc. FCCC/CP/2022/10/Add.2 (2023), paras. 7–8; COP27, Decision 2/CP.27, UN Doc. FCCC/CP/2022/10/Add.1 (2022).

Per articles 194(5) and 211(1), the marine environment also includes “coastlines,” “rare or fragile ecosystems,” and “the habitat of depleted, threatened or endangered species and other forms of marine life.” Article 1(1)(4) also refers to the “marine environment” as “including estuaries”, which are defined as the “tidal mouth of a river, where the tide meets the current of fresh water.”¹⁰ This is particularly important for Bangladesh given its extremely wide delta region – the largest in the world – with 21 estuaries home to a remarkable array of over 800 species of marine flora and fauna.¹¹

I will not repeat today the textual analysis or the decisions of international tribunals in support of this point,¹² but suffice it to say that the “marine environment” under the Convention covers the entire marine ecosystem, including its living and non-living resources, which extends to the ocean; estuaries; the marine cryosphere, including ice shelves (floating glaciers) and sea ice (frozen seawater); the seabed; coastlines; and living and non-living marine resources.

Mr President, members of the Tribunal, I now turn to a second point of focus for Bangladesh in these oral submissions: the deleterious effects that Bangladesh is suffering and will continue to suffer from climate change.

These deleterious effects trigger two key legal conclusions. First, as they are – as I will explain – the actual or likely result of the introduction of massive amounts of heat and carbon into the marine environment from greenhouse gas emissions, they confirm that anthropogenic greenhouse gas emissions meet the definition of “pollution of the marine environment” under the Convention. Second, these severe harms to the marine environment inform the scope of the obligation to “protect and preserve” the marine environment.

Rear Admiral Alam spoke about deleterious climate effects on Bangladesh, and Section II of Bangladesh’s written statement sets them out in more detail. Here, I will focus on the specific impacts on Bangladesh of sea-level rise, ocean warming and ocean acidification.

As you saw from satellite photograph shown by Rear Admiral Alam, Bangladesh’s geography makes it vulnerable to sea level rise: most of Bangladesh’s land territory is a floodplain of which around 70 per cent of the total area is less than one metre above sea level and 10 per cent of the land area is made up of lakes and rivers.¹³ Climate change causes coastal flooding as a result of the introduction of excessive heat into the marine environment. Heat expands ocean water, which accounts for about 50 per cent of sea-level rise.¹⁴ Melting of ice sheets and sea ice exacerbates sea-level rise.¹⁵ The ocean floods coastlines as it rises, and it exacerbates flooding caused by tropical cyclones, which ocean warming makes more extreme.¹⁶ Ocean warming and acidification contribute to coastal flooding because they kill off

¹⁰ Law of the Sea, Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, Appendix I (Glossary of Technical Terms), pp. 47, 54 (UN Sales No. E.88.V.5* (1989)); VCLT, article 31(1).

¹¹ M. Refat Jahan Rakib et al., *Ecohydrological features and biodiversity status of estuaries in Bengal delta, Bangladesh: A comprehensive review*, 10 FRONTIERS ENV’T SCI. (November 2022), <https://www.frontiersin.org/articles/10.3389/fenvs.2022.990099/full>.

¹² See SRFC Advisory Opinion, para. 216; *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 March 2015) (“*Chagos Award*”), para. 538; *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016) (“*South China Sea Award*”), para. 945; Detlef Czybulka, *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1287.

¹³ BANGLADESH DELTA PLAN 2100 (Abridged Version) (October 2018), p. 9.

¹⁴ IPCC, Working Group I, *Chapter 9: Ocean, Cryosphere and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1292.

¹⁵ *Id.*, p. 1318.

¹⁶ IPCC, *Chapter 4: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), pp. 360–361; IPCC, Working Group

reefs, mangroves and seagrass meadows that protect coasts from storm surges.¹⁷ Global warming also causes riverbank flooding in Bangladesh by accelerating the melting of Himalayan glaciers.¹⁸

The model here from Bangladesh's Center for Environmental and Geographic Information Services (CEGIS) shows inundation levels from sea-level rise and storm surges expected by the 2050s, according to IPCC projections. You can see here that about 18 per cent of Bangladesh's coastline could be underwater by that time. Coastal flooding has a particular effect on estuaries: the IPCC has found that salinization of estuaries degrades the habitats of marine flora and fauna living there.

This chart shows historical riverbank erosion in Bangladesh. It reflects erosion at a rate of over 10,000 hectares per year.¹⁹ The area around the Lower Meghna River alone, including its estuary at the Bay of Bengal, has lost 1,366 square kilometres of land to erosion. That's almost twice the land area of the entire city of Hamburg.

Of course, flooding also impacts humans who live in and rely on the floodplains, as set out by Rear Admiral Alam. I will only add that Bangladesh is the country with the highest proportion of its population and the second highest number of residents who face very high risks of climate exposure.²⁰ Millions of Bangladeshis have already faced at least temporary displacement due to climate disasters. Analysis by experts from Bangladesh's Ministry of Environment, Forest and Climate Change shows that a further 1°C rise in average global temperature would force up to 40 million Bangladeshis to leave their homes.²¹

With respect to Bangladesh's marine ecosystems, the introduction of heat strains marine ecosystems with sea-level rise and ocean warming. It also reduces the mixing between warmer water at the surface and cooler water at lower depths, which inhibits the vertical circulation of life-sustaining oxygen and other nutrients throughout the ocean.²² And the absorption of excess carbon dioxide creates a chemical reaction that leaves the ocean more acidic.²³

All of these physical and chemical changes to the ocean have a dramatic impact on coastal ecosystems.

Take, for example, Bangladesh's Sundarbans Reserve Forest, the world's largest mangrove forest and a UNESCO World Heritage Site.²⁴ Home to a startling array of biodiversity, including 260 bird species, the endangered Bengal tiger and the estuarian crocodile, it is at risk of inundation by 2050 due to climate change.²⁵ Already, parts of the Sundarbans facing the sea have started losing their original banks, and seawater has caused many native Sundari trees to decay, as seen here. The complete inundation of the Sundarbans

I, *Chapter 9: Ocean, Cryosphere and Sea Level Change*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 1314.

¹⁷ IPCC, *Chapter 4: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), pp. 379–380.

¹⁸ NATIONAL ADAPTATION PLAN OF BANGLADESH (2023-2050) (October 2022), pp. 21–22.

¹⁹ NATIONAL ADAPTATION PLAN OF BANGLADESH (2023–2050) (October 2022), pp. 23–24.

²⁰ U.S. AGENCY FOR INT'L DEVELOPMENT, FRAGILITY AND CLIMATE RISKS IN BANGLADESH (2018), p. 4.

²¹ See Permanent Mission of the People's Republic of Bangladesh to the United Nations, *Climate Change* (citing data from the Bangladesh Ministry of Environment, Forest, and Climate Change), <https://bdun.org/bangladesh-priorities-at-the-un/climate-change/>.

²² IPCC, Working Group I, *Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks*, SIXTH ASSESSMENT REPORT: THE PHYSICAL SCIENCE BASIS (2021), p. 717–719.

²³ *Id.*, p. 717.

²⁴ THIRD NATIONAL COMMUNICATION OF BANGLADESH TO THE UNFCCC (June 2018), p. 76; *The Sundarbans*, UNESCO: WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/list/798/>.

²⁵ *The Sundarbans*, UNESCO: WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/list/798/>.

would swamp rare and fragile vegetation endemic to the region and the habitats of terrestrial animals.²⁶

Ocean warming, deoxygenation and acidification have also decreased offshore marine life abundance and biodiversity. For example, a recent study from Dhaka University revealed that, at current rates of warming and acidification, the reefs off of St Martin’s Island in the Bay of Bengal (seen here) would be depleted of coral by 2045 at the latest.²⁷ Ocean deoxygenation will also harm fish and other marine life living elsewhere in the Bay of Bengal.²⁸

Coastal flooding also has a particular impact on estuaries: the IPCC has found that salinization of estuaries can degrade the habitats of marine flora and fauna living there.²⁹

Mr President, members of the Tribunal, the deleterious effects that Bangladesh and its marine environment are suffering as a result of climate change are catastrophic. Urgent, ambitious measures are required to protect and preserve the marine environment from those harms, both present and future.

This takes me to my final topic: States Parties’ obligations under UNCLOS to mitigate the greenhouse gas emissions that cause these deleterious effects in Bangladesh, especially on rare and fragile ecosystems.

As many States Parties and international organizations explained in their written statements, the core mitigation obligations under the Convention arises out of the obligations under articles 192, 194(1) and 194(2).

In my time remaining today, I focus on the even more stringent obligations contained in article 194(5) with respect to “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”³⁰ That article provides that the measures taken in accordance with Part XII “shall include those necessary to protect and preserve” such ecosystems and habitats. This obligation is particularly relevant when it comes to greenhouse gas emissions, given the IPCC’s 2018 finding that some “unique and threatened systems,” such as coral reefs like those around St Martin’s Island, are at “risk from climate change at current temperatures, with increasing numbers of systems at potential risk of severe consequences at global warming of 1.6°C.”³¹

The IPCC has also found that the generally applicable 1.5°C limit I and others have told you about may not be enough to save some specific rare or fragile marine ecosystems from the worst effects of climate change. Thus, the IPCC has warned that “overshooting” 1.5°C – exceeding that limit, even for a short period of time – would devastate corals and other fragile ecosystems.³²

Mangroves and coastal wetlands like those in the Sundarbans, which are also rare and fragile due to their vulnerability to sea-level rise and storm surges, and home to endangered marine life, are critical to mitigation for another reason: they are extremely efficient at removing carbon dioxide from the atmosphere. Mangroves, salt marshes and seagrass beds can store up to five times the amount of carbon per equivalent area compared to mature tropical

²⁶ THIRD NATIONAL COMMUNICATION OF BANGLADESH TO THE UNFCCC (June 2018), p. 184–186.

²⁷ Md. Yousuf Gazi et al., *Detection of Coral Reefs Degradation Using Geospatial Techniques Around Saint Martin’s Island, Bay of Bengal*, 55 OCEAN SCI. J. (2020), p. 8

²⁸ Hongsik Kim et al., *A Selected Review of Impacts of Ocean Deoxygenation on Fish and Fisheries*, 8 FISHES (2023), pp. 8–9, 14 (citing Elayaperumal Vivekanandan, Rudolf Hermes, Chris O’Brien, *Climate change effects in the Bay of Bengal Large Marine Ecosystem*, 17 ENV’T. DEV. (2016), pp. 46–56).

²⁹ IPCC, *Chapter 4: Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019), p. 378.

³⁰ UNCLOS, Art. 194(5).

³¹ IPCC, *Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems*, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), p. 253.

³² IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 382.

forests. As a result, coastal wetlands sequester carbon at 10 times the rate of those forests.³³ Widespread destruction of coastal ecosystems, such as by sea-level rise or storm surges, would create what climate scientists call a “positive feedback loop,” whereby one climate change impact begets more climate change.

In sum, article 194 of UNCLOS requires States Parties to follow the science in preventing, reducing and controlling greenhouse gas emissions, which at least means mitigating these emissions to limit average global temperature rise to no more than 1.5°C above pre-industrial levels, but may require more to protect and preserve rare and fragile ecosystems.

Mr President, members of the Tribunal, this concludes my remarks on behalf of the People’s Republic of Bangladesh. Thank you for your attention. May I ask that you please invite Professor Payam Akhavan to address you.

THE PRESIDENT: Thank you, Ms Amirfar.

I would now like to give the floor to Mr Akhavan to make his statement. You have the floor, Sir.

³³ *Coastal Blue Carbon*, NAT’L OCEAN SERV. (13 August 2023), <https://oceanservice.noaa.gov/ecosystems/coastal-blue-carbon/>

STATEMENT OF MR AKHAVAN
BANGLADESH
[ITLOS/PV.23/C31/6/Rev.1, p. 24–30]

Mr President, members of the Tribunal, good afternoon. I am honoured to appear before you on behalf of the People’s Republic of Bangladesh.

You have just heard from my colleague Ms Amirfar on Bangladesh’s positions on the key issues that States Parties and international organizations raised during the written phase, as well as on States Parties’ specific obligations under the Convention to mitigate global greenhouse gas emissions. I will now address States Parties’ obligations to adapt to the harms that these emissions cause to the marine environment.

But, first, I would like to highlight the critical interplay between adaptation and mitigation in ensuring that climate-vulnerable marine ecosystems remain habitable for marine life as the world warms. Specifically, the IPCC’s most recent assessment report made clear that adaptation and mitigation must go hand in hand to maintain any hope that the marine environment will avoid the worst consequences of climate change. The IPCC noted that “[a]daptation options that are feasible and effective today will become constrained and less effective with increasing global warming,” and that the “effectiveness of adaptation, including ecosystem-based and most water-related options, will decrease with increasing warming.”¹

In other words, time is running out to ensure that there will be a viable marine environment left to “protect and preserve” by the time that even the most ambitious – even the most ambitious – emission targets are reached. The IPCC concludes with high confidence that, with any additional global warming above today’s levels, “limits to adaptation and losses and damages, strongly concentrated among vulnerable populations, will become increasingly difficult to avoid,” and that, above 1.5°C, “ecosystems such as some warm-water coral reefs [and] coastal wetlands ... will have reached or surpassed hard adaptation limits.”²

For the balance of my time, I will show that UNCLOS’s general obligation on all States Parties to protect and preserve the marine environment requires taking measures not just to mitigate, but also to adapt to climate change. I will proceed in two steps: first, I will address States Parties’ specific obligations under the Convention to adapt to protect and preserve the marine environment, and, in particular, rare and fragile ecosystems; and, second, I will highlight some of Bangladesh’s groundbreaking efforts consistent with those adaptation goals.

Mr President, members of the Tribunal, adaptation did not receive as much attention in the written phase as mitigation, but it is equally important to the continued survival of the marine environment as a matter both of law and scientific fact. As with mitigation, States Parties’ adaptation obligations are an expression of the general obligation under article 192 to “protect and preserve the marine environment.” This is clear from the ordinary meaning of “preserve”, which is “to keep in its original or existing state” or “to make lasting”.³ Along these lines, the Virginia Commentary notes that, “while the word ‘protect’ indicates measures relating to imminent or existing danger or injury, the word ‘preserve’ conveys the meaning of conserving the natural resources and retaining the quality of the [...] environment.”⁴ The Commentary continues: “Preservation would seem to require active measures to maintain, or improve, the present condition of the marine environment.”⁵

¹ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 19.

² IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 19.

³ OXFORD ENGLISH DICTIONARY, “preserve”.

⁴ *Part XII: Protection and Preservation of the Marine Environment*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 11.

⁵ *Article 192: General Obligation*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 40.

Improving the present condition of the marine environment in the face of climate change is what the IPCC calls “adaptation”, defining it for natural systems as “the process of adjustment to actual or expected climate change and its effects.”⁶ In the context of the marine environment, that process entails what the *South China Sea* tribunal called “active measures to protect and preserve the marine environment.”⁷

For these reasons, Bangladesh concurs with the conclusion in the written statements of Mauritius, the Netherlands, Rwanda, Sierra Leone, the African Union and COSIS, that article 192 incorporates obligations to take measures to adapt the marine environment to climate change impacts.⁸

It is also clear that the obligation in article 194(5) to “protect and preserve rare or fragile ecosystems and the habitat of depleted, threatened or endangered species and other forms of marine life” incorporates the general obligations under article 192 with respect to those ecosystems and habitats. The Virginia Commentary notes that it is “self-explanatory” that paragraph 5 “*extends* the concept of the protection and preservation of the marine environment”, as a whole, to “rare or fragile ecosystems” and “the habitat of depleted, threatened or endangered species and other forms of marine life.”⁹ That is exactly the approach that the Annex VII tribunal in the *Chagos Marine Protected Area* arbitration took when it held that “Article 194 is ... not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems.”¹⁰

Similarly, the tribunal in the *South China Sea* arbitration found that the general obligation to protect and preserve the marine environment was “given particular shape in the context of fragile ecosystems by Article 194(5).”¹¹ The arbitral tribunal thus held that “Article 192 imposes a due diligence obligation to take those measures ‘necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life’.”¹²

As Ms Amirfar explained, article 194(5) provides that any measures taken in accordance with Part XII must include those “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” As with the marine environment more broadly, adaptation is necessary to protect and preserve these ecosystems and habitats. The IPCC has specifically concluded, for example, that adaptation is necessary to protect and preserve coral reefs, coastal wetlands and beaches to prevent the most severe climate change impacts.¹³

Articles 198 and 199, which apply when “the marine environment is in imminent danger of being damaged or has been damaged by pollution,” are also applicable. Article 199 provides that, in such circumstances, “States in the area affected, in accordance with their capabilities, and the competent international organizations shall co-operate, to the extent

⁶ IPCC, Working Group II, *Annex II: Glossary*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), p. 2898.

⁷ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 941.

⁸ Mauritius Written Statement, § V; Netherlands Written Statement, paras. 4.5–4.8; Sierra Leone Written Statement, paras. 78–79; Rwanda Written Statement, chs. 4, 6; African Union Written Statement, paras. 336–338; COSIS Written Statement, ch. 8.

⁹ *Article 194: Measures to Prevent, Reduce, and Control Pollution of the Marine Environment*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, vol. IV (Myron H. Nordquist et al. eds. 2013), p. 68.

¹⁰ *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 March 2015), para. 538.

¹¹ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 959.

¹² *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 959.

¹³ IPCC, *Summary for Policymakers*, SIXTH ASSESSMENT SYNTHESIS REPORT (2023), p. 19–20; *see also* IPCC, Working Group II, *Chapter 3: Ocean and Coastal Ecosystems and Their Services*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION AND VULNERABILITY (2022), pp. 423–424.

possible, in eliminating the effects of pollution and *preventing or minimizing the damage to this end.*” The Prölß commentary explains that, “[w]here it is not possible to prevent pollutants escaping into the environment,” article 199 requires that “efforts ... be made to prevent or minimize the damage those pollutants cause”, which, in the context of greenhouse gas emissions, means adaptation.¹⁴

But it would be unjust and contrary to UNCLOS to place that adaptation burden exclusively on States like Bangladesh, whose marine environments are most vulnerable to climate change, especially when they have made only marginal contributions to climate change. The Preamble to the Convention reflects States Parties’ belief that “the codification and progressive development of the law of the sea ... will contribute to the strengthening of ... co-operation” in solving the “problems of ocean space.”

The drafters codified that commitment in Part XII. Article 202, for example, requires developed States Parties to provide scientific, technical and other assistance to protect and preserve the marine environment. Such assistance includes: training scientific and technical personnel; supplying developing States with necessary equipment and facilities, or enhancing their capacity to manufacture such equipment; and providing advice on research, monitoring, educational and other programmes.

In addition, articles 276 and 277 require States to “promote the establishment of regional marine scientific and technological research centers, *particularly in developing States,*” including to promote “study programmes related to the protection and preservation of the marine environment and the prevention, reduction and control of pollution.”

As the Prölß Commentary explains, article 202 is “one of the means of implementing common but differentiated responsibilities in the context of the law of the sea by encouraging the strengthening of the capabilities of developing countries.”¹⁵ This principle is also reflected elsewhere in the Convention, namely in the Preamble, which “takes into account ... the special interests and needs of developing countries,” and throughout Part XII.¹⁶ Under the principle, in the words of the 1992 Rio Declaration on the Environment and Development, developed States “acknowledge the responsibility that they bear” in efforts to achieve sustainable development given the “pressures their societies place on the global environment” and the “technologies and financial resources they command.” CBDR has emerged as a well-established principle of international law, finding expression in and informing a number of environmental treaties, such as the UNFCCC, the Kyoto Protocol and the Paris Agreement, in addition to the Convention.¹⁷

In the context of climate change, CBDR acknowledges that developed States have greater financial and technological capacity to mitigate and adapt to climate change in part because of the historical benefits that they have reaped by burning fossil fuels to run their economies. Thus, as Bangladesh stated in its Third National Communication to the UNFCCC in June 2018, developed States must “ensure that robust commitments are in place to push forward the mitigation actions and climate financing needed for adaptation and mitigation efforts, and to shape low-carbon, climate-resilient economies.”¹⁸ In this regard, Bangladesh

¹⁴ Tim Stephens, *Article 199: Contingency plans against pollution*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1341.

¹⁵ James Harrison, *Article 202: Scientific and technical to developing States*, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Alexander Prölß ed. 2017), p. 1347.

¹⁶ See, e.g., UNCLOS, Arts. 203 and 207(4).

¹⁷ See, e.g., Convention on Biological Diversity, Preamble and article 20(4); Convention on Persistent Organic Pollutants, article 13(4); UNFCCC, article 3(1); Kyoto Protocol, article 3(1); Paris Agreement, Preamble and articles 2(2), 4(3); Montreal Protocol, article 5(1).

¹⁸ THIRD NATIONAL COMMUNICATION OF BANGLADESH TO THE UNFCCC (June 2018), p. 6.

concur with the positions taken by the African Union, Rwanda and Sierra Leone in their written statements.¹⁹

Bangladesh is dedicated to a carbon-free, sustainable future, and calls on developed States Parties to comply with their assistance obligations and help Bangladesh and all developing States to achieve that goal. Bangladesh has achieved impressive economic growth over the last two decades, having gone from one of the world's poorest countries in 1971 to being on track to becoming an upper-middle income country by 2031, according to The World Bank.²⁰ Bangladesh is committed to achieving its growth sustainably, as a model for other countries looking to build more prosperous and equitable economies.

In this spirit, the words of Bangabandhu Sheikh Mujibur Rahman, the founding father of Bangladesh, in his 1974 speech to the UN General Assembly just three years after the country's founding, ring true still today. He said: "Our goal is self-reliance; our chosen path is the united and collective efforts of our people. International cooperation and the sharing of the resources and technology could no doubt make our task less onerous and reduce the cost of human suffering."²¹

Mr President, members of the Tribunal, I will now address the extensive efforts that Bangladesh is already making to comply with its obligations to preserve its marine environment against climate change and its effects.

Mr President, to the extent that the break is at issue, I think I should not be more than 10 minutes in the conclusion of my statements.

THE PRESIDENT: You may proceed.

MR AKHAVAN: Thank you, Mr President.

Although all States Parties' national adaptation strategies must be tailored to their particular circumstances, Bangladesh's truly outstanding efforts in this area serve as both an inspiration and a model for the world.

As Rear Admiral Alam explained, in 2022, Bangladesh adopted its National Adaptation Plan, which seeks to reduce risks and vulnerabilities to climate change impacts and to provide a viable path to climate-resilient development.²² The National Adaptation Plan built on the government's earlier Bangladesh Delta Plan 2100, adopted in 2018, which focused on adaptation strategies for the Ganges Delta.²³ The IPCC favourably cited the Bangladesh Delta Plan in its most recent assessment report, further highlighting its high scientific standards.²⁴ It is considered one of the world's leading strategies for climate adaptation.

The Bangladesh Delta Plan called for a number of critical adaptation techniques for the Ganges Delta, including:

River management, excavation and smart dredging preceded by appropriate feasibility studies;

Restoration, redesign, and modification of embankments and structures; and

¹⁹ African Union Written Statement, paras. 240–242; Rwanda Written Statement, ch. 7; Sierra Leone Written Statement, paras. 62–63.

²⁰ *The World Bank in Bangladesh: Overview*, WORLD BANK (6 April 2023), <https://www.worldbank.org/en/country/bangladesh/overview>.

²¹ Address by Sheikh Mujibur Rahman, Prime Minister of Bangladesh, U.N. GAOR, 29th Sess., 2243rd plen. mtg. at 161, U.N. Doc. A/PV.2243 (September 25, 1974).

²² NATIONAL ADAPTATION PLAN OF BANGLADESH (2023–2050), MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH, p. ii. (October 2022).

²³ BANGLADESH DELTA PLAN 2100, BANGLADESH PLANNING COMMISSION (October 2018).

²⁴ IPCC, Working Group II, *Chapter 10: Asia*, SIXTH ASSESSMENT REPORT: IMPACTS, ADAPTATION, AND VULNERABILITY (2022), p. 1513.

Management of rivers and embankments with provision of fastest drainage of water during monsoon and flood.²⁵

A key objective in the more recent National Adaptation Plan is to protect against climate change effects on Bangladesh's marine environment. For example, it calls for the extension and expansion of the coastal greenbelt for protecting and restoring coastal habitats, including the Sundarbans, mangroves and salt marshes.²⁶ And it emphasizes the importance of ecosystem-based sediment management along coasts and in estuaries.²⁷ It also calls for innovative adaptation strategies, such as: coastal erosion protection with oyster reefs; robust monitoring of ecosystems and biodiversity based on high-tech artificial intelligence and space technologies; and provision of artificial oxygen supplies through oxygen cylinders and stop feed supplies during heavy rains and in oxygen-depleted conditions.²⁸

In furtherance of these goals, Bangladesh has designated nearly 9 per cent of its exclusive economic zone, including the waters around the Sundarbans and St Martin's Island, as Ecologically Critical and Marine Protected Areas.²⁹

The National Adaptation Plan also calls for extensive field research to develop new ecosystem-based adaptation options suitable for Bangladesh's marine environment.³⁰

The plan, as shown here, envisions a total investment of US\$ 230 billion over 27 years, with 72.5 per cent of that total investment cost expected to be mobilized by 2040.³¹ This is an enormous investment for a country with a gross domestic product of around US\$ 400 billion. It is deeply unfair for a country that has contributed tiny amounts of greenhouse gases to global emissions – just 0.4 per cent since the pre-industrial era – to make such enormous investments to adapt to the catastrophes that others have caused.

Mr President, members of the Tribunal, we have reached the end of Bangladesh's oral statements in these historic, landmark proceedings on *the* critical problem facing the global ocean and all low-lying developing States.

The United Nations Convention on the Law of the Sea, the constitution of the ocean, created with the express purpose of solving practical problems of ocean space, must, and does, provide a legal framework for addressing the gravest threat that the marine environment has faced in recorded history. The marine environment of Bangladesh, including its estuaries, mangrove forests, reefs and fisheries, is especially vulnerable. It has suffered, and will continue to suffer, devastating effects, unless the major polluters assume responsibility for their actions.

In response to these challenges, UNCLOS tells us to look to the science. The current scientific consensus, in turn, is equally clear: We can avoid the worst consequences of climate change if we do everything in our power to hold global average temperature rise to within 1.5°C of pre-industrial levels, while *also* working cooperatively to mitigate and adapt to the effects of climate change that have already arrived.

Bangladesh respectfully urges this Tribunal to render an opinion that makes these obligations plain and specific in order to provide meaningful practical guidance to States Parties on what international law requires of them at this critical moment for the marine environment.

²⁵ Bangladesh Delta Plan 2100, BANGLADESH PLANNING COMMISSION (October 2018), pp. 16–18.

²⁶ *Id.*, pp. iii, 75–77.

²⁷ *Id.*, p. 95.

²⁸ National Adaptation Plan of Bangladesh (2023–2050), MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH, pp. 62–64 (October 2022).

²⁹ *The government of Bangladesh announces new Marine Protected Areas totaling about 8.8% of its Exclusive Economic Zone*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS: SUSTAINABLE DEVELOPMENT (4 January 2022).

³⁰ National Adaptation Plan of Bangladesh (2023–2050), MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH, pp. 65–66 (October 2022).

³¹ *Id.*, p. iv.

Mr President, members of the Tribunal, this concludes the oral statement of the People's Republic of Bangladesh. Thank you for your attention.

THE PRESIDENT: Thank you, Mr Akhavan.

This brings to an end this afternoon's sitting. The Tribunal will sit again tomorrow morning at 10:00 a.m. when it will hear oral statements made on behalf of Chile, Portugal and Djibouti.

PUBLIC SITTING HELD ON 14 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

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Mr Antonio Correa Olbrich, General Consul of the Republic of Chile, Hamburg

Ms Valeria Chiappini Koscina, Legal Advisor

Ms Beatriz Pais Alderete, Legal Advisor

Portugal

Ms Patrícia Galvão Teles, Director-General for Legal Affairs, Ministry of Foreign Affairs

Mr Mateus Kowalski, Head, Public International Law Department, Ministry of Foreign Affairs

Mr Vasco Seruya, Consul-General of Portugal, Hamburg

Ms Ana Luísa Riquito, First Secretary, Embassy of Portugal, Berlin

Djibouti

Mr Yacin Houssein Doualé, Ambassador of the Republic of Djibouti, Germany

Mr Mohamed Osman Chireh, First Counsellor, Embassy of the Republic of Djibouti, Germany

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AUDIENCE PUBLIQUE TENUE LE 14 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILOLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

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M. Pierre-Baptiste Chipault, collaborateur, cabinet Allen & Overy LLP
M. Pranay Lekhi, collaborateur, cabinet Allen & Overy LLP

THE PRESIDENT: Good morning. Today we will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. This morning we will hear oral statements from Chile, Portugal and Djibouti.

At the outset, I wish to inform you that at 11 o'clock this morning, the German authorities will be conducting a nationwide warning test to make sure that all information systems work well in case of an emergency. The test is conducted through several platforms, in particular, radio, phone applications and sirens. An "all clear" siren will be sounded at 11:45. You may therefore hear sirens or receive phone alerts at those specified times.

May I kindly ask that everyone ensure that their mobile phones are either on airplane mode or switched off completely? Thank you.

I now give the floor to the representative of Chile, Ms Fuentes Torrijo, to make her statement. You have the floor, Madam.

STATEMENT OF MS FUENTES TORRIJO

CHILE

[ITLOS/PV.23/C31/7/Rev.1, p. 1–13]

Mr President, distinguished members of the International Tribunal for the Law of the Sea, it is an honour to appear before you on behalf of the Republic of Chile in these proceedings concerning the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, henceforth referred to as "COSIS".

In response to the Tribunal's invitation to States Parties to the Convention to submit written statements on the questions submitted by COSIS, on 16 June 2023, Chile presented a written statement with its views about the two questions on which the Tribunal has been asked to render an advisory opinion.

In its written statement, Chile considered it helpful to convey to the Tribunal its views on the advisory jurisdiction of the Tribunal and its discretionary power to decide whether or not to render an advisory opinion in this case. The position of Chile, developed in the first section of its written presentation, is that the Tribunal has jurisdiction to give the requested advisory opinion and that there are no compelling reasons for the Tribunal to refuse to do so.

In the second section of its written statement, Chile highlighted the existence of scientific consensus that climate change is causing serious detrimental impacts on the ocean, including but not limited to, ocean warming, sea-level rise and ocean acidification. In sections III and IV of its written statement, Chile put forward its views about the interpretation and application of the relevant provisions of Part XII and other provisions of the United Nations Convention on the Law of the Sea (which I will refer further to as "UNCLOS" or "the Convention").

Following the Tribunal's indication that at this stage States should not simply reiterate what they have already stated in their written statements, Chile would like to take the opportunity of these oral hearings to develop further certain legal issues which are at the basis of the questions posed to the Tribunal, and to add some additional scientific information regarding the effects of climate change on Chile, as a coastal State with a coast of more than 8,000 kilometres facing the Pacific and the Antarctic Oceans.

In this oral presentation, I would like to develop four points on which Chile considers there is still need for further consideration, namely:

First, the powers of the Tribunal to render advisory opinions and the absence of compelling reasons for the Tribunal to decline to respond to COSIS's request;

Second, the irrefutable scientific evidence regarding the extent and seriousness of the deleterious effects of climate change on the marine environment and how this undeniable evidence should impact on the assessment of the due diligence standard that States are expected to comply with in the context of UNCLOS;

The relationship between UNCLOS obligations, namely, the duty to prevent, reduce and control pollution, and the more general obligation to protect and preserve the environment, and the obligations contained in the United Nations Framework Convention on Climate Change and in the Paris Agreement; and

Fourth, the relevance of international human rights law for the interpretation of UNCLOS.

Concerning the powers of the Tribunal to render advisory opinions and the absence of compelling reasons for the Tribunal to decline to respond to COSIS's request, Chile supports the right of COSIS to request an advisory opinion from the Tribunal. COSIS has exercised this right in accordance with the Statute and the Rules of the Tribunal.

In their written statements submitted to the Tribunal, two States, at least, have asked the Tribunal to refrain from rendering the requested advisory opinion on the basis that the Tribunal lacks jurisdiction to do so in the present case. These States argue that the Convention and, in particular, article 21 of the Statute of the Tribunal, has not conferred advisory jurisdiction to the full Tribunal. Other States, while admitting that the full Tribunal has advisory jurisdiction, in their written and oral statements have asked the Tribunal to clarify the scope of its advisory jurisdiction.

In its Advisory Opinion on the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, the Tribunal has already confirmed that article 21 of the Statute allows that an international agreement related to the purposes of the Convention may confer advisory jurisdiction on the full Tribunal.

The Tribunal has concluded that it is the interplay between article 21 of the Statute and the "other agreement" which confers advisory jurisdiction on the Tribunal. In other words, the "other agreement" may confer jurisdiction on the Tribunal because it is article 21 that has so provided.

The Statute of the Tribunal belongs to Annex VI to the Convention. Thus, it is an integral part of the Convention. Therefore, States Parties to the Convention themselves have admitted the possibility that the group of States may reach an international agreement related to the purposes of the Convention, and that this agreement may contemplate the option to request an advisory opinion from the Tribunal.

In its turn, the Rules of the Tribunal establish certain prerequisites for the operation of the advisory jurisdiction of the Tribunal, namely,

(a) the existence of an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion;

(b) that the request 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; and

(c) that the request must submit a legal question to the Tribunal.

All these prerequisites have been fulfilled in the present case.

Nevertheless, and beyond these formal prerequisites, Chile would like to elaborate on the rationale behind article 21 of the Statute and article 138 of the Rules of the Tribunal, the two provisions on which the advisory jurisdiction of the Tribunal rests.

It is Chile's contention that the Convention has conceived the advisory jurisdiction of the Tribunal as a way to assist States Parties to an international agreement related to the purposes of the Convention, by assuring those Parties that the interpretation and application of their agreement is consonant with the Convention.

UNCLOS has been described as the Constitution of the Ocean. Indeed, it is a comprehensive agreement that attempts to establish the principles and general rules governing almost all activities on the sea and the uses of its resources. From a political and legal perspective, the comparison with a constitution is a very pertinent one. In fact, the Convention shares many features with domestic constitutions.

In the first place, its purpose, as described in the Preamble, is to establish “a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and conservation of the marine environment.” In other words, its purpose is to regulate all activities on the seas and oceans.

A second feature that warrants the comparison with a domestic constitution is that the Convention is not easy to amend, and, third, as domestic constitutions do, the Convention relies on other agreements that will implement its principles and objectives.

This third feature of the Convention, that is to say reliance on other agreements that will contribute to implementing its principles and objectives can be very clearly recognized in various provisions of Part XII. To start with, article 197 calls States “to cooperate on a global basis and, as appropriate on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”

In its turn, article 237 states that, and I quote:

(1) The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

(2) Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

Small island States have indeed created an international organization, the Commission of Small Island States for Climate Change and International Law, with the precise purpose of promoting and contributing, and I quote, “to the definition, implementation and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligation 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”.¹

In fulfilling its mandate, COSIS is required to abide by the principles and provisions of the Convention. Therefore, the request for an advisory opinion from the Tribunal regarding the identification of obligations of States Parties to the Convention with regard to (a) the obligation to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result from climate change and to (b) the obligation to protect and preserve the marine environment in relation to climate change, will certainly assist COSIS in fulfilling its mandate in a manner that is consonant with the Convention.

¹ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (31 October 2021), Article 1(3).

The advisory opinion that the Tribunal will render in the context of these advisory proceedings is of the utmost importance. The interpretation of the obligations of the Convention in relation to the detrimental effects of climate change will assist COSIS in determining specific actions in fulfilment of its mandate, gaining certainty that these actions comply with the provisions of the Convention. COSIS will be able to rely on the authoritative interpretation of the relevant provisions of the Convention, to take actions in a manner that concerns the very survival of small island States. COSIS not requested an advisory opinion as an academic exercise, but in response to a real need.

Now, I move to the second point: The irrefutable scientific evidence regarding the extent and seriousness of the deleterious effects of climate change on the marine environment and how this undeniable evidence impacts on the assessment of the standard of conduct that States are expected to comply with in the context of UNCLOS.

As stated in Chile’s written statement, the scientific evidence regarding the deleterious effects of greenhouse gas emissions on the ocean is irrefutable.

For decades, the effects of greenhouse gases on the ocean were unknown. The Intergovernmental Panel on Climate Change was established by United Nations General Assembly resolution 43/58 of 6 December 1988. In adopting this resolution, the General Assembly expresses its concern that “certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences”.

The 1988 resolution also speaks of, at that time, “the emerging evidence” that “indicates that continued growth in atmospheric concentrations of ‘greenhouse’ gases could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for [hu]mankind if timely steps are not taken at all levels.”

The resolution also calls upon “Governments and intergovernmental organizations to collaborate in making every effort to prevent detrimental effects on climate and activities which affect the ecological balance” and also calls upon “non-governmental organizations, industry and other productive sectors to play their due role.”

Since then, 35 years have passed. What was then an “emerging evidence” is today an irrefutable fact: anthropogenic greenhouse gases have caused global warming with all its associated effects on the Earth’s ecosystems. In July 2023 the Secretary-General of the United Nations announced, and I quote, that “the era of global warming ended and the era of global boiling has arrived”.²

The particular vulnerability of the ocean to climate change risks is made clear in the 2019 Special Report on the Ocean and Cryosphere by the Intergovernmental Panel on Climate Change, which concluded that the ocean absorbs 20 to 30 per cent of the anthropogenic CO₂ emissions released into the atmosphere.³ Incidentally, Chile was a promoter of this special report since its inception at COP21 in 2015.⁴

The ocean has been warming continuously and taking up more than 90 per cent of the excess heat present in the climate system.⁵ The consequences of the absorption of heat and CO₂ are: ocean warming, ocean acidification and sea-level rise. These changes are undeniably disturbing the marine environment, especially rare or fragile ecosystems.

² United Nations Press Release: *Hottest July ever signals ‘era of global boiling has arrived’ says UN chief* (27 July 2023), available at <https://news.un.org/en/story/2023/07/1139162> .

³ IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Portner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegria, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 9. <https://doi.org/10.1017/9781009157964.001> .

⁴ Because the Ocean, The Initiative, available at <https://www.becausetheocean.org/the-initiative/>

⁵ Op. Cit., note 3.

Small island States are specially affected by these detrimental effects on the ocean. For them, ocean warming, sea-level rise and ocean acidification represent a threat to their very survival as independent States and to the living conditions of their population. Besides small island States, many other countries are looking with great interest to what the Tribunal has to say about the obligations of States Parties to the Convention to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result from climate change and to protect and preserve the marine environment in relation to climate change impacts.

Chile, as a coastal State, is also vulnerable to the detrimental effects of climate change. In this regard, we are witnessing the tropicalization of the South Pacific, bringing changes to the marine ecosystem at the local level, affecting the distribution of resources for small-scale fisheries.⁶ These fisheries are critical for our coastal communities.⁷

In the Chilean Northern macrozone, the recollection of seaweeds (*Macrocystis* species) and fishing are directly exposed to the climate variability associated with the El Niño-Southern Oscillation (ENSO). Increase in temperature is unfavourable to seaweeds, slowing down recovery times and putting their associated ecosystems in jeopardy. In this region, we expect that the ocean surface temperature will increase considerably by 2040-2050, posing a high threat to the humpback whales,⁸ the Humboldt penguins⁹ and the common bottlenose dolphin.¹⁰

In the Chilean Centre-South macrozone, threats include precipitation deficit, loss of estuarine areas and wetlands, and temperature rise. The precipitation deficit could affect the contribution of essential nutrients for the biological production of phytoplankton, which is at the base of the trophic chain, with direct impacts on the availability of several resources, like Chilean hake, which is currently threatened by overfishing.¹¹

An increase in the sea level and tidal waves would contribute to coastal erosion and geomorphology changes, which include changes in the marine current systems; detachment of the substratum in the seaweeds; and loss of biomass and habitats for fishes, molluscs and crustaceans.¹²

Considering that in Chile many human and natural systems are located within 10 metres above sea level, nearly one million people, about 5.5 per cent of our national population, could be potentially exposed to sea-level rise and tidal waves, and around 500,000 houses, that is 7.42 per cent of the national total, would be exposed to these threats.¹³

⁶ Chile (2021). National Communication (NC). NC 4, p. 59, available at https://unfccc.int/sites/default/files/resource/4NC_Chile_Spanish.pdf.

⁷ Undersecretary of Fisheries and Aquaculture (2016). Plan de Adaptación al Cambio Climático para Pesca y Acuicultura, available at <https://mma.gob.cl/wp-content/uploads/2016/12/Plan-Pesca-y-Acuicultura-CMS.pdf> p. 27.

⁸ Atlas de Riesgo Climático, available at https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_ballenajorobada/.

⁹ Atlas de Riesgo Climático, available at https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_pinguinodeHumboldt/.

¹⁰ Atlas de Riesgo Climático, available at https://arclim.mma.gob.cl/atlas/view/paarc_coquimbo_biodiversidad_delfin_narizdebotella/.

¹¹ Atlas de Riesgo Climático, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf p. 16-17.

¹² Cubillos, L.; Soto, D.; Hernández, A. & Norambuena, R., 2020. Informe Proyecto ARClím: Pesca Costera. COPAS Sur-Austral, Universidad de Concepción e INCAR coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 5, Concepción, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf.

¹³ Centro UC Cambio Global, Determinación del riesgo de los impactos del Cambio Climático en las costas de Chile, available at <https://cambioglobal.uc.cl/proyectos/272-determinacion-del-riesgo-de-los-impactos-del-cambio-climatico-en-las-costas-de-chile>

In addition, many ecosystems and infrastructure are at risk, such as wetlands, fishing coves, dune fields, beaches, places of interest for biodiversity, facilities (schools, police stations) and ports. It is estimated that 12 critical coastal districts are in need of adaptation action plans.¹⁴

As regards ocean acidification, this is causing a detrimental impact on the reproduction, size, and palatability of molluscs and loss of biomass.¹⁵

Chile is the second global producer of *Mytilus chilensis* (the Chilean mussel) and the leading exporter worldwide. Mussels in Chile are highly susceptible to climate change, due to the fact that 99 per cent of the seeds come from natural banks.¹⁶ Ocean acidification interacts with the calcification of several species,¹⁷ including the Chilean Mussel; studies have shown that acidification prevents the normal development of shells, which in turn affects larvae, seeds and adult species.¹⁸

Marine and insular bird populations in Chile are declining due to sea-level rise and increase in ocean temperatures, resulting in the loss of habitats and the decrease of availability of marine prey. Decline in bird populations impacts the availability of *guano*, and this affects the availability of nutrients for marine species.¹⁹

In Chile, the impacts of climate change can also be seen beyond the coast. In particular, sea-level rise has had, and will continue to have, severe impacts on the cryosphere, that is the Earth's snow and ice regions. The severe impacts on the cryosphere prompted Chile and Iceland to lead a coalition of 20 governments at the last COP in Sharm-el-Sheikh, the purpose of which is to create a high-level group on sea-level rise and mountain water resources.

The consequences of a changing cryosphere due to global warming and the greenhouse gas emissions will be felt within and far beyond polar and mountain regions. Polar fisheries will be affected by ocean warming, but also by the increasing acidification of the polar oceans,

¹⁴ Chile (2021). National Communication (NC). NC 4, p. 59, available at https://unfccc.int/sites/default/files/resource/4NC_Chile_Spanish.pdf

¹⁵ Cubillos, L.; Soto, D.; Hernández, A. & Norambuena, R., 2020. Informe Proyecto ARClím: Pesca Costera. COPAS Sur-Austral, Universidad de Concepción e INCAR coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 5, Concepción, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/02_PESCA_COSTERA.pdf

¹⁶ Soto, D.; León-Muñoz, J.; Molinet, C.; Soria-Galvarro, Y.; Videla, J.; Opazo, D.; Díaz, P.; Tapia, F. & Segura, C. 2020. Informe Proyecto ARClím: Acuicultura. INCAR, Universidad de Concepción, Universidad Católica de la Santísima Concepción, Universidad Austral de Chile, INFOP, Universidad de Los Lagos, e INTEMIT coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 7, Puerto Montt, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/01_ACUICULTURA.pdf.

¹⁷ Buschmann, A. H, S. Gelfich, P. Díaz, R. Estévez, M. C. Hernández González, N. Lagos, M. Lardies, M.J. Martínez-Harms, S. V. Pereda y J. Pulgar (2019). Acuicultura, pesca y biodiversidad en ecosistemas costeros de Chile. Santiago: Comité Científico COP25; Ministerio de Ciencia, Tecnología, Conocimiento e Innovación, available at https://cdn.digital.gob.cl/filer_public/86/3b/863b82f8-b481-4c93-b83b-ac1ad69cb9b9/8biodiversidad-acuicultura-buschmann.pdf p. 14.

¹⁸ Soto, D.; León-Muñoz, J.; Molinet, C.; Soria-Galvarro, Y.; Videla, J.; Opazo, D.; Díaz, P.; Tapia, F. & Segura, C. 2020. Informe Proyecto ARClím: Acuicultura. INCAR, Universidad de Concepción, Universidad Católica de la Santísima Concepción, Universidad Austral de Chile, INFOP, Universidad de Los Lagos, e INTEMIT coordinado por Centro de Ciencia del Clima y la Resiliencia y Centro de Cambio Global UC para el Ministerio del Medio Ambiente a través de La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), p. 9, Puerto Montt, available at https://cambioclimatico.mma.gob.cl/wp-content/uploads/2021/06/01_ACUICULTURA.pdf.

¹⁹ Uribe Botero, Eduardo (2015). El cambio climático y sus efectos en la biodiversidad en América Latina, p. 18, available at https://repositorio.cepal.org/bitstream/handle/11362/39855/S1501295_en.pdf?sequence=1.

which scientists predict will reach a critical threshold at 450 ppm – a level we are on track to reach in just 12 years.²⁰

Thus, the Ambition on Melting Ice Declaration signed in November 2022 by Chile, Iceland and 18 other mountain, polar and low-lying nations puts the protection of the cryosphere at the forefront of vigorous climate action. This is not a matter of concern for these States alone. The protection of the cryosphere should be an urgent global concern because the greatest impacts on human communities will be felt beyond these regions.²¹ The best option to slow progressive cryosphere loss and the resulting widespread catastrophes is to rapidly decrease global CO₂ and other greenhouse gas emissions, across all sectors.²²

Let me now move to an important legal question: How does this undeniable scientific evidence impact on the assessment of the standard of conduct that States are expected to comply with, in the context of their obligations under UNCLOS?

COSIS has posed two questions to the Tribunal. The Request for an Advisory Opinion reads as follows:

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?

With regard to questions (a) and (b), articles 192 and 194 of the Convention are the basic provisions on the basis of which the Tribunal can draw specific conclusions regarding the obligations of the States Parties to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects of 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.

Article 192 prescribes that “States have the obligation to protect and preserve the environment.” For its part, article 194(1) prescribes that: “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.”

Despite the fact that the main focus of article 194 appears to be the prevention, reduction and control of pollution, paragraph 5 is relevant to answering the question about the obligation to protect and preserve the marine environment in relation to climate change impacts, insofar as this provision prescribes that:

“The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” Various other provisions of the Convention are relevant to give a more specific content to this obligation contained in article 194(5). In its

²⁰ Declaration Ambition on Melting Ice (AMI) on Sea-level Rise and Mountain Water Resources, 16 November 2022, available at <https://ambitionmeltingice.org/ami-declaration/> .

²¹ Ibid.

²² Ibid.

written statement, Chile has already identified articles 117, 123, 197, 203, 204 and 237 as relevant provisions that will assist the Tribunal in identifying specific obligations in this regard.

Now, having said this, Chile would like to dwell upon the standard of conduct required to comply with these obligations. In this connection, it is usual to describe the obligations contained in articles 192 and 194 of the Convention as due diligence obligations. This means that States have an obligation of conduct to take all measures necessary to prevent, reduce and control pollution of the marine environment and all measures necessary to protect and preserve the marine environment in relation to climate change impacts.

Oliver Wendell Holmes wrote in 1881 that: “The life of the law has not been logic; it has been experience”.²³ Experience shows that since 1988, at least, States have been aware that greenhouse gas emissions are causing detrimental effects on the ocean; however, States have, to a large extent, continued business as usual. Therefore, the Tribunal has the very important task of interpreting what it means that States have the obligation to take “all measures necessary”. If we know that greenhouse gas emissions will condemn small island States to disappear or will destroy marine life as we know it, and if we also know what actions are causing this injury, then due diligence cannot be interpreted as a simple best effort standard.

In relation to this, I come to our third point, which is the relationship between UNCLOS obligations, namely, the duty to prevent, reduce and control pollution and the obligation to protect and preserve the marine environment, and the obligations contained in the United Nation’s Framework Convention on Climate Change and the Paris Agreement.

The threat of climate change is addressed today by the international community of States through negotiations under the UNFCCC. Under the umbrella of the UNFCCC, the Paris Agreement is the latest negotiated treaty that “aims to strengthen the global response to the threat of climate change”.

The UNFCCC entered into force on 21 March 1994. Its objective, stated in article 2, is “the stabilization of GHG concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. This objective “would be achieved with a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.” In case of a threat of irreversible damage, the UNFCCC contemplates the application of a precautionary approach, which means that measures cannot be postponed. That is in article 3.3.

The UNFCCC is a framework agreement. This means that its implementation requires the conclusion of successive treaties or protocols. This law-making technique might tell us something about the nature of the problem that a framework agreement attempts to tackle.

Normally, the problem at hand requires detailed regulation and not all the negotiating States are in a position to accept all the rules. Participation in these kind of treaties often requires sticks and carrots as incentives. Another typical feature of this kind of framework agreement is that they tend to show some flexibility with regard to breach of treaty obligations. Therefore, when States are unable to fulfil their obligations, they may be assisted by a non-compliance procedure, the purpose of which is to promote compliance instead of allocating responsibilities.

As explained by Professor Alan Boyle: “Solutions to global climate change have not been so easily forthcoming. In principle, the same legal tools could be used to regulate greenhouse gas emissions and construct an international regime for tackling climate change, but the intimate connection with economic growth has made international agreement on effective solutions especially hard to achieve”.²⁴

²³ Holmes, Oliver W: *The Common Law* (orig. ed. 1881), Harvard University Press, 2009, p. 3.

²⁴ Boyle and Redgwell, *International Law and the Environment* (4th ed. OUP, 2021) p. 356.

In this context, the 2015 Paris Agreement is the latest implementing treaty of the UNFCCC today in force. But it is not clear that this agreement will be able to successfully tackle climate change.

Therefore, from the perspective of the Convention, the UNFCCC and the Paris Agreement have to be approached through the lens of articles 207 and 212 of the Convention, as relevant agreed rules, standards, practices and procedures that States should take into account in the adoption of their laws and regulations to prevent pollution of the marine environment.

However, it is necessary to be clear that the UNFCCC and the Paris Agreement neither derogate nor modify the obligations contained in the Convention with regard to the obligation 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.

In particular situations in which State commitments under the Paris Agreement fall short of compliance with the obligations under UNCLOS, States Parties to the Convention must nonetheless take action to address the deleterious effects of climate change on the ocean, by virtue of the Convention.

And I have come to my last, and fourth, point, which is the relevance of international human rights law in the interpretation of the United Nations Convention on the Law of the Sea.

Article 293 of the Convention provides that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”

Article 293 is under Section 2 of Part XV of the Convention, which governs the settlement of disputes, specifically, compulsory procedures entailing binding decisions.

Advisory proceedings are not a dispute settlement procedure and they do not entail a binding decision. Nevertheless, the Tribunal, in the *Southern Regional Fisheries Commission Advisory Opinion*, relied on article 23 of the Statute of the Tribunal and on article 130 of the Rules of Procedure, to apply article 293 of the Convention in the context of an advisory proceeding.

Therefore, in the present proceedings, the applicable law comprises UNCLOS and other rules of international law not incompatible with this Convention. The systemic interpretation rule enshrined in article 31(3)(c) of the Vienna Convention on the Law of Treaties has been explicitly included, then, in article 293 of UNCLOS.

In this vein, Chile requests the Tribunal to consider international human rights law when responding to this request for an advisory opinion.

The Preamble of the Convention recognizes that the rules establishing a legal order for the seas and oceans have the purpose, among others, to promote the equitable and efficient utilization of the resources of the seas and oceans, the conservation of their living resources and the protection and preservation of the marine environment. Furthermore, the Preamble adds that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing countries.

Such a just and equitable economic order needs to consider international human rights law, especially the right to self-determination.

The first human right included in the International Covenant on Civil and Political Rights and in the International Covenant on Social, Economic and Cultural Rights is the right to self-determination. Article 1 of the two covenants prescribes that:

(1) All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The deleterious effects of climate change affect the human right to self-determination of the entire population of the small island States. Climate change affects the very survival of these communities.

The right to self-determination requires the full enjoyment of a panoply of rights, without any of which this right cannot be fulfilled. These subsidiary rights include the right to life, adequate food, water, health, adequate standard of living, the use of and enjoyment of property, and the enjoyment of culture. Regretfully, anthropogenic greenhouse gas emissions, and the deleterious effects on the ocean, have direct negative effects on the enjoyment of these rights, effectively depriving peoples of their right to self-determination.²⁵

Respect for the right to self-determination is an obligation *erga omnes*. This means that all States have a legal interest in protecting that right, as has been stated by the International Court of Justice in the *East Timor* case between Portugal v. Australia and in the *Chagos Advisory Opinion*, amongst others.

The Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations states that: “Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.”

In the case of the small island States, the protection of the marine environment is inseparable from the protection of the self-determination of these States and their population. Sea-level rise, ocean warming and ocean acidification are already affecting their right to life, health, food, water and sanitation, housing, property, their cultural rights, and, in a short span of time, the habitability of their territory.

In sum, in addition to the conclusions already detailed in Chile’s written statement, Chile considers that, in accordance with article 21 of the Statute of the Tribunal and article 138 of the Rules of Procedure, the Tribunal should render the requested advisory opinion because there are no compelling reasons to refuse to do so.

Chile also reaffirms the existence of the deleterious effects of climate change on the marine environment, and this is, undeniably, a conclusion that is sustained on evidence that has been endorsed by the international scientific community and by States themselves, demonstrating that a global consensus on this matter has been reached.

Furthermore, in regard to the relationship between UNCLOS obligations and the obligations contained in the United Nations Framework Convention on Climate Change and the Paris Agreement, Chile considers that where the obligations set in the UNFCCC and the

²⁵ Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati (24 Feb 2020), *The Yale Law Journal*, 129 available at <https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination#:~:text=self%2Ddetermination%20in%20the%20face,%2C%20cultural%2C%20and%20economic%20rights>.

Paris Agreement are not appropriate or sufficient to address the impacts of climate change on the oceans, the obligations under UNCLOS remain applicable on their own.

Lastly, Chile requests the Tribunal to take into account international human rights law when responding to this *Request for an Advisory Opinion on Climate Change and International Law*, in particular the right of self-determination.

Chile would like to end with a quote by former United Nations High Commissioner for Human Rights, and former President of the Republic of Chile, Ms Michelle Bachelet: “The world has never seen a threat to human rights of this scope”.²⁶ And the Secretary-General of the United Nations who urged the international community in the following sense: “No more hesitancy. No more excuses. No more waiting for others to move first”.

Chile respectfully asks this Tribunal to consider this urgent call and with this, Mr President, I finish my call. Thank you very much.

THE PRESIDENT: Thank you Ms Fuentes Torrijo.

I now give the floor to the representative of Portugal, Ms Galvão Teles, to make her statement. You have the floor, Madam.

²⁶ United Nations Press Release: We are ‘burning up our future’, UN’s Bachelet tells Human Rights Council (9 September 2019), available at <https://news.un.org/en/story/2019/09/1045862> .

STATEMENT OF MS GALVÃO TELES
PORTUGAL
[ITLOS/PV.23/C31/7/Rev.1, p. 13–21]

Mr President, distinguished members of the Tribunal, it is a great honour to address you today on behalf of the Portuguese Republic in these advisory proceedings. Let me start with a few brief words about the central role of the oceans in addressing climate change. This short overview is largely factual in nature and based on available scientific evidence, notably the reports produced by the IPCC.

The Portuguese Republic recognizes that any advisory opinion issued by ITLOS will be legal in nature. However, the international treaties relevant to the response to this advisory request, in particular UNCLOS, expressly refer to the best available scientific evidence as a basis for determining the international obligations of subjects of international law, particularly States. Accordingly, Portugal believes that ITLOS must necessarily consider in its legal determinations what science says about the central role of the oceans in addressing climate change and the nexus between oceans and climate, which was reaffirmed in the Oceans Declaration adopted last year in Lisbon, and I quote:

We recognize that the ocean is fundamental to life on our planet and to our future. The ocean is an important source of the planet's biodiversity and plays a vital role in the climate system and water cycle. The ocean provides a range of ecosystem services, supplies us with oxygen to breathe, contributes to food security, nutrition and decent jobs and livelihoods, and acts as a sink and reservoir of greenhouse gases and protects biodiversity, provides a means for maritime transportation, including for global trade, forms an important part of our natural and cultural heritage and plays an essential role in sustainable development, a sustainable ocean-based economy and poverty eradication.

The ocean plays thus an important role in the context of climate change and affects our climate system in profound ways. Scientific research underscores the crucial role of the ocean as a climate regulator. In addition to producing along with forests, about 50 per cent of our atmospheric oxygen, the ocean (i) stores large amounts of heat, (ii) acts as a global thermostat, and (iii) absorbs about a quarter of our CO₂ emissions, including those emitted by humans. All this makes the ocean a cornerstone of the Earth's carbon cycle.

But that comes at costs – warming and acidification – and the evidence is clear. Human activities, particularly greenhouse gas emissions, have caused a 1.1°C increase in global surface temperature since the 1800s. Melting ice caps and thermal expansion are causing sea levels to rise rapidly. If emissions continue, sea levels could rise by as much as a meter by 2100, affecting not only wildlife but coastal communities.

In addition, extreme events throughout the climate system are disrupting ecosystems and causing mass mortality of marine life. Predictions indicate that these events (i) will become more frequent and intense and (ii) are already posing a significant threat to marine ecosystems.

Changes in ocean circulation patterns and temperature-induced shifts affect primary production in the marine environment and have cascading effects on food chains and our livelihoods. Increased temperatures also stress marine life, as evidenced by coral bleaching. These factors, combined with acidification, create food insecurity by altering bioaccumulation, increasing disease incidence and affecting the metabolism of marine organisms.

Doing nothing leads to dire consequences: water scarcity, crop loss, flooding, ocean acidification and rising sea levels.

Portugal, as a maritime country and with one of the largest EEZs in Europe and the world, and also as one of the European countries most vulnerable to climate change, fully

supports the initiative by COSIS to bring these matters before ITLOS in the current advisory proceedings, to clarify the state of international law and thus provide States with the necessary legal tools to better protect and preserve the marine environment and to fight climate change.

Science compels us to act and so does international law.

Mr President, distinguished members of the Tribunal, this oral statement, following our written statement, will look specifically at what Part XII of UNCLOS actually requires of its States Parties in the context of climate change.

For this purpose, UNCLOS is the central legal instrument to be interpreted by ITLOS in the context of the present proceedings, since it is at the heart of the legal framework dedicated to the preservation and protection of the ocean. However, as a living instrument and a constitution for the oceans, UNCLOS must be put in the context of other international legal instruments also binding on its Parties and of rules of customary international law that have developed in the meantime.

UNCLOS provisions today must be informed by the global climate regime and other international environmental legal instruments with respect to the impacts of climate change on the ocean and *vice versa*. To this end, this oral statement will *first* discuss the issue of the openness of UNCLOS and its synergies and complementarity with other international instruments relating to the environment and climate change, such as the OSPAR Convention, the UNFCCC and the Paris Agreement.

Second, it will discuss the main legal characteristics of the United Nations Framework Convention on Climate Change and the Paris Agreement and their relevance in the context of the interpretation of Part XII of UNCLOS for the purposes of the present advisory proceedings.

Third, it will examine how these legal treaties impact the obligations of States Parties arising from Part XII of UNCLOS. It will focus, in particular, on what the obligations enshrined in articles 192, 194, 207 and 212 require of States Parties to UNCLOS in light of a coherent and comprehensive interpretation.

Mr President, distinguished members of the Tribunal, on the openness of UNCLOS and its relationship to other instruments of international law related to the environment and climate change: UNCLOS is a treaty that is also key to determining the international obligations of States in the context of climate change. It is comprehensive and embodies a holistic view of ocean governance. Its ambition is nothing less than the establishment of a legal framework that promotes the peaceful use of the ocean, the equitable use of resources, and the preservation and protection of the marine environment.

Adequate interpretation and application of UNCLOS is therefore of paramount importance. This requires that we treat UNCLOS as a dynamic and not a self-contained treaty. This means that the interpretation and application of its provisions require the consideration of other international legal instruments in an exercise of complementary and mutual reinforcement. This is particularly important when dealing with legal issues that are not explicitly addressed in UNCLOS, such as climate change.

The questions posed to the Tribunal in these advisory proceedings have a direct relation with climate change. One question, by broadly addressing States Parties' obligations regarding the marine environment. And the other question, by focusing on obligations aimed at preventing pollution tied to the detrimental effects associated with climate change.

Therefore, the openness of UNCLOS to other international treaties is particularly important for the interpretation and application of its Part XII, including with respect to the environment and climate change. Indeed, this link has been recognized by the United Nations General Assembly, already in its resolution 66/288 of 2012, entitled "The future we want", which states, and I quote,

We recognize that oceans, seas and coastal areas form an integrated and essential component of the Earth's ecosystem and are critical to sustaining it, and that international law, as reflected in the United Nations Convention on the Law of the Sea, provides the legal framework for the conservation and sustainable use of the oceans and their resources. We stress the importance of the conservation and sustainable use of the oceans and seas, of their resources for sustainable development, including through their contributions to poverty eradication, sustained economic growth, food security and creation of sustainable livelihoods and decent work, while at the same time protecting biodiversity and the marine environment and addressing the impacts of climate change.

We therefore commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment to deliver on all three dimensions of sustainable development.

From a legal standpoint, UNCLOS is open to outside influence for its evolutionary interpretation in three different ways, all of which find support in article 31 of the Vienna Convention on the Law of Treaties and in the customary rule contained therein.

First, by considering subsequent agreements and subsequent practice as well as any other international rule that may be applicable between the States Parties.

Second, by using *renvoi* rules that explicitly link UNCLOS to other instruments.

Third, by formulating provisions that are inherently open-ended. In all cases, the interpretation and application of UNCLOS must be consistent with its principles and objectives pursuant to articles 237 and 311 of the Convention.

In this regard, Portugal has highlighted in its written submission several relevant international instruments, in particular the United Nations Framework Convention on Climate Change, the Paris Agreement and the OSPAR Convention. This is the reason why understanding their core features and structure plays an important role in determining the international obligations of States Parties to UNCLOS in the context of climate change.

Mr President, distinguished members of the Tribunal, let me first address the relevance of regional treaties to the interpretation and application of UNCLOS. There are several provisions in Part XII requiring States Parties to cooperate at both the global and regional levels to formulate and develop international rules, standards and recommended practices and procedures consistent with this Convention for the protection and preservation of the marine environment. Articles 197, 207(4) and 212(3) are just a few examples. Therefore, cooperation to protect and preserve the marine environment is an internationally binding obligation under UNCLOS. It is not merely a matter of policy preference.

One such regional instrument is the 1992 Convention on the Protection of the Marine Environment of the North-East Atlantic, also known as the OSPAR Convention. Portugal is one of its sixteen parties. The territorial scope of the OSPAR Convention is limited to the Northeast Atlantic, more precisely to the maritime area referred to in article 1(a) of the OSPAR Convention.

The importance of the OSPAR Convention for the interpretation and application of UNCLOS lies in the fact that it contains international rules applicable between the States Parties to UNCLOS. But, in addition to the text of the OSPAR Convention, one also needs to consider all other international rules adopted under the OSPAR Convention, including the decisions and measures adopted by the OSPAR Commission. The interpretation and application of the provisions of UNCLOS in the light of the international rules contained in the

OSPAR Convention finds legal support in the Vienna Convention on the Law of Treaties, in particular in its article 31(3)(c).

It is undisputed that such international rules must, in any case, be consistent with the principles and objectives of UNCLOS. This is what the OSPAR Convention does.

First, in the opening paragraphs of its preamble, it recognizes the critical importance of the marine environment and the need to protect it by emphasizing, among other things, the need for cooperative action at the national, regional and global levels to prevent marine pollution.

Second, it requires States Parties to act on the basis of the ecosystem approach; that is, a holistic management strategy of the marine environment based on sound science. States are, therefore, bound (i) to apply the precautionary principle; (ii) to use the best available techniques and the best environmental practices; and (iii) to apply the principles that preventive action should be taken and that priority is given to environmental damage being rectified at source.

Third, and more importantly, it requires in article 2(1) that its States Parties take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities, including to conserve marine ecosystems and, when practical, restore marine areas which have been adversely affected.

Finally, the Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2030 translates the obligation of the OSPAR Convention and related instruments into measurable goals to tackle climate change's cascading effects. Each of these objectives underscores the urgency to prevent pollution from hazardous substances, protect and conserve biodiversity, restore degraded habitats, and enhance awareness and adaptation to climate change.

In conclusion, the OSPAR Convention is a regional instrument whose provisions embody international obligations that are consistent with the broader objectives of UNCLOS. This is especially true for those obligations dealing with climate change and the preservation of the marine environment.

Mr President, I turn now to the 1992 United Nations Framework Convention on Climate Change, which is a foundational legal instrument in its field. It is a treaty that contains clearly defined goals and recognizes climate change as a shared concern. Article 2 establishes the fundamental international obligation of its States Parties: to stabilize greenhouse gas concentrations in a manner that would prevent dangerous interference with our climate system.

As a framework convention, it further defines many critical concepts related to climate change and establishes key principles that must guide our global efforts to combat it. First, by emphasizing the need for international cooperation and participation by the entire global community. Second, by recognizing the uneven distribution of responsibility for climate change. And third, by establishing a commitment to address climate change together.

The 2015 Paris Agreement further reshaped the landscape of climate change law. This agreement emphasizes the importance of a strong, progressive response based on the best available science and presents an array of international obligations to achieve this goal. It further highlights the importance of conserving and enhancing greenhouse gas sinks in article 5(1). This aligns with the scientific reality that the ocean acts as a vital sink and reservoir and further reflects the necessity of ecosystem integrity and the protection of biodiversity.

More importantly, article 2(1) of the Paris Agreement sets out its core obligations. On the one hand, the obligation to keep the global temperature increase well below 2°C above pre-industrial levels; on the other hand, States Parties must make every effort to limit the increase even further to 1.5°C. Both obligations have a due process character. They are an obligation of means. States Parties are not required to achieve a specific result, but only to take all necessary measures to achieve the set thresholds. They enjoy discretion in determining policies and measures to this end.

These obligations are collective in nature, binding the international community as a whole and reflecting a shared responsibility to combat climate change. The normative structure of these obligations constitutes a legal novelty. However, these legal complexities should not deter us from pursuing legal accuracy, particularly with what is required from States Parties to UNCLOS.

Mr President, distinguished members of the Tribunal, what does this all mean then to the interpretation and application of the provisions of UNCLOS, in particular those of Part XII which the Tribunal is required to interpret in the context of the present advisory proceedings? Articles 192 and 194 are the more general provisions concerning the preservation and protection of the marine environment.

Article 192 serves as a cornerstone. The obligation it contains has both a positive and a negative character. States Parties to UNCLOS must safeguard and improve the marine environment while simultaneously having an obligation not to harm it. And such has been recognized by several international courts and tribunals, including by this Tribunal in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*.

As mentioned earlier, the Paris Agreement strengthened the landscape of international climate change law. This has not been without impact on UNCLOS and the obligations of its States Parties. The Paris Agreement sets specific, measurable goals – to hold the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts limiting it to 1.5°C. There is abundant scientific evidence showing that ocean preservation and protection are of paramount importance because a healthy and vibrant ocean is central to achieving these goals. Accordingly, the discretion that UNCLOS States Parties have under article 192 is narrower and more demanding.

This is also true for the interpretation and application of articles 194, 207 and 212 of UNCLOS, and this is because these provisions are similar in nature and they aim to achieve similar normative objectives. On the one hand, by recognizing that States Parties have discretion in discharging their obligations to take measures to prevent, reduce and control pollution of the marine environment. But, on the other hand, by also demanding from them the harmonization of their policies and measures.

Article 194 is undeniably more general than articles 207 and 212, which address specifically pollution from land-based sources and from or through the atmosphere, respectively. And the same can be said, for example, about article 211, which deals with pollution from vessels.

But all these provisions outline specific legal regimes that revolve around the common theme of pollution. Accordingly, an adequate and shared understanding of the term “pollution of the marine environment” is imperative. Article 1(4) of UNCLOS provides the definition and clarifies that the term encompasses the introduction of substances or energy by humans into the marine environment resulting in adverse effects such as harm to marine life, hazards to human health, hindrance to maritime activities, degradation of water quality and a decline in amenities.

Anthropocene greenhouse gases emissions clearly meet the definition of pollution of the marine environment under UNCLOS, as they result in the introduction of energy and substances into the marine environment, thus causing deleterious effects to the marine environment.

The discharge of each of these obligations by States Parties to UNCLOS has not been the same since the Paris Agreement. And this is because the discretion that States Parties currently enjoy under articles 194, 207 and 212 of UNCLOS is also narrower and more demanding in light of the measurable targets enshrined in article 2(1) of the Paris Agreement.

The global goal of limiting temperature increase undeniably shapes today the obligations concerning the issue of pollution of the marine environment and thus its preservation and protection.

This is, in our view, a fundamental takeaway resulting from the comprehensive interpretation of Part XII of UNCLOS in light of the climate change legal instruments, namely, the UNFCCC and the Paris Agreement.

And States have already recognized this in the Declaration adopted in the Lisbon Oceans Conference in 2022 entitled “Our Ocean, Our Future, Our Responsibility”, and I quote:

We emphasize the particular importance of implementing the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, including the goal to limit the temperature increase to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C, recognizing that this would significantly reduce the risks and impacts of climate change and help to ensure the health, productivity, sustainable use and resilience of the ocean and thus our future.

It is now high time to implement these commitments fully and as a matter of urgency.

Mr President, distinguished members of the Tribunal, let me close this statement on behalf of the Portuguese Republic by making the following final five remarks:

One, unlike at the time of the UNCLOS negotiations, the nexus between the ocean and climate is now well established from a scientific point of view. On the one hand, the fight against climate change is inextricably linked to preserving the well-being of the ocean. On the other hand, all efforts to combat global warming will be ineffective if the effects of climate change on the oceans and their influence on climate change are neglected.

Two, as a living instrument, UNCLOS is subject to evolutionary interpretation. This is fundamental for the purposes of having a comprehensive and up-to-date legal regime for the oceans. Therefore, the interpretation of UNCLOS must also consider other international legal instruments and regimes, particularly international environmental and climate change law. And to this end, the UNFCCC, the Paris Agreement and the OSPAR Convention are three of the most relevant international instruments.

This is part three. Part XII of UNCLOS addresses the protection and preservation of the marine environment. The answers to the questions posed in these advisory proceedings are closely linked to the obligations arising from the provisions of this Part. The structure of Part XII of UNCLOS resembles an inverted pyramid. On the lowest level, article 192 of UNCLOS establishes the overarching and general obligation that informs the entirety of Part XII.

On a second level stands article 194 of UNCLOS, which focuses on the obligation of States Parties to adopt measures to prevent, reduce and control pollution of the marine environment. In this case, the scope of the provisions is broad enough to include any source of pollution of the marine environment, including greenhouse gas emissions. And then at the third level, there are the other provisions that seek to develop the provisions of the previous levels, namely articles 192 and 194.

Four, all in all, the interpretation of these provisions justifies the conclusion that UNCLOS lays down obligations for States to (i) protect and preserve the marine environment; (ii) to prevent, reduce and control pollution in the marine environment, including in view of the deleterious effects of climate change caused by anthropogenic GHG emissions that constitute a form of pollution of the marine environment.

For this purpose, the Paris Agreement notably lowers the threshold and the level of discretions that States Parties have under Part XII of UNCLOS, by setting the 1.5°C goal based on the best available science. This is true even if the Paris Agreement does not go beyond

imposing a collective obligation of result on the Parties. The Paris Agreement should be considered a minimum standard for compliance with Part XII of UNCLOS as concerns the deleterious effects of climate change.

And finally, five, moreover, these legal regimes, taken as a whole, require that States Parties – acting individually and in the context of international cooperation – endeavour to do everything in their power, in accordance with the principles of due diligence and common but differentiated responsibilities: first, to address the adverse impacts of climate change; and, second, to preserve and protect the marine environment, particularly taking into account the abovementioned nexus between the ocean and the climate system.

I thank you for your attention.

THE PRESIDENT: Thank you, Ms Galvão Teles.

We have reached 11:25. At this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 11:55.

(Pause)

THE PRESIDENT: I now give the floor to the representative of Djibouti, Mr Yacin Houssein Doualé, to make his statement. You have the floor, Sir.

EXPOSÉ DE M. DOUALÉ

DJIBOUTI

[TIDM/PV.23/A31/7/Rev.1, p. 23–28]

Monsieur le Président, Mesdames et Messieurs les Membres du Tribunal, en ma qualité d'ambassadeur de la République de Djibouti accrédité auprès de l'Allemagne, j'ai l'honneur de me présenter devant vous aux fins d'exposer la position de la République de Djibouti concernant la demande d'avis consultatif dont votre Tribunal est saisi.

Cette procédure consultative marque un tournant dans le mouvement mondial visant à lutter contre le changement climatique et, je l'espère, contribuera au changement que la protection de l'environnement et des océans nécessite.

La position de Djibouti sera présentée en deux temps. Dans un premier temps, j'exposerai les grands enjeux environnementaux, humains et économiques qui sous-tendent les questions dont vous êtes saisis, et dans un second temps, Me Guled Yusuf, conseil de la République de Djibouti, traitera des aspects strictement juridiques de cette affaire.

J'aborderai le sujet en trois temps. D'abord, il y a lieu de rappeler l'importance des océans pour la terre tout entière, et en particulier pour les États côtiers, et le fait qu'il s'agit d'une ressource essentielle à la vie devant être protégée et préservée des effets du changement climatique. Ensuite, il conviendra d'exposer en quoi ce sujet est tout particulièrement important pour la République de Djibouti. Enfin, il sera opportun de s'attarder sur l'utilité de la présente procédure.

Les océans, qui occupent plus de 70 % de la surface de la terre, sont indispensables à l'existence et à l'équilibre de tous les êtres vivants, qu'ils soient humains, animaux ou végétaux. Les océans sont essentiels à notre survie, à notre bien-être et à notre prospérité. Ils jouent un rôle clé dans l'écosystème en absorbant un quart des émissions annuelles de dioxyde de carbone et en contrebalançant les fortes températures. Ils constituent également une source de nourriture, une voie de navigation et une base pour le commerce. En outre, ils abritent une biodiversité exceptionnelle et précieuse. En d'autres termes, c'est la vie.

Le changement climatique menace les océans et, par voie de conséquence, toute forme de vie qui en dépend. Si rien n'est fait, les êtres humains, notamment les millions de personnes vivant près des côtes, dont font partie les Djiboutiens, et les richesses naturelles de la faune et de la flore sous-marines et côtières risquent de perdre leurs moyens de subsistance.

Comme vous le savez, les océans se réchauffent en raison de ce changement climatique. En 2019, le Groupe d'experts intergouvernemental sur l'évolution du climat a observé dans son rapport spécial sur les océans et la cryosphère, qu'il est « quasiment certain » que les océans se sont réchauffés de manière continue depuis 1970. L'influence humaine a été, selon eux, le principal moteur de ce phénomène.

Les conséquences de ce changement climatique sur les océans sont multiples.

D'abord, le changement climatique entraîne une augmentation du niveau de la mer. La montée des eaux s'est accélérée au cours des dernières décennies et l'Organisation météorologique mondiale démontre que le niveau de la mer à l'échelle mondiale a augmenté en moyenne de 4,5 millimètres par an sur la période 2013-2021. Cette augmentation du niveau de la mer constitue un danger pour les États côtiers et les millions de personnes et d'espèces animales et végétales qui vivent dans ces régions, dès lors que la montée des eaux accroît la fréquence des inondations côtières, endommageant au passage les infrastructures et les écosystèmes, et affectant la disponibilité de l'eau potable.

Le statut même de certains États côtiers et leur souveraineté sont menacés, dans la mesure où leurs terres pourraient devenir totalement inhabitables si ce changement climatique se poursuivait.

Les ressortissants de ces États, tels que Djibouti, sont donc confrontés au risque de perdre leurs habitations et d'être déplacés. Cette situation est évidemment extrêmement préoccupante, d'autant plus qu'environ 680 millions de personnes vivent aujourd'hui en zone côtière de faible altitude.

Ensuite, le changement climatique affecte l'équilibre de l'acidité des océans et endommage de ce fait les organismes marins et les écosystèmes. D'après plusieurs études, les océans sont environ 30 % plus acides qu'à l'époque préindustrielle. Cette acidification de l'eau marine est particulièrement inquiétante. D'une part, en menaçant la vie marine, cette acidification menace celle des personnes qui en dépendent. En d'autres termes, le changement climatique n'a pas seulement un impact sur la biodiversité marine, mais constitue également une menace pour la sécurité alimentaire, le poisson contribuant à la consommation de protéines d'environ quatre milliards de personnes.

D'autre part, l'acidification réduit la capacité des océans à absorber les gaz à effet de serre et à limiter également les effets du changement climatique. Plus le climat change, moins l'océan est en mesure d'en atténuer les effets, ouvrant ainsi la voie à une accélération continue du changement climatique, comme l'indique le Groupe d'experts intergouvernemental sur l'évolution du climat.

Enfin, le changement climatique a entraîné une augmentation des vagues de chaleur marines, tant en termes de fréquence que d'intensité. Cette montée du niveau de la mer a eu un impact supplémentaire sur la vie marine, en provoquant un blanchiment généralisé des coraux et une dégradation des récifs. Le Programme des Nations Unies pour l'environnement estime qu'entre 25 et 50 % des récifs coralliens de la planète ont déjà été détruits et que tous les récifs coralliens risquent de mourir d'ici 2100 si les émissions de gaz à effet de serre ne sont pas réduites de manière drastique. Donc, pour l'humanité, il s'agira d'une perte irréversible.

Bien que l'existence du changement climatique et de ses effets délétères soit connue depuis au moins deux décennies, les mesures nécessaires n'ont pas été prises, de sorte que les dommages causés aux océans ont atteint un point critique. Il est urgent d'agir pour protéger et restaurer cette ressource essentielle, avant que l'irréparable ne se produise.

Avec cette procédure consultative, ce Tribunal a donc la possibilité de contribuer à la sauvegarde d'un avenir viable et durable. En tant que gardien principal de l'ordre judiciaire des océans, il est particulièrement bien placé pour contribuer à la protection et à la conservation des océans ; plus encore, il a le devoir de le faire, comme l'expliquera M. Yusuf dans quelques instants.

Permettez-moi maintenant d'aborder le deuxième point de cet exposé, qui est l'impact du changement climatique pour la République de Djibouti. Si le changement climatique est une menace pour tous, la République de Djibouti apparaît comme l'un des États les plus immédiatement exposés.

Située dans la Corne de l'Afrique, la République de Djibouti dispose de très peu de terres arables du fait de l'aridité de son territoire. À cause de sa situation géographique, Djibouti a toujours été exposé aux catastrophes naturelles telles que les sécheresses et les inondations. Avec le changement climatique, les catastrophes naturelles qui frappent Djibouti sont de plus en plus graves. Par exemple, en mai 2018, le cyclone tropical Sagar a causé des inondations sans précédent à Djibouti et engendré une destruction d'infrastructures et d'habitations d'une ampleur inédite. Près de 50 % de la ville de Djibouti a été touchée, alors que plus de la moitié de la population de notre pays y réside.

La forte exposition de Djibouti aux conséquences du changement climatique résulte également de sa situation d'État côtier. Sur le plan économique, la République de Djibouti repose en grande partie sur les activités de services dans le secteur du transport maritime. 76 % du PIB et 53 % de l'emploi total de la République de Djibouti sont directement liés aux activités économiques situées dans les zones côtières et autres zones de basse altitude. Sur le plan

démographique, enfin, environ 80 % de la population vit sur la côte et se concentre dans les principales zones résidentielles de Djibouti-ville, de Tadjourah et d'Obock.

Le changement climatique et l'augmentation du niveau de la mer auront des conséquences dévastatrices pour Djibouti si aucune mesure n'est prise. Selon le Fonds monétaire international, en l'absence de mesures appropriées la montée du niveau de la mer inondera les zones côtières et affectera jusqu'à la moitié de notre population et des activités économiques de notre pays et un tiers du stock de capital existant. Les implications macroéconomiques seront extrêmement graves : la République de Djibouti devra faire face à des coûts démesurés afin de s'adapter et de limiter les effets du changement climatique. Le coût global dépassera de loin les ressources actuellement disponibles pour notre pays.

Pour ces raisons, la République de Djibouti a été classée comme le septième État le plus vulnérable au changement climatique parmi les petits États en développement.

La situation est d'autant plus préoccupante que la République de Djibouti n'est qu'un exemple parmi tant d'autres États faisant face aux dangers immédiats du changement climatique. Sa situation n'est pas unique ; elle illustre l'urgence du défi que le changement climatique fait peser sur le monde. En dépit de cette situation, et de son statut économique en développement, Djibouti fait preuve d'une grande détermination et d'une forte résilience, en adoptant, sous la houlette du Président de la République de Djibouti, Son Excellence M. le Président de la République de Djibouti Ismaïl Omar Guelleh, la vision 2035, qui préconise notamment le développement des énergies renouvelables, et s'inscrivant ainsi dans l'effort mondial de lutte contre le changement climatique.

En particulier, Djibouti a établi une interconnexion électrique avec l'Éthiopie dans le cadre de la coopération régionale d'intégration, au lieu de construire une nouvelle centrale thermique génératrice d'émissions de gaz à effet de serre supplémentaires ; elle a entrepris de développer plusieurs projets d'énergie géothermique, notamment dans les zones de Fialé et de Gale Koma ; elle a également signé un protocole d'accord pour le développement d'une centrale solaire de 25 mégawatts à Grand Bara ; finalisé la construction d'un parc éolien de 60 mégawatts au Ghoubet, lequel a été inauguré le 10 septembre 2023 et est également opérationnel ; en mai 2022, l'Observatoire régional de recherche sur l'environnement et le climat (ORREC), qui a pour mission de surveiller les effets du changement climatique dans la région, a été également établi.

L'ensemble de ces projets permettra d'éviter que des quantités extrêmement importantes de dioxyde de carbone ne soient libérées dans l'atmosphère.

Dans le même esprit, comme l'a rappelé Son Excellence M. le Président de la République de Djibouti Ismaïl Omar Guelleh dans son allocution lors du dernier sommet Climat Afrique à Nairobi, la République de Djibouti a mis en place en 2023 une Stratégie nationale pour l'économie bleue, dont la vision nationale et les principes directeurs guideront l'action du gouvernement, de ses partenaires et de la société civile dans les domaines maritimes et côtiers. L'économie bleue vise à créer des partenariats permettant d'exploiter les océans pour un changement de paradigme en termes d'action vers le développement durable. Il en est de même pour la région de l'Autorité intergouvernementale pour le développement – l'IGAD – qui a élaboré une stratégie quinquennale 2021-2025 ainsi qu'un plan de mise en œuvre pour l'économie bleue, tous deux alignés sur la stratégie pour l'économie bleue en Afrique.

De la même manière, Djibouti a ratifié la Convention-cadre des Nations Unies sur les changements climatiques de 1995, le protocole de Kyoto de 2001, l'amendement de Doha au protocole de Kyoto de 2014, et l'Accord de Paris de 2015.

Conformément à ses obligations au titre de l'Accord de Paris, la République de Djibouti a soumis sa contribution déterminée au niveau national en 2016. Malgré sa contribution très marginale au réchauffement climatique, la République de Djibouti s'est volontairement engagée à réduire ses émissions de gaz à effet de serre de 20 % d'ici 2030, sans condition, et

de 40 % d'ici 2030, sous réserve d'une assistance technique et financière de la part de la communauté internationale.

Malgré ces efforts, il est évident que le développement des énergies renouvelables dans un pays comme Djibouti nécessite un transfert de technologie adéquat et un soutien financier substantiel de la part de la communauté internationale.

Il me semble donc impératif de rappeler aujourd'hui deux points essentiels.

D'une part, le changement climatique n'affecte pas tous les États de la même manière. À cet égard, l'Union africaine a rappelé à juste titre dans ses observations écrites que le continent africain est particulièrement vulnérable à toutes les conséquences négatives du changement climatique, et que les risques environnementaux auxquels font face les États africains s'aggraveront au cours des prochaines décennies. D'autre part, les États les plus touchés sont ceux qui contribuent le moins au changement climatique. Par exemple, le Groupe de la Banque mondiale confirme qu'en 2020, la République de Djibouti a émis 1 395 kilotonnes de gaz à effet de serre, ce qui représente 0,003 % des émissions mondiales de gaz à effet de serre.

La République de Djibouti présente ces observations, non pas pour dénoncer son impuissance face au changement climatique, mais pour montrer que les États peuvent et doivent s'engager davantage dans la lutte contre le changement climatique.

La République de Djibouti invite donc le Tribunal à prendre les mesures urgentes qui s'imposent pour lutter contre le changement climatique et aider les peuples de l'ensemble des États côtiers à survivre, et à prospérer.

Il y a lieu, maintenant, d'évoquer l'objet de la présente procédure.

L'objet de cette procédure n'est autre que de contribuer à la lutte contre le changement climatique en protégeant et en préservant la vie marine et, par voie de conséquence, la vie et les moyens de subsistance des personnes et de la biodiversité, en particulier dans les zones côtières.

L'avis consultatif que la Commission des États insulaires sollicite du Tribunal s'inscrit dans le cadre du rôle de gardien de celui-ci. Ce rôle est double.

Le Tribunal est, d'abord, le gardien de la Convention des Nations Unies sur le droit de la mer, et le Tribunal veille au respect de la Convention par les États qui y sont parties.

Ensuite, en s'assurant que tous les États respectent leurs obligations au titre de la Convention, le Tribunal veille dans le même temps à ce que d'autres États ne souffrent pas des conséquences de la violation de la Convention.

La République de Djibouti estime que cette procédure offre à ce Tribunal et, plus largement, à la communauté internationale, l'occasion de participer à la lutte contre la pollution marine et les conséquences néfastes du changement climatique, en rendant un avis qui influencera la conduite des États, en les encourageant à faire plus en matière de défense de l'environnement.

La République de Djibouti se présente devant vous comme fervent défenseur de l'ordre juridique international, des ressources qu'offre notre planète et des États côtiers, et c'est à ce titre qu'elle participe à la présente procédure.

Au travers de mon exposé, vous aurez pu constater qu'il est urgent de prendre les mesures qui s'imposent et que ce Tribunal, au travers des questions qui lui sont posées, a l'opportunité d'apporter une pierre importante à l'édifice de la lutte contre les effets néfastes du changement climatique.

Avec votre permission, j'aimerais maintenant laisser la parole à M. Guled Yusuf, conseil de la République de Djibouti, qui complètera mon propos en traitant des aspects purement juridiques de la présente procédure.

Je vous remercie de votre attention.

THE PRESIDENT: Thank you, Mr Yacin Houssein Doualé.

I now give the floor to Mr Guled Yusuf to make his statement. You have the floor, Sir.

EXPOSÉ DE M. YUSUF
DJIBOUTI

[TIDM/PV.23/A31/7/Rev.1, p. 29–36]

Monsieur le Président, Mesdames et Messieurs les Membres du Tribunal, j'ai l'honneur de prendre la parole après Son Excellence M. Yacin Houssein Doualé.

Je compléterai l'exposé de la République de Djibouti en traitant des trois points suivants.

Premièrement, je reviendrai sur la compétence du Tribunal pour connaître de la demande de la Commission et exposerai pourquoi celle-ci est établie en l'espèce et pourquoi le Tribunal doit l'exercer.

Deuxièmement, j'exposerai brièvement en quoi les questions soumises par la Commission sont bien recevables.

Et troisièmement, je ferai valoir la position de la République de Djibouti concernant les questions soumises au Tribunal.

Je commence donc par le premier point de mon propos : la compétence du Tribunal.

Le Tribunal est compétent pour connaître les questions de la Commission.

En effet, l'article 21 de la Convention dispose que « [l]e Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumises conformément à la Convention et toutes les fois que cela est expressément prévu dans tout autre accord conférant compétence au Tribunal ». Cette disposition confère au Tribunal sa compétence en matière d'avis consultatifs : l'article 21 fait référence à « tous les différends et toutes les demandes ». Cette disposition est univoque : le Tribunal est compétent pour connaître tant des affaires contentieuses que des affaires non contentieuses, ce qui inclut les demandes d'avis consultatifs. Le Tribunal s'est d'ailleurs déjà reconnu compétent pour connaître d'une telle demande par le passé, dans l'affaire concernant la *Demande d'avis consultatif soumise par la Commission sous-régionale des pêches*.

Le Tribunal est donc compétent pour répondre aux questions qui lui sont soumises par la Commission, ce qui est d'ailleurs – je le constate – l'opinion d'une grande partie des États intervenant dans la présente procédure.

Ce n'est pas tout : non seulement le Tribunal est compétent pour rendre l'avis consultatif sollicité mais, de plus, les conditions d'exercice de cette compétence sont réunies en l'espèce.

En vertu de l'article 138 du Règlement du Tribunal, ce dernier peut rendre un avis consultatif lorsque les trois conditions suivantes sont cumulativement remplies :

Il doit exister un accord international se rapportant aux objectifs de la Convention et prévoyant expressément la possibilité de saisir le Tribunal d'une demande d'avis consultatif ;

La demande doit être soumise par un organe autorisé à cet effet par un accord au sens de l'article 21 du Statut ou en vertu de celui ; et

L'avis sollicité doit porter sur une « question juridique ».

En l'espèce, ces trois conditions sont remplies.

En ce qui concerne la première condition, nous sommes bien en présence d'un accord international se rapportant aux objectifs de la Convention. Le préambule de l'Accord pour la création de la Commission des petits États insulaires sur le changement climatique et le droit international fait expressément référence à la Convention (aux paragraphes 5 et 10), en disposant que la Commission est établie « [c]ompte tenu des obligations des États en vertu [...] de la Convention des Nations unies sur le droit de la mer de 1982 et d'autres conventions et principes du droit international, applicables à la protection et à la préservation du système

climatique et du milieu marin ». Le reste des dispositions de l'Accord est également cohérent avec les objectifs de la Convention¹.

Par ailleurs, l'Accord envisage expressément la compétence de ce Tribunal en matière consultative. Son article 2, paragraphe 2, dispose que « la Commission est autorisée à demander des avis consultatifs au Tribunal international du droit de la mer (le TIDM) sur toute question juridique relevant de la Convention des Nations Unies sur le droit de la mer de 1982, conformément à l'article 21 du Statut du TIDM et à l'article 138 de son Règlement ».

La première condition d'exercice de la compétence consultative du Tribunal est donc remplie.

S'agissant des deux autres conditions, elles sont tout autant satisfaites.

La Commission est expressément autorisée à saisir ce Tribunal de demandes d'avis consultatifs aux termes de l'article 2 2) de l'Accord. Elle a, du reste, déposé sa demande auprès du Tribunal, lequel est compétent pour en connaître au titre de l'article 21 du Statut du Tribunal.

Par ailleurs, les questions de la Commission sont bien de nature juridique. Comme l'ont énoncé tant ce Tribunal que la Chambre pour le règlement des différends relatifs aux fonds marins dans deux affaires passées (*Avis consultatif de la CSRP* et *Avis consultatif « Responsabilités et obligations des États dans le cadre d'activités menées dans la Zone »*), une question est de nature « juridique » lorsqu'elle est « libellée en termes juridiques » et que le Tribunal peut y répondre en interprétant les dispositions de la Convention des Nations Unies sur le droit de la mer et en identifiant « [d']autres règles applicables de droit international »².

En l'espèce, les questions de la Commission portent expressément sur les « obligations » des États Parties à la Convention. Elles sont donc manifestement d'ordre juridique.

La dimension politique éventuelle d'une question n'en efface pas le caractère juridique. Pour reprendre les termes de la Cour internationale de Justice dans son avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*, l'aspect politique d'une question « ne suffit pas à la priver de son caractère de “question juridique” ».

En d'autres termes, les trois conditions d'exercice par le Tribunal de sa compétence consultative sont remplies en l'espèce. Rien n'empêche donc le Tribunal de répondre aux demandes de la Commission ; au contraire, la situation environnementale dégradée que nous connaissons invite le Tribunal à traiter des questions que la Commission lui soumet.

Cette position est d'ailleurs cohérente avec la déclaration de M. le Président Hoffman qui, lors de son allocution devant l'Assemblée générale des Nations Unies en décembre 2022, a confirmé que le « Tribunal [était] prêt à s'acquitter de tout mandat que les États pourraient souhaiter lui confier, [...] y compris au titre de sa fonction consultative ».

J'en viens maintenant au deuxième point de ma présentation : la recevabilité des questions soumises au Tribunal.

Je comprends qu'il est soutenu par certaines parties que le Tribunal ne devrait pas pouvoir procéder à l'examen de la demande de la Commission, quand bien même il serait

¹ Par exemple, l'article 2.1 dispose que « [l]es activités de la Commission consistent notamment à aider les petits États insulaires à promouvoir la définition, la mise en œuvre et le renforcement progressif des règles et principes du droit international relatifs aux changements climatiques et à y apporter leur contribution, en particulier s'agissant de la protection et la préservation du milieu marin, y compris au moyen de la jurisprudence des cours et tribunaux internationaux ». La Convention reconnaît, par ailleurs, au paragraphe 4, qu'il est souhaitable d'établir un ordre juridique pour les mers et les océans, qui favorisera la protection et la préservation du milieu marin. La partie XII de la Convention, qui est au centre de la présente procédure, énonce les obligations des États en matière de protection et de préservation du milieu marin. La Convention établit également ce Tribunal avec un rôle défini, pour interpréter ses obligations

² Dans le même sens, dans l'affaire du *Sahara occidental*, [la Cour] a suggéré que les questions sont « juridiques » par nature si elles sont « par leur nature même, susceptibles de recevoir une réponse fondée en droit » [*Sahara occidental, avis consultatif du 16 octobre 1975, C.I.J. Recueil 1975, par. 15*].

compétent, dès lors que : d'une part, le Règlement du Tribunal exige un « énoncé précis de la question », ce que n'offriraient pas les questions présentées par la Commission ; et d'autre part, la demande de la Commission mettrait en cause les droits et obligations d'États n'ayant pas consenti à la demande portée par la Commission devant le Tribunal.

Il me semble que ces deux inquiétudes – quoique légitimes dans certains contextes – n'ont pas lieu d'être dans le cas qui nous occupe.

D'abord, il me semble que les questions présentées au Tribunal sont suffisamment claires. Elles visent à déterminer les obligations spécifiques découlant de certaines obligations générales de la Convention. Les obligations générales en question sont précisément identifiées : il y en a deux qui, comme je l'expliquerai plus tard, reflètent les articles 192 et 194 de la Convention.

Je comprends au demeurant de la jurisprudence du Tribunal et de la Cour internationale de Justice que ces derniers se reconnaissent en général compétents pour « donner un avis consultatif sur toute question juridique, abstraite ou non ».

S'agissant par ailleurs de la mise en cause d'États tiers, je suis d'accord que, par principe, aucune procédure ne devrait porter sur les droits et obligations d'un État sans le consentement de ce dernier. Pour autant, je comprends de la jurisprudence du Tribunal et de la Cour internationale de Justice que ce principe ne s'applique pas aux procédures consultatives relatives à des points de droit généraux telles que la présente procédure.

Dans ces circonstances, il ne me semble y avoir aucun obstacle à la recevabilité de la demande de la Commission, laquelle peut donc bien être examinée par le Tribunal.

J'en viens maintenant à mon troisième et dernier point : les questions soumises au Tribunal.

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, comme vous le savez, la question de la Commission vous invite à définir « les obligations particulières des États Parties à la Convention des Nations Unies sur le droit de la mer, notamment en vertu de la partie XII » et, plus précisément, les obligations spécifiques qui découlent :

d'une part, de l'obligation de prévenir, réduire et maîtriser la pollution du milieu marin, laquelle figure à l'article 194 de la Convention ; et,

d'autre part, de l'obligation de protéger et de préserver le milieu marin, laquelle est comprise à l'article 192 de la Convention.

Je vais donc revenir successivement sur ces deux obligations et exposer les obligations qui découlent de chacune d'entre elles.

D'abord, donc : l'obligation de prévenir, réduire et maîtriser la pollution du milieu marin.

Aux termes de l'article 194 1) de la Convention, les États doivent prendre les mesures nécessaires pour « prévenir, réduire et maîtriser » la pollution du milieu marin. D'après la République de Djibouti, ces mesures, qui ne sont pas définies par la Convention, comprennent plusieurs obligations spécifiques.

En premier lieu, elles comprennent l'obligation de prévenir, réduire et maîtriser la pollution causée par l'émission de gaz à effet de serre d'origine anthropique, laquelle implique par ailleurs l'obligation de maintenir l'augmentation de la température moyenne mondiale bien en dessous de 2 °C au-dessus des niveaux préindustriels et d'œuvrer pour limiter l'augmentation de la température à 1,5 °C au-dessus des niveaux préindustriels.

En effet, la notion de « pollution du milieu marin » est définie suffisamment largement dans la Convention pour englober les émissions anthropiques de gaz à effet de serre, c'est-à-dire produites par les activités humaines. Aux termes de l'article 1, paragraphe 4, la « pollution » au sens de la Convention est causée par l'introduction par l'Homme dans le milieu marin d'une « substance » ou « énergie » ayant des « effets nuisibles », lesquels comprennent

toute atteinte aux ressources biologiques, à la vie, à la santé de l'homme et aux activités maritimes, et ce, « quelle qu'en soit la source ».

Il est clair – du moins pour Djibouti – que la notion de « pollution du milieu marin » comprend toute émission de gaz à effet de serre d'origine anthropique. Comme vous le savez, ces gaz constituent une forme de pollution, notamment du milieu marin, dans la mesure où ils perturbent le cycle naturel du carbone en piégeant une partie du rayonnement solaire renvoyé par la surface de la terre. L'obligation de prévenir, réduire et maîtriser la pollution du milieu marin inclut donc naturellement l'obligation spécifique de réduire et maîtriser la pollution causée par l'émission de gaz à effet de serre d'origine anthropique.

La République de Djibouti souhaite par ailleurs faire valoir que l'obligation de prévenir, réduire et maîtriser la pollution du milieu marin s'étend à toutes obligations spécifiques des États qui découlent de l'obligation de réduire et maîtriser la pollution causée par l'émission de gaz à effet de serre, dont l'obligation de maintenir l'augmentation de la température moyenne mondiale bien en dessous de 2 °C au-dessus des niveaux préindustriels et d'œuvrer pour limiter l'augmentation de la température à 1,5 °C au-dessus des niveaux préindustriels, qui figure dans la Convention-cadre des Nations Unies sur les changements climatiques et l'Accord de Paris.

La référence à ces textes est justifiée. En l'occurrence, la Convention-cadre et l'Accord de Paris, à la lumière desquels il est permis d'interpréter la Convention, prévoient que les États parties à ces textes se sont engagés à lutter contre les émissions de gaz à effet de serre en maintenant l'augmentation de la température.

En second lieu, la République de Djibouti estime que l'obligation de « prévenir, réduire et maîtriser » la pollution du milieu marin comprend également l'obligation pour les États de coopérer entre eux pour prévenir, réduire et maîtriser la pollution du milieu marin.

En effet, l'article 194 de la Convention dispose que « [l]es États prennent, séparément ou conjointement selon qu'il convient, toutes les mesures compatibles avec la Convention qui sont nécessaires pour prévenir, réduire et maîtriser la pollution du milieu marin ». En visant l'action « conjointe » des États, l'article 194 implique manifestement une obligation de coopération entre États, lorsque leur action commune est nécessaire pour prévenir, réduire et maîtriser la pollution du milieu marin.

Cette obligation de coopération a elle-même plusieurs ramifications, comme le Tribunal l'a expliqué dans l'affaire *Usine MOX*. Elle renferme notamment l'obligation pour les États Parties de « procéder [...] à des consultations » en vue d'échanger entre eux des informations, d'assurer une surveillance des risques ou des effets pour l'environnement des activités planifiées et d'élaborer ensemble les normes et règles internationales nécessaires à la lutte contre la pollution marine pouvant résulter de l'émission de gaz à effet de serre.

La coopération interétatique est d'autant plus importante que, comme l'a rappelé Son Excellence dans ses propos introductifs, la lutte contre le changement climatique ne s'arrête pas aux frontières d'un État et ne peut être menée seule. L'action conjointe des États est nécessaire. Pour reprendre les termes de la Cour internationale de Justice dans l'affaire *Usines de pâte à papier* : « c'est en coopérant que les États p[ourro]nt gérer en commun les risques de dommages à l'environnement ».

Je note enfin que cette interprétation est cohérente avec l'esprit de la Convention, dont plusieurs autres dispositions renferment cette exigence de coopération interétatique. Par exemple, l'article 197 de la Convention exige des États Parties de « coop[érer] au plan mondial et, le cas échéant, au plan régional ». De la même manière, l'article 201 impose aux États d'établir « directement ou par l'intermédiaire des organisations internationales compétentes » des « critères scientifiques appropriés pour la formulation et l'élaboration de règles et de normes, ainsi que de pratiques et procédures recommandées visant à prévenir, réduire et maîtriser la pollution du milieu marin ».

Pour conclure sur l'obligation de « prévenir, réduire et maîtriser » la pollution du milieu marin, Djibouti soutient que celle-ci comprend les obligations spécifiques suivantes :

d'une part, l'obligation de prévenir, réduire et maîtriser la pollution causée par l'émission de gaz à effet de serre d'origine anthropique, laquelle implique l'obligation de maintenir l'augmentation de la température moyenne mondiale bien en dessous de 2 °C au-dessus des niveaux préindustriels et d'œuvrer pour limiter l'augmentation de la température à 1,5 °C au-dessus des niveaux préindustriels ;

d'autre part, l'obligation pour les États de coopérer entre eux pour prévenir, réduire et maîtriser la pollution du milieu marin.

La République de Djibouti demande donc respectueusement au Tribunal de confirmer cette lecture de la Convention.

Je passe maintenant à la deuxième obligation visée par la demande de la Commission : l'obligation de protéger et préserver le milieu marin de l'article 192 de la Convention.

D'après la République de Djibouti, cette obligation comprend plus spécifiquement l'obligation pour les États de surveiller et contrôler les activités susceptibles de polluer le milieu marin.

L'article 192 de la Convention dispose, de manière générale, que « [l]es États ont l'obligation de protéger et de préserver le milieu marin ». Or, pour protéger et préserver ce milieu, il est nécessaire d'anticiper toutes les actions qui seraient susceptibles de l'impacter négativement ; comme l'a rappelé Son Excellence M. l'Ambassadeur tout à l'heure, les effets du changement climatique sont malheureusement souvent irréversibles. Si ces effets ne sont pas anticipés, ils ne peuvent être évités et leurs effets ne peuvent plus être corrigés. Le milieu marin ne peut donc pas être protégé et préservé efficacement sans que les États ne surveillent et contrôlent les activités susceptibles de l'affecter.

Cette lecture de l'obligation de protéger et préserver le milieu marin est cohérente avec la jurisprudence :

Dans l'affaire *Certaines activités*, la Cour internationale de Justice a retenu qu'« un Etat doit, avant d'entreprendre une activité pouvant avoir un impact préjudiciable sur l'environnement d'un autre Etat, vérifier s'il existe un risque de dommage transfrontière important, ce qui déclencherait l'obligation de réaliser une évaluation de l'impact sur l'environnement ».

Et, dans l'affaire *Usines de pâte à papier*, la Cour a également confirmé que l'obligation de réaliser une étude d'impact sur l'environnement existait au titre du droit international coutumier, ce qui a été ensuite confirmé par la Chambre pour le règlement des différends relatifs aux fonds marins dans son *Avis consultatif « Responsabilités et obligations des États dans le cadre d'activités menées dans la Zone »*.

La position de la République de Djibouti concernant l'obligation de protéger et préserver le milieu marin est en outre conforme à l'esprit de la Convention, dont d'autres dispositions impliquent pour les États de surveiller et de contrôler les activités susceptibles de polluer le milieu marin. Par exemple, l'article 206 exige des États qu'ils évaluent, dans la mesure du possible, les activités relevant de leur juridiction ou de leur contrôle lorsqu'il existe des raisons sérieuses de penser que ces activités peuvent polluer de manière le milieu marin. De même, l'article 204 2) exige des États parties qu'ils « surveillent » les effets des activités qu'ils autorisent.

En résumé, la République de Djibouti demande respectueusement au Tribunal de confirmer que l'obligation de protéger et préserver le milieu marin comprend l'obligation spécifique pour les États de surveiller et de contrôler les activités susceptibles de polluer ce milieu.

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, la Convention internationale sur le droit de la mer constitue un cadre juridique essentiel pour la protection du

milieu marin et la coopération entre les États face aux défis du changement climatique et de la pollution des océans.

D'après la République de Djibouti, ce texte, qui impose aux États des obligations générales de prévenir, réduire et maîtriser la pollution du milieu marin, et de protéger et préserver ce milieu, implique également les obligations spécifiques pour les États de : prévenir, réduire et maîtriser la pollution causée par l'émission de gaz à effet de serre d'origine anthropique ; coopérer entre eux pour prévenir, réduire et maîtriser la pollution du milieu marin ; et surveiller et contrôler les activités susceptibles de polluer ce milieu.

Ces obligations spécifiques ne sont pas une atteinte à la souveraineté des États sur leurs ressources naturelles, mais au contraire une expression de leur responsabilité de protéger et de préserver le patrimoine commun de l'humanité, qui est l'océan.

L'article 193 de la Convention abonde d'ailleurs en ce sens et dispose que « [l]es États ont le droit souverain d'exploiter leurs ressources naturelles selon leur politique en matière d'environnement et conformément à leur obligation de protéger et de préserver le milieu marin ». Du reste, les États restent libres de définir les moyens qu'ils mettent en œuvre en vue d'exécuter les obligations en question : renforcement de l'arsenal législatif et réglementaire, adoption de mesures administratives ou création de mécanismes de surveillance.

De même, la reconnaissance de ces obligations spécifiques s'inscrit dans le respect du principe des responsabilités communes mais différenciées, qui reconnaît les disparités entre les États en termes de capacités, de besoins, de contributions et de vulnérabilités face aux impacts du réchauffement global ; implique que les États développés prennent l'initiative de réduire leurs émissions de gaz à effet de serre, et fournissent un soutien financier et technique aux États en développement, tels que Djibouti ; et reconnaît que les États moins développés contribuent également à la lutte contre le changement climatique, mais à proportion de leurs moyens.

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, la Convention internationale sur le droit de la mer est un instrument vivant et évolutif, qui doit s'adapter aux réalités et aux besoins du XXI^e siècle. Elle offre un cadre juridique solide et universel, mais elle nécessite aussi une volonté sincère et une action collective de la part de tous les États Parties.

La protection de l'environnement marin et la lutte contre le changement climatique et la pollution des océans sont des impératifs éthiques, écologiques, économiques et sécuritaires qui concernent l'humanité tout entière. Son Excellence M. l'Ambassadeur a exposé les principaux enjeux et les perspectives d'avenir pour la mise en œuvre effective de la Convention face aux menaces croissantes que représentent le réchauffement climatique, l'acidification des océans et la perte de biodiversité.

C'est pourquoi j'invite le Tribunal à réaffirmer son engagement en faveur de la Convention internationale sur le droit de la mer, en soutenant sa mise en œuvre et son actualisation, de manière à participer activement à la coopération internationale pour la sauvegarde de notre bien commun, les océans.

Je vous remercie de votre attention.

THE PRESIDENT: Thank you, Mr Guled Yusuf.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3:00 p.m. The sitting is now closed.

(Lunch break)

PUBLIC SITTING HELD ON 14 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Guatemala

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Mr Alfredo Crosato Neumann, PhD, Geneva Graduate Institute; Member, Bar of Lima

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Mr P.K. Srivastava, Scientist 'G', Ministry of Earth Science

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Mr Shard, Scientist 'E', Ministry of Environment, Forest and Climate Change

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Ms Anastasia Francilia Adire, Legal Advisor, Permanent Mission of the Republic of Nauru to the United Nations, New York

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THE PRESIDENT: Good afternoon. The Tribunal will continue its hearing in a Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law. This afternoon we will hear statements from Guatemala, India and Nauru.

I now give the floor to the representative of Guatemala, Mr Ortega Lemus, to make his statement. You have the floor, Sir.

STATEMENT OF MR ORTEGA LEMUS

GUATEMALA

[ITLOS/PV.23/C31/8/Rev.1, p. 1–7]

Mr President, honourable members of the Tribunal, it is my distinct honour to stand before you today and speak within these advisory proceedings on behalf of my country, the Republic of Guatemala.

From the outset, I would like to state that the Republic of Guatemala holds the highest respect for the Commission of Small Island States on Climate Change and International Law and the visionary people involved in its establishment. Furthermore, Guatemala deeply appreciates the task that COSIS has taken upon itself through its many activities, including this request for the Tribunal to render an advisory opinion. I would also like to pay tribute to the youth-led organizations behind climate litigation for their courage and inspiring work, and, in particular, to the world's youth for climate justice.

The positions we will put forward with my colleague, whether aligned or slightly divergent from that of COSIS and of other speakers, seek to assist the Tribunal in the discharge of its judicial function and in no way diminishes the said admiration and appreciation, nor do they represent a denial by Guatemala of the climate emergency the world is experiencing.

Guatemala is aware of the world's dire situation regarding climate change and its deleterious effects on the environment, including the oceans. There is no question about how real climate change is and that the anthropogenic input on top of natural processes is the trigger of that crisis.

In that regard, we would like to express our gratitude for the work carried out by the International Law Association Committee on International Law and Sea Level Rise, as well as that of the International Law Commission of the United Nations.

For context, Mr President, members of the Tribunal, Guatemala holds the second largest rainforest in the Americas, only behind the Amazon. From that position, it facilitates carbon sinking in a magnitude significantly superior to its relative size and contribution to global emissions. Guatemala is also a coastal State on the Pacific Ocean and the Caribbean Sea; therefore, it is especially interested in the protection and preservation of the marine environment.

As a State Party to UNCLOS, the UNFCCC and the Paris Agreement, Guatemala is engaged in fulfilling its obligations under both regimes. It published its NDC, which was updated as recently as 2021, and has committed to significant reductions of greenhouse gases. Guatemala only contributes with 0.08 per cent of global emissions, despite being the largest economy and the most populous country in Central America. At the same time, it is among the most vulnerable countries to the adverse effects of climate change.

As a developing country, Guatemala continues to strive in raising the living standards of its citizens. We have a megadiverse biodiversity and abundant natural resources, both renewable and non-renewable, and we must consistently assert our right to development and to the principle of permanent sovereignty over natural resources.

In light of that, Mr President, Guatemala would like to begin by going beyond what has been said so far regarding UNCLOS, characterizing it as the constitution of the oceans, as Ambassador Tommy Koh of Singapore christened it. We want to touch upon its developmental character.

As we know, the trigger for the Third United Nations Conference on the Law of the Sea was the famous *Maltese Proposal* spearheaded by Arvid Pardo's seminal presentation at the United Nations General Assembly's First Committee on 1 November 1967.¹ He spoke of untold riches that lay on the ocean floor in the form of polymetallic nodules ready to be extracted; riches that, in his view, should not go to the hands of those few countries with the means to exploit them, exacerbating the appalling gap between developed and developing countries. Instead, Pardo proposed that these new, untapped resources should be utilized for the benefit of mankind as a whole. His proposal was firmly grounded within the New International Economic Order.

That objective found its way into the text of the Convention, and so development was permanently inscribed within its provisions. Right to development, development differences, different capabilities, different needs – all these appear from the very Preamble until its annexes.

For example, preambular paragraph 4 sets out the goal of achieving the establishment of a legal order for the seas and oceans, which facilitates international communication and promotes peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

Preambular paragraph 5, for its part, affirms that achieving that goal would contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole, but, in particular, the special interests and needs of developing countries, whether coastal or landlocked.

Citing the leading UNCLOS commentary, the Proelss Commentary, I quote:

Preamble 5 differentiates between the needs and interests of mankind as a whole and, “in particular, the special interests and needs of developing countries.” ... the distinction between developed and developing countries was considered to be essential for a new international economic order. Taking the different needs and interests in Preamble 5 “into account,” the States Parties realized these differences.²

To circumscribe ourselves to Part XII, which seems to be the epicentre of COSIS's requests, article 207, *Pollution from land-based sources*, stipulates that when States seek to establish international rules and standards, the economic capacity of developing States and their need for economic development must be taken into account. It must be noted that in the quoted article, it refers not only to the economic capacity of developing States, but also to their need for economic development.

This is but one example of how UNCLOS was built within the context of the New International Economic Order and, thus, with a focus on achieving development for those countries that need it the most.

Common but differentiated responsibilities, or CBDR, is the other side of that coin. Just now, I have mentioned capacity and need; but entitlements must bring about responsibilities, too. That is what COSIS has requested the Tribunal to decide on: obligations. Of course, given the cross-cutting developmental focus of UNCLOS, fulfilment of those obligations is not

¹ A/C.1/PV.1515 https://www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf .

² Proelss, *UNCLOS*, 1st edition 2017, p. 12.

always equal for all States Parties. Guatemala will bring to your attention how CBDR should shape any answer the Tribunal may decide to render.

But before that, Mr President, members of the Tribunal, and for the sake of completeness of this presentation, I will first address the matter of the Tribunal’s jurisdiction to entertain requests for advisory proceedings. I will add some comments on issues of admissibility and propriety in the specific case at hand.

Thereafter, Dr Alfredo Crosato will take the floor and set out Guatemala’s observations on COSIS’s request in more detail.

Mr President, members of the Tribunal, you have surely perused Guatemala’s written statement, which focuses mainly on procedural issues and addresses precisely the questions of jurisdiction, admissibility and propriety whilst reserving Guatemala’s right to expound on other matters at a later stage.

Guatemala expected a second round of written statements. It advocated for the usefulness of such a second round for the benefit of the participants, the Tribunal and the expediency of these oral hearings. A second round of written statements, or written comments, would have allowed the parties to refine their arguments and comment on written statements of other participants in the advisory proceeding, providing much more clarity to the Tribunal on the diverse positions at hand.

With regard to the Tribunal’s advisory jurisdiction, we would like to note the following:

A general statement of jurisdiction to disputes concerning the application or interpretation of the Convention is found in article 288, paragraphs 1 and 2 of UNCLOS, which indicates that the judicial bodies listed in article 287 shall have jurisdiction over any dispute concerning interpretation or application of the Convention, submitted in accordance with Part XV, and that those judicial bodies shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention, which is submitted to any of them in accordance with such agreement.

The jurisdiction of the Tribunal is also set out in article 21 of the Statute, which indicates that it comprises all disputes and all applications submitted to it in accordance with the Convention, and all matters expressly provided for in any other agreement which confers jurisdiction to it.

Concerning advisory proceedings specifically, the Rules of the Tribunal, in article 138, provide that the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention so provides, that such request must be transmitted to the Tribunal by whatever body is authorized or in accordance with the agreement, and, finally, that in advisory proceedings, the Tribunal must apply articles 130 to 137 of said rules *mutatis mutandis*.

The Tribunal indicated in its Case No. 21 that, based on article 318 of the Convention, annexes form an integral part of the Convention and, therefore, the Statute enjoys the same status as the Convention. Following the Tribunal’s reasoning, this results in a non-subordinated relationship between article 21 of the Statute and article 288 of the Convention, whereby article 21 of the Statute, and I quote, “stands on its own footing and should not be read as being subject to article 288 of the Convention”.³

The Tribunal admitted that there is no provision in the Convention or the Statute expressly granting it an advisory jurisdiction. However, it had indicated that article 21, and, more specifically, the phrase, and I quote, “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”, was critical to the issue.

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 20, para. 52.*

The Tribunal explained that the word “matters” necessarily has a distinct meaning from the words “disputes” and “applications” and that “[c]onsequently, it [‘matters’] must mean something more than only ‘disputes’. That something more must include advisory opinions if specifically provided for in ‘any other agreement which confers jurisdiction on the Tribunal’.”⁴

The Tribunal went on to state that the expression “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal” did not in itself establish the advisory jurisdiction; rather, it is the “other agreement” which could confer such jurisdiction:

When the “other agreement” confers advisory jurisdiction on the Tribunal, the Tribunal then is rendered competent to exercise such jurisdiction with regards to ‘all matters’ specifically provided for in the “other agreement”. Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.⁵

Regarding article 138 of the Rules of the Tribunal, the same Advisory Opinion indicates that it “does not establish the advisory jurisdiction of the Tribunal” as it only “furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction.”⁶

Having established the above, the Tribunal determined that said prerequisites for the exercise of its advisory jurisdiction are the following:

- (a) An international agreement related to the purposes of the Convention that specifically provides for the submission to the Tribunal of a request for an advisory opinion;
- (b) The request must be transmitted to the Tribunal by a body authorised by or in accordance with the said agreement; and
- (c) Such an opinion may be given on a “legal question”.⁷

The request for an advisory opinion submitted by COSIS appears, *prima facie*, to fulfil these prerequisites that article 138 of the Rules of the Tribunal and the *Sub-Regional Fisheries Commission Advisory Opinion* demand, namely:

- (a) The Agreement for the Establishment of the Commission appears, in principle, to be related to the purposes of the Convention, and its article 2(2) incorporates an express authorization for the Commission to request advisory opinions from the Tribunal “on any legal question within the scope of” UNCLOS;
- (b) The request for an advisory opinion was transmitted to the Tribunal by the Co-Chairs of the Commission in accordance with article 3 of the Agreement;
- (c) The two questions transmitted to the Tribunal are framed in legal terms and are of a legal nature.

As stated by a top-tier international practitioner, after the Tribunal’s decision in Case No. 21, it would require a brave advocate to try to persuade the Tribunal to change its mind with regards to finding it has an advisory jurisdiction.⁸ And Mr President, members of the Court, despite holding a relatively strong personal conviction against the existence of an advisory jurisdiction for the Tribunal in full, since I speak on behalf of Guatemala, and at least today, I will not be that advocate.

⁴ *Ibid.*, p. 21, para. 56. See also *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 106, para. 51.

⁵ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 22, para. 58.

⁶ *Ibid.*, p. 22, para. 59.

⁷ *Ibid.*, p. 22, para. 60.

⁸ Wood, p. 218 in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016*.

Therefore, following the Tribunal’s reasoning concerning its advisory jurisdiction as per Case No. 21, it would appear that the Tribunal has jurisdiction to entertain the present request for an advisory opinion.

Notwithstanding this concession, Guatemala contends that Case No. 31 is an opportunity for the Tribunal to clarify and cement its advisory jurisdiction. Our invitation is to consider filling any gap left by the decision of Case No. 21 and provide States with unequivocal guidance for advisory proceedings before this honourable Tribunal.

A further invitation in the same line concerns procedure. Guatemala believes the Tribunal should consider standardizing the steps to follow and clarifying the scope of the applicable rules without nullifying the flexibility necessary to adapt to each matter brought before it.

Specifically, the Tribunal may want to consider articles 138, paragraph 2, and 130, paragraph 1, with regards to the rules related to contentious cases which may be applied *mutatis mutandis* to advisory proceedings, with an emphasis on facilitating equality among the participants and ensuring fairness, in matters such as the ones regulated by articles 80, 78 and, in relation to those, article 72, of the Rules of the Tribunal, among others.

If the Tribunal indeed finds that it has jurisdiction to entertain this request for an advisory opinion, we contend that no reasons for the inadmissibility of the request will be found either, nor will the Tribunal find “compelling reasons” to exercise its discretion and not answer the request.

Guatemala reiterates the following contentions as words of caution for how the Tribunal ought to proceed.

Firstly, the Tribunal must bear in mind that the requesting entity is an organization comprised of a discreet number of States, and its membership is limited to the members of the Alliance of Small Island States. In other words, the Commission does not enjoy the universality or quasi-universality that the organs and organizations authorized to request advisory opinions usually enjoy, together with the ensuing procedure that brings about the request for an advisory opinion.

Some speakers that preceded us have cited ITLOS and the ICJ regarding the consent of third parties, not members of the requesting body, being irrelevant to the admissibility of a request for an advisory opinion. However, the question here is not of consent. It, rather, relates to the fact that within a treaty arrangement of 169 States Parties, two form an organization and empower it with a prerogative to request advisory opinions from the Tribunal in any legal question regarding the treaty that concerns all 167 and invite only another restrictive set of States to become parties to that organization with no avenues for other interested parties to that treaty to participate in the said organization nor in the formulation of the questions included in the request for an advisory opinion. To us, Mr President, honourable members of the Tribunal, that very much brings back echoes of paragraphs 6 to 11 of Judge Cot’s Declaration in Case No. 21.⁹

To be clear, Mr President, members of the Tribunal, by the above, Guatemala does not argue for the inadmissibility of COSIS’s request for an advisory opinion. In turn, what it is doing is urging the Tribunal to proceed cautiously.

Care must be shown in protecting the rights of third States who were not consulted when the questions were drafted or submitted to the Tribunal. This necessity is especially acute, as concerns have been expressed about how the advisory jurisdiction of the Tribunal has been triggered in this case – by virtue of an international agreement arguably concluded for the sole purpose of submitting the request for an advisory opinion at hand – and its potential effect in

⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 73-76, Declaration Judge Jean-Pierre Cot.*

encouraging further similar requests which may distort the object and purpose for which the Tribunal was established.

Secondly, Guatemala trusts the Tribunal will zealously protect its judicial function and use its inherent power to determine the actual scope and meaning of the questions object of the request. I quote, “if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, [the Tribunal] must ascertain what are the legal questions really in issue in questions formulated in a request.”¹⁰

Thirdly, if the Tribunal decides to furnish an opinion, the answers to the questions must remain within the remit of *lex lata* and avoid the temptations of diverting towards the realm of *lex ferenda*. It is Guatemala’s understanding that an advisory opinion ought to be a statement of the law and not a legislative exercise. So far, the majority of parties in these proceedings, including counsel for COSIS, have stated similar messages, and we are convinced that the Tribunal has taken note of it.

Separately, and this is a substantive reflection: I kindly request that the Tribunal take due consideration of the work that States have done with regards to greenhouse gas emissions from vessels through cooperation within the International Maritime Organization, in particular MARPOL Annex VI, and no less than two decades of efforts to achieve the decarbonization of the shipping industry. These efforts appear to align with the fulfilment of the obligations set out in UNCLOS articles 211 and 212 with regards to greenhouse gas emissions from ships.

For reasons I trust the Tribunal will fully understand, I am obliged to make a statement before closing my remarks. Mr President, in its written statement, Belize claims territory that – as it acknowledges in a footnote therein – is the subject of ongoing proceedings before the International Court of Justice. Guatemala reserves its position on what Belize writes or says in the present proceedings, which can have no effects on its claims before the International Court of Justice.

With that, I have come to the end of my speech, Mr President. I would like to thank you and all members of the Tribunal for your consideration to this presentation and, as well, for the support received by the Registrar and her staff.

I now yield the floor and respectfully ask you, Mr President, to call Dr Crosato to the lectern. Many thanks.

THE PRESIDENT: Thank you, Mr Ortega Lemus.

I now give the floor to Mr Crosato Neumann to make his statement. You have the floor, Sir.

¹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para. 35.

STATEMENT OF MR CROSATO NEUMANN
 GUATEMALA
 [ITLOS/PV.23/C31/8/Rev.1, p. 8–15]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you on behalf of the Republic of Guatemala. As Mr Ortega indicated, I shall present Guatemala’s observations on the request submitted by COSIS, so as to assist the Tribunal in these important proceedings.

The two questions before you are broad and raise complex legal issues. COSIS had the opportunity to address them for 12 hours this week. Since our time is more limited, this presentation will focus on key aspects of the request to which Guatemala attaches particular importance. Guatemala agrees with much of what has been said already, but silence on a particular point should not be necessarily understood as agreement.

My presentation will be divided in two parts. First, I will address the Tribunal’s jurisdiction *ratione materiae*, the applicable law, and the relationship between UNCLOS and other rules of international law, in particular the UN Framework Convention on Climate Change and the Paris Agreement.

Second, I will set out Guatemala’s observations on questions (a) and (b), with emphasis on two issues: the due diligence obligations in Part XII of the Convention and the principle of common but differentiated responsibilities, or “CBDR”.

Mr President, I turn first to the Tribunal’s jurisdiction and the law to be applied by the Tribunal, and the relationship between the Convention and other rules of international law. The broad formulation of the questions submitted by COSIS and the numerous references in these proceedings to rules of international law external to the Convention, call for a proper analysis of these matters.

It is also important to keep in mind that the International Court of Justice will render an advisory opinion on States’ obligations in relation to climate change. The questions put to the Court by the General Assembly are no doubt wider in scope. They include, but are not limited to, obligations arising under UNCLOS. As some participants have noted, your advisory opinion will be examined with great care by those involved in the ICJ proceedings.

It is therefore essential, in Guatemala’s view, for the Tribunal to articulate the relationship between the Convention and other instruments in a clear manner.

The Tribunal’s jurisdiction is governed by article 288 of the Convention, as well as by article 21 of the Statute. Under paragraph 1 of article 288, the jurisdiction covers “any dispute concerning the interpretation or application of [the] Convention”. Paragraph 2 provides that jurisdiction may extend to disputes concerning the interpretation and application of other agreements “related to the purposes of the Convention”, if those agreements confer such jurisdiction on the Tribunal.

The law to be applied by the Tribunal is, in turn, governed by article 293. It provides that the Tribunal must apply the “Convention and other rules of international law not incompatible with [it].”

Articles 237 and 311 are also relevant in this context, as they further specify the relationship between the Convention and other instruments. Paragraph 2 of article 311 provides that the Convention “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with [the] Convention and which do not affect the enjoyment by other States Parties of their rights or performance of their obligations”

Article 237 addresses more specifically States’ obligations under other treaties on the protection and preservation of the marine environment. It indicates that the provisions of Part XII “are without prejudice to ... agreements which may be concluded in furtherance of the general principles set forth” in the Convention. It also provides that such other agreements

“should be carried out in a manner consistent with the general principles and objectives” of the Convention.

The provisions I have just referred to call for some observations.

First, it is clear that the jurisdiction *ratione materiae* of the Tribunal is limited to UNCLOS. Your jurisdiction may extend to other agreements but only if they provide for this. This means that, in a contentious case, the Tribunal may, in principle, only find breaches of the Convention. Similarly, the focus of an advisory opinion should be, first and foremost, on the Convention.

The provisions of Part XII of UNCLOS, and in particular articles 192 and 194, are most relevant in these proceedings. Indeed, COSIS’s request largely mirrors the language of these two articles.

Second, the Tribunal may interpret Part XII of the Convention in light of other rules of international law. Or, as some participants have put it, such other rules may inform Part XII. These other rules may be found in other treaties, in customary international law or in general principles of law within the meaning of article 38(1)(c) of the ICJ Statute.

This is not only justified by article 293, but also by the principle of systemic integration reflected in article 31(3)(c) of the Vienna Convention of the Law of Treaties.

In addition, certain provisions of the Convention, including in Part XII, expressly refer to internationally recognized rules or standards for purposes of their interpretation and application. The precise legal effect of these so-called “rules of reference” must be determined on a case-by-case basis, considering the formulation of each relevant provision.¹

Guatemala considers that, in this case, the Framework Convention and the Paris Agreement are among the most relevant instruments for purposes of interpreting and applying Part XII of UNCLOS. The principle of prevention, which forms part of customary international law,² can also provide guidance. The same is true for the principle of common but differentiated responsibilities, to which Guatemala attaches great importance.

Applicable law should not be confused with jurisdiction. As the Tribunal stated in the *Norstar* case, “article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal”.³ So your jurisdiction must, in all cases, remain within the confines of the Convention. The Framework Convention and the Paris Agreement have their own dispute settlement clauses. They do not envisage the submission of disputes concerning their interpretation or application to this Tribunal.

Third, whatever the Tribunal may decide in relation to the precise content of the obligations under Part XII, these obligations ought to be, following articles 237 and 311, “without prejudice” to the specific obligations under the Framework Convention and the Paris Agreement. The Tribunal may rely on these treaties to interpret UNCLOS, but it should not be suggested that UNCLOS may somehow alter or modify them.

This does not mean that the Tribunal cannot interpret the Framework Convention or the Paris Agreement, as some participants appear to suggest.⁴ The Tribunal can obviously do this if it is to meaningfully determine the content of States’ obligations under UNCLOS where reference to these treaties is necessary.

¹ See, for example, articles 207(1), 211(2), and 212(1) of UNCLOS.

² *Trail Smelter Case (United States, Canada)*, Award, 11 March 1941, *UNRIAA*, p. 1965; 1972 Stockholm Declaration on the United Nations Conference on the Human Environment, Principle 21; 1992 Rio Declaration on Environment and Development, Principle 2; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, pp. 241-242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, *I.C.J. Reports 2010*, pp. 55-56, para. 101.

³ *M/V “Norstar” (Panama v. Italy), Judgment*, *ITLOS Reports 2018-2019*, p. 47, para. 136.

⁴ See, for example, written statement of Brazil, para. 20.

This also does not exclude that the Convention, through article 197, may impose on States an obligation to cooperate to conclude agreements that go beyond what is required by the Framework Convention and the Paris Agreement, if this is necessary for States to be able to meet their obligations under Part XII.

These, Mr President, are some of the basic principles which, in Guatemala's view, should guide the Tribunal in answering to COSIS's request. But before moving on to the specific questions, some additional remarks are in place.

You have heard a few times this week that, in rendering its advisory opinion, the Tribunal will apply the existing law; it will not create new law. Guatemala naturally agrees, as Mr Ortega just indicated, that the Tribunal's function is to state the law as it stands at present – the *lex lata*. The Tribunal is not a legislative body.

This is not to say, however, that the obligations under UNCLOS relating to climate change have always existed. Indeed, as some participants have indicated, including this morning, the Convention must be interpreted in an evolutive manner, in light of the best available science, so that it may cover the problems posed by climate change.⁵ Climate change is a “moving target”, as Professor Lowe put it on Tuesday.⁶

It would be useful, in Guatemala's view, if the Tribunal could indicate when the obligations under the Convention relating to climate change came into being, and how additional or different obligations may arise in the future. This will be relevant when assessing whether a State has complied with its obligations.

It is also clear, Mr President, that the precise normative relationship between UNCLOS, the Framework Convention and the Paris Agreement will be at the centre stage of the Tribunal's advisory opinion.

Is it a relationship of *lex specialis* or is it a relationship of complementarity and mutual supportiveness? Does UNCLOS impose obligations that go beyond the obligations under the climate change regime? Or is it sufficient for States to comply with their obligations under the Framework Convention and the Paris Agreement to fulfil their obligations under Part XII of UNCLOS?

Guatemala agrees with other participants that the relationship between these treaty regimes is one of complementarity. There is no discernible normative conflict between the relevant treaties, as Professor Mbengue explained in some detail on Monday.⁷ They all deal with anthropogenic greenhouse gas emissions and their adverse effects on the environment, including the marine environment.

But it is important for the Tribunal to clarify what this complementarity means exactly.

Its most basic consequence is that the Convention should be interpreted in the light of the Framework Convention and the Paris Agreement, as I noted some moments ago.

This may mean, for example, that a State Party is obliged to adopt all measures necessary to prevent, reduce and control marine pollution through greenhouse gas emissions by joining the efforts to hold the increase in the global average temperature to well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5°C.⁸

States' obligations under UNCLOS would also need to be interpreted in the light of the principle of common but differentiated responsibilities, which permeates the entire climate change regime. I will address this in more detail shortly.

⁵ See, for example, written statement of Chile, para. 66; written statement of COSIS, paras. 185, 410; written statement of the Democratic Republic of the Congo, para. 127; written statement of the European Union, para. 91; written statement of France, para. 74; written statement of Mozambique, para. 51; written statement of Portugal, para. 91.

⁶ ITLOS/PV.23/C31/4, 12 September 2023 (Lowe), p. 30.

⁷ ITLOS/PV.23/C31/2, 11 September 2023 (Mbengue), pp. 30-39.

⁸ Paris Agreement, article 2(1)(a).

Unlike some other participants, Guatemala takes no issue with the suggestion that UNCLOS may impose obligations that go beyond those contained in the Framework Convention and the Paris Agreement. This is a perfectly acceptable legal proposition insofar as States do not have conflicting obligations under these different treaties. Again, no discernible conflict has been shown to exist. There is no incompatibility.

If the policies and obligations agreed under the climate change regime to date do not suffice to meet UNCLOS obligations, then States may need to go beyond this regime or redouble their efforts within the existing regime. States may, for example, have to submit more ambitious, nationally determined contributions. Or they may have to cooperate for the conclusion of new agreements, as appropriate.

In the end, the text of Part XII of the Convention is sufficiently clear. It imposes certain obligations on States – obligations which may be relevant in the context of climate change. Just like the Tribunal cannot create new law, it cannot disregard existing law.

Mr President, members of the Tribunal, I now turn to the two questions submitted by COSIS. A lot has already been said about this, and there is much to agree with. We do not want to tire you with repetition, so let me start by stating, briefly, the points which Guatemala does not find controversial.

One: The definition of “pollution of the marine environment” in article 1(1)(4) of the Convention covers greenhouse gas emissions. The provision is evidently broad, and the scientific evidence is not contested; so, it can be safely said that the obligations under Part XII may apply to anthropogenic greenhouse gas emissions from all sources which result, or are likely to result, in deleterious effects on the marine environment.

Two: Article 194 of the Convention imposes an obligation on States to take, individually or jointly, all measures that are necessary to prevent, reduce and control anthropogenic greenhouse gas emissions. This article reflects the customary principle of prevention, recognized also in the Framework Convention on Climate Change.⁹

This is a due diligence obligation. An obligation of conduct, not of result. The obligation has to be implemented by using “the best practicable means” at the disposal of each State, and taking into account its own “capabilities”.

Three: Article 192 of the Convention imposes a broad, independent due diligence obligation. It can be interpreted as an obligation to protect and preserve the marine environment from the adverse impacts of climate change. It may require, for example, that States adopt measures for mitigation and adaptation, and to increase the resilience of the marine environment.

Four: Part XII of UNCLOS encompasses obligations of cooperation that are instrumental to fulfil the obligations under articles 192 and 194. Cooperation through international organizations, as required by article 197, is particularly important in the context of climate change, given that a proper response to climate change may be achieved not only through the action of individual States, but also by means of a coordinated global approach.

Mr President, members of the Tribunal, these are, from Guatemala’s point of view, uncontroversial points that can be reasonably and confidently upheld by the Tribunal.

However, some important nuances need to be made. On Tuesday, counsel for COSIS presented an extensive catalogue of obligations which, in their submissions, are contained in UNCLOS. We cannot comment on each of them in the limited time we have. But we are obliged to stress that the burdens and costs that those obligations would entail cannot fall upon all States equally.

This is for two main reasons.

⁹ UNFCCC, eighth preambular paragraph.

First, the core duties under Part XII of UNCLOS are due diligence obligations, which must consider the particular position of each State.

Second, the principle of common but differentiated responsibilities also has an important role to play. This principle, as you know well, is one of the cornerstones of the climate change regime. And if this regime is complementary to UNCLOS, the principle must be taken into account when interpreting and applying UNCLOS obligations relating to climate change.

COSIS acknowledges the principle of common but differentiated responsibilities, but the principle does not seem to play a significant role in its pleadings. On Monday, Professor Akhavan said that “given how close we are to the brink of disaster, that differential burden cannot become a pretext for developing States not to do their fair share to protect the marine environment”.¹⁰ For Guatemala, as surely for many other developing States with marginal historical emissions, it is crucial to determine what that “fair share” is.

Part XII of UNCLOS itself makes clear that States’ obligations do not apply across the board in a sweeping manner; rather, the special situation of developing States is expressly recognized.

Article 194, paragraph 1, as I mentioned, provides that the obligation to take measures to prevent, reduce and control pollution must be applied using the best practicable means at the disposal of each State, and taking into account its own capabilities. What those capabilities are, and which practicable means are available, certainly requires a case-by-case analysis.

In addition, article 202 addresses scientific and technical assistance to developing States. It includes, for example, an obligation to provide appropriate assistance for the minimization of the effects of major incidents which may cause serious pollution and also to provide assistance concerning the preparation of environmental assessments.

Importantly, article 203 provides that developing States shall, for the purpose of prevention, reduction and control of pollution, be granted preference by international organizations in the allocation of funds and technical assistance.

Mr President, members of the Tribunal, you have heard this week that the obligations under articles 192 and 194 are due diligence obligations. Guatemala agrees. This means that they require certain conduct, but not a particular result. As the Seabed Disputes Chamber indicated in the *Area* Advisory Opinion, this is not an obligation “to achieve, in each and every case” a result, but “to deploy adequate means, to exercise best possible efforts, to do the utmost”, to obtain the desired result.¹¹

Due diligence also requires States to exercise a level of vigilance in enforcement and administrative control, so as to ensure that the measures they adopt to meet their obligations are effectively implemented. This has been reaffirmed by the International Court of Justice, this Tribunal and the tribunal in the *South China Sea* arbitration.¹²

So, it is clear, Mr President, that when it comes to due diligence obligations, the same conduct cannot be expected from all States. The situation of each State must be assessed separately. The same standard cannot be applied to all.

This may have an impact on the degree of detail in which you may respond to the questions submitted by COSIS. As the Seabed Disputes Chamber indicated, “the content of

¹⁰ ITLOS/PV.23/C31/1/Corr.1, 11 September 2023 (Akhavan), p. 25.

¹¹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 41, para. 110.

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, pp. 79-80; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 41, para. 131, para. 197; *South China Sea Arbitration*, Award, 12 July 2016, RIAA, p. 521, para. 944.

‘due diligence’ obligations may not easily be described in precise terms”.¹³ Due diligence, in the words of the Chamber, is “a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge”, or in light of the “risks involved”.¹⁴

Mr President, Guatemala’s last observation concerns the principle of common but differentiated responsibilities. As I mentioned earlier, Guatemala attaches particular importance to this fundamental principle of climate change law. It should, without doubt, inform States’ obligations under UNCLOS relating to climate change.

CBDR is well established in the climate change regime. It was first laid down in the 1992 Rio Declaration. Principle 7 established that “[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.”

Article 3(1) of the Framework Convention expressly refers to this principle. It reads, and I quote:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combatting climate change and the adverse effects thereof.

Article 2(2) of the Paris Agreement also indicates that the agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and capabilities, in the light of different national circumstances.”

UNCLOS does not expressly mention CBDR. But, as we have explained, UNCLOS and the climate change regime are mutually supportive; so, the principle must be considered in the context of the Convention and its obligations in relation to climate change.

Various provisions of the Convention, as I mentioned some moments ago, take into account States’ respective capabilities and their need for assistance to developing countries. The preamble of the Convention also refers to the “realization of a just and equitable international economic order”, which takes into account, in particular, “the special interests and needs of developing countries”. Article 193 of the Convention, while recalling States’ duty to protect and preserve the marine environment, also reaffirms their “sovereign right to exploit their natural resources.”

Mr President, members of the Tribunal, the rationale and immense importance of the principle of common but differentiated responsibilities is self-evident. Not all States have contributed equally to the degradation of the climate system. Most greenhouse gas emissions have originated from developed, industrialized countries. The historical contributions of most developing countries, in contrast, are much less significant, often even marginal, as is the case of Guatemala. At the same time, and paradoxically, it is developing countries which are most vulnerable to the adverse effects of climate change, as the representative for Djibouti recalled this morning. Such a situation is not just. It is not equitable.

This is not to say that developing countries must not join the efforts to combat climate change. Clearly, they must. They have obligations under international law as well. But the fulfilment of those obligations has to take place against the background of their different situations, their right to develop and their need to eradicate poverty. Developing countries cannot be expected to assume the costs of the degradation of the climate system caused by

¹³ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117,

¹⁴ *Ibid.*

others. CBDR, as an equitable principle, serves to strike a proper balance between these different legitimate interests.

In short, Mr President, to the extent that UNCLOS contains obligations in relation to climate change, these obligations must be interpreted in the light of the principle of common but differentiated responsibilities enshrined in the Framework Convention and the Paris Agreement.

The due diligence obligations under Part XII should therefore take into account not only the best available means and the capabilities of individual States. The historical contributions of a State to climate degradation are also a factor to be considered, and Guatemala would urge the Tribunal, respectfully, to recognize the role of equity in this context.

Mr President, members of the Tribunal, this concludes my presentation, and the observations of the Republic of Guatemala. I thank you for your kind attention.

THE PRESIDENT: Thank you, Mr Crosato Neumann.

I now give the floor to the representative of India, Mr Rangreji. You have the floor, Sir.

STATEMENT OF MR RANGREJI

INDIA

[ITLOS/PV.23/C31/8/Rev.1, p. 16–21]

Mr President, distinguished members of the Tribunal, it is a singular honour for me to appear before this Tribunal representing the Republic of India. India, with its longstanding association and support to the UN Convention on the Law of the Sea, attaches significant importance to the work of the Tribunal.

With your permission, Mr President, I present the comments of India on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

I would like to present my comments in three parts: (i) jurisdictional issues; (ii) protection and preservation of the marine environment under Part XII of the Convention; and, lastly, (iii) the existing climate change treaty regime.

Mr President, advisory opinions of courts and tribunals afford an excellent opportunity to expound the application and interpretation of international law. However, in the present request, India believes that the Tribunal should consider: (a) whether it has jurisdiction to render an advisory opinion; and (b) if so, whether the Tribunal should exercise its discretion in giving the opinion.

Mr President, the Tribunal derives its jurisdictional authority primarily from article 288 of the Convention and article 21 of the Statute of the Tribunal. Both of these provisions provide for contentious jurisdiction of the Tribunal in clear and express terms. However, neither the Convention nor the Statute provides for advisory jurisdiction of the full Tribunal. In fact, article 159, paragraph 10, and article 191 of the Convention provide that the Tribunal, through its Seabed Disputes Chamber, can give advisory opinions to organs of the International Seabed Authority. If it was the intention of the drafters that a similar competence had to be conferred on the full Tribunal, it would have been expressly provided for in the Convention.

Furthermore, Mr President, while article 138 of the Rules of the Tribunal provides competence to render an advisory opinion, it is humbly submitted that the Rules by themselves cannot confer a new jurisdiction when the Convention or the Statute are silent on the matter. Be that as it may, India believes that the Tribunal should carefully examine the legal basis and its scope, and exercise discretion while rendering an advisory opinion in the current request.

In addition, India also believes that the two questions put to the Tribunal are rather general in nature. The questions seek opinion of the Tribunal on specific obligations of Parties to UNCLOS, relating to newer aspects of the protection of marine environment; namely, ocean warming, sea-level rise, ocean acidification and anthropogenic greenhouse gas emissions into the atmosphere and climate change impacts, all of which have not been provided in Part XII of the Convention.

Mr President, the Tribunal should desist from rendering an opinion, wherein there exists a standalone treaty regime addressing issues of climate change. On the issue of admissibility, we believe there are sufficient “compelling reasons”, as was held by the ICJ in the *Wall* and the *Western Sahara* cases, to exercise discretion and decline the request.

Mr President, the second part of India’s comments deal with the protection and preservation of the marine environment. The United Nations Convention on the Law of the Sea establishes the most comprehensive legal order for the protection of the marine environment. In fact, UNCLOS touches upon all activities related to oceans and the sea. In article 192, States have an obligation to protect and preserve the marine environment. This obligation, as has been widely recognized, involves an obligation of conduct as opposed to an obligation of result. It is a due diligence/best endeavour obligation cast upon all States to protect and preserve the marine environment.

Complementing this obligation, article 194 provides measures to prevent, reduce and control pollution of the marine environment. These measures are to be taken based on the “best practicable means at their disposal and also in accordance with their capabilities”. Thus, there is no fixed standard to controlling pollution. The abilities of developing countries to protect and preserve the marine environment is without detriment to their sovereign right to exploit their natural resources, as has been provided in article 193 of the Convention.

Mr President, distinguished members of the Tribunal, from the above, it is evident that the Convention places due diligence obligations upon States depending upon their technical capabilities and economic development. Here, UNCLOS provides some rudimentary insights of the principle for common but differentiated responsibilities and respective capabilities, also called in an abbreviated form as CBDR-RC, the fundamental, guiding principle of the climate change treaty regime.

Mr President, it may thus be stated that there is nothing in the Convention to prevent, reduce and control pollution that results, or is likely to result, from climate change, nor does the Convention provide a mandate to protect and preserve the marine environment in relation to climate change impacts. The UN Framework Convention on Climate Change, along with its Kyoto Protocol and Paris Agreement, constitutes the existing multilateral legal framework regulating climate change. In accordance with the principle of *generalia specialibus non derogant*, when two legal systems are being considered to address a particular situation, the special law, the *lex specialis*, takes precedence over general law.

Mr President, coming to article 1(1)(4) of the Convention, it provides a definition of “pollution of the marine environment”. Herein, the words “... *introduction by man directly or indirectly, of substances or energy into the marine environment ... which results or is likely to result in such deleterious effects*” should not involve an interpretation to include greenhouse gas emissions within the ambit of “pollution of the marine environment”. It is humbly submitted that this would be tantamount to the Tribunal exercising legislative functions, which is the exclusive domain of States Parties. In this process, there is a likelihood that the obligations of States Parties under Part XII will be expanded through interpretation for which the States Parties have never consented to.

Mr President, a similar case has also been filed before the International Court of Justice on 29 March 2023. The cases before the ICJ and ITLOS are on the same subject, albeit with slightly different questions. The substantive briefs by interested parties in both of these proceedings are likely to be similar. A deliberate pursuit of parallel proceedings may lead to the inevitable risk of conflicting opinions and findings.

Mr President and members of the Tribunal, coming to the third part of India’s statement, the UNFCCC treaty regime has put in place a sound legal framework for combating climate change. Climate change and its impacts are the foremost challenges facing our world today. It is a complex global phenomenon which calls for global responsibility and cooperation, bearing in mind the historic responsibility of developed countries to take the lead. The UNFCCC preamble very presciently notes, and I quote, “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs”.

Reports of the Intergovernmental Panel on Climate Change (IPCC) have noted that, from the net historical, cumulative anthropogenic emissions between 1850 and 2019, North America and Europe alone have contributed almost 10 times more to the global cumulative emissions in this period, though they have only about 13 per cent of the global population. On the other hand, the contribution of the entire South Asian region is only about 4 per cent, even though the region includes almost 24 per cent of the global population.

The UNFCCC and its Paris Agreement provides an elaborate framework, wherein the Conference of Parties and subsidiary bodies meet annually and adopt decisions on obligations of States with respect to climate change in a manner that maintains the delicate balance of different workstreams taken together, which include mitigation, adaptation, means of implementation and support in terms of climate finance, development and transfer of technology and capacity-building.

Mr President, as regards impact of climate change on oceans, recent COPs (that is, the Conference of Parties) have held discussions, and the outcome documents include references to oceans and the marine environment. COP25 mandated the first Ocean and Climate Change Dialogue, and COP26 mandated to hold the Dialogue annually. Now, there exists a workstream to strengthen ocean-based actions and to deep-dive into specific solutions that strategically support and strengthen ocean-climate action at the national and international levels under the UNFCCC. As the Ocean Dialogue, the IPCC and other workstreams of the UNFCCC and subsidiary bodies are undertaking a comprehensive review of the Dialogue between climate change and oceans, it would be premature for the Tribunal to provide an advisory opinion on the effects of greenhouse gases on oceans.

Mr President, it may also be improper to conflate environmental pollution and climate change. While there is an overlap in some areas, the science is clear on the differences between the two, both at the temporal and the spatial levels. The best available science has not qualified “heat” and “carbon dioxide” as environment pollutants. The current understanding of science indicates that absorption of carbon dioxide by oceans, and the resultant heat, are an integral part of the carbon cycle, which is important for sustenance of life on Earth. The IPCC reports, being referred to by participants in the current proceedings, have presented their findings on the impacts of climate change, including those on coastal and marine ecosystems. However, it is important to understand that none of the IPCC reports have termed the impacts of carbon dioxide on various sectors as “environmental pollution”.

The Tribunal may also wish to note that some Parties to the UNFCCC have raised pertinent concerns that the IPCC assessment and scenarios, which are based on current literature, contravene the principles of the UNFCCC regime, particularly equity and CBDR-RC. They also completely ignore the fact that developed countries have not met their obligations and the world has already warmed by 1.1°C from the pre-industrial levels.

India also believes that addressing the question of impact of climate change on the marine environment, and whether effects of climate change are responsible for the deleterious effects, goes beyond the legal interpretation of the provisions of the Convention. Hence, the Tribunal, in the exercise of its judicial function, may consider refraining from rendering an opinion on the direct linkages between climate change and pollution of the marine environment.

Mr President, members of the Tribunal, another important aspect the Tribunal should factor is that obligations of States with respect to the impacts of climate change are not uniform; rather, States have common but differentiated responsibilities. The UNFCCC states that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.

Mr President, developing countries have been demanding an equitable carbon space in climate change negotiations and also in various other fora. In the pursuit of global net zero emissions by 2050, a current discourse under the UNFCCC, the principles of equity, climate justice and CBDR-RC of the UNFCCC, require that developing countries have a fair share of the global carbon budget. Article 4 of the Paris Agreement emphasizes the importance of achieving, and I quote, “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century on the basis of equity and in the

context of sustainable development and efforts to eradicate poverty”. The legitimate needs of developing countries for equitable carbon and development space are also provided for in the UNFCCC and the Paris Agreement.

Mr President, the ability of the developing countries to meet their obligations related to climate change are interlinked with, and are dependent upon, the developed countries fulfilling their obligations on providing the means of implementation such as climate finance, transfer of technology and capacity-building. The same is unambiguously spelled out in several articles of the UNFCCC and Paris Agreement.

Article 4, paragraph 7, of the UNFCCC states:

The extent to which developing countries will effectively implement their commitments under the Convention will depend on the effective implementation by developed countries’ Parties of their commitments under the Convention related to provide financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

Mr President, for combating climate change, the foremost need of the hour is global cooperation to enable States to meet their climate goals. In fact, “international cooperation” is a fundamental principle and obligation for the effective implementation of the climate regime and also protection of the marine environment as provided under Part XII of the Convention. For developing countries and lesser developed countries facing huge challenges of eradication of poverty and livelihood issues, climate goals can only be realized with support in terms of finance, low-carbon technology transfer and capacity-building. These obligations, it is submitted, must be undertaken in good faith based on the principle of *pacta sunt servanda*.

Developing countries cannot deploy low-carbon climate technologies at a significant scale unless a facilitative global technology transfer regime is in place, and the incremental and associated costs of these technologies are met by grant-based and concessional public-sources finance provided by developed countries. A collaborative international mechanism needs to ensure that barriers, such as intellectual property rights, are lowered by developed countries to facilitate technology transfer from developed countries to developing countries.

Mr President, India has contributed little to global warming historically, and its current per capita greenhouse gas emissions is about a third of the global average. Despite this, India has actively contributed to the global fight against climate change and its impacts. India has consistently made ambitious commitments under the UNFCCC framework and has led by example with ambitious domestic actions to meet its climate change commitments.

India has also pioneered, along with partner countries, some important global initiatives that includes:

- the International Solar Alliance (ISA), a global alliance of around 100 member countries working together for increased deployment of solar energy technologies;

- the Coalition for Disaster Resilient Infrastructure (also called the CDRI) a coalition of international agencies and over 30 member countries working towards promoting the resilience of infrastructure systems to climate and disaster risks in support of sustainable development;

- the Infrastructure for Resilient Island States (called as IRIS), an initiative dedicated to promote resilient, sustainable and inclusive infrastructure development in Small Island Developing States; and

- the Leadership Group on Industry Transition (called LeadIT), to foster collaboration among decision-makers in public and private sectors towards accelerating industry transition.

To bring individual behavioral changes at the forefront of the global climate action narrative, India has also launched the Mission LiFE, the Lifestyle for Environment, which envisions replacing the prevalent use-and-dispose economy with a circular economy.

Through various initiatives, Mr President, India has been assisting developing countries in scaling up the use of renewable energy, capacity-building and disaster risk reduction, including through sharing of climate information and early warning.

Mr President, even as the request by COSIS affords an opportunity to the Tribunal to examine the obligations of States to protect and preserve the marine environment, bringing in newer aspects such as ocean warming, sea-level rise, ocean acidification caused by greenhouse gases and climate change impacts, it is submitted that the Tribunal should be mindful that we live in an unequal world where capacities of developing countries to combat climate change are limited. Developed countries must lead by example and fulfil their obligations under the UNFCCC and the Paris Agreement in good faith.

Finally, Mr President, distinguished members of the Tribunal, even as the Tribunal has been called upon to clarify and provide guidance with respect to obligations of States to protect and preserve the marine environment, India submits that the Tribunal should be mindful that the UNFCCC and the Paris Agreement is the specialized multilateral legal regime to address climate change and its impacts, including on the marine environment.

Mr President, India concludes its oral statement, and I thank you for your attention.

THE PRESIDENT: Thank you, Mr Rangreji.

We have now reached 4:15. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 4:45.

(Short break)

THE PRESIDENT: I now give the floor to the representative of Nauru, Ms Adire, to make her statement.

You have the floor, please.

STATEMENT OF MS ADIRE

NAURU

[ITLOS/PV.23/C31/8/Rev.1, p. 21–24]

Mr President, distinguished members of the Tribunal, my name is Anastasia Francilia Adire, and, together with the other members of our delegation, Professor Eirik Bjorge and Ms Joan Yang, I represent the Republic of Nauru in these proceedings. I will begin by opening Nauru's oral statement. I will then be followed by Professor Bjorge, who will deal with certain technical interpretations of international law. After his presentation, I will conclude Nauru's oral submissions.

It is an honour for me to appear in this capacity before the Tribunal. The highest respect in which Nauru holds this Tribunal needs no further demonstration. It is attested by Nauru's participation in the important advisory proceedings in *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*.¹

Nauru welcomes the initiative and leadership of the Commission of Small Island States on Climate Change and International Law in these vital proceedings. It also welcomes the Commission's positive engagement with Small Island Developing States and the solidarity it has shown to member and non-member alike.

Nauru is a Small Island Developing State, one of the world's smallest. One reason the present proceeding is so important to Nauru is that the population of our island is a people of the ocean. Our lives are inextricably linked to the Pacific Ocean specifically.

For all of these reasons, Nauru is among the States most affected by climate change. We face significant challenges caused by climate change and its deleterious effects.² The effects of climate change have the potential to impact our coastal infrastructure, food and water security, public health and safety, and local ecosystems.³ But climate change is *already* undermining and threatening Nauru's ability to cater to the basic needs of its population.⁴

We are dependent for our subsistence and economic development on marine resources and the marine environment. Against this background, the deleterious effects of climate change constitute nothing short of an existential threat to the population of Nauru. Climate change is having catastrophic repercussions for the livelihood and economic well-being of the population of our island. Professor Bjorge will, in due course, address these questions as a matter of the law of the sea.

As you will know, Mr President, members of the Tribunal, there is a reason why the initiative to these proceedings originated with Small Island Developing States. It has long since been evident to Small Island Developing States not only that the global climate must be protected, but also that there is a pivotal connection between climate change and the oceans.

It was through the foresight of one such State, Malta, that in 1988 the General Assembly adopted its resolution 43/53, entitled *Protection of climate change for present and future generations of mankind*. This resolution, the first of its kind to address climate change, identified that "certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences".⁵ But it also pointed to the connection between "the continued growth in atmospheric

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

² Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

³ Republic of Nauru, Updated Nationally Determined Contribution, 14 October 2021, p. 12.

⁴ Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

⁵ GA res. 43/53 (1988), preambular para. 3

concentration of ‘greenhouse’ gases” and the effects of climate change on the *sea*, such as “rise in sea levels”.⁶ Already in the 1980s was there a clearly crystallized understanding that there was a vital nexus between climate change and the marine environment. You will hear from Professor Bjorge as to the interpretation of UNCLOS in this regard.

In 2009, in resolution 63/281, entitled *Climate change and its possible security implications*, the General Assembly expressed its deep concern “that the adverse impacts of climate change, including sea-level rise, could have possible security implications”.⁷

One of the problems Nauru faces today in relation to sea-level rise, and climate change more generally, was well described in 2016 by the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and I quote that passage:

Climate change threatens the very existence of some small island States. Global warming expands ocean waters and melts land-based ice, causing sea levels to rise. ... If the residents of small island States are forced to evacuate and find other homes, the effects on their human rights, including their rights to self-determination ... will be devastating.⁸

“Devastating” is, sadly, right. Whilst of course Nauru will continue to exist, and its baselines and existing maritime entitlements will remain unaltered,⁹ climate change poses an *existential threat* to Nauru’s population and to its vital needs. It represents serious security risks to the livelihoods and to the subsistence of our island population. These are among the types of concerns to which the General Assembly gave expression in its resolution 63/281.

I shall briefly touch on two of the ways in which the effects of climate change pose such a threat to Nauru, namely, sea-level rise and ocean acidification.

First, climate change poses an existential threat to the population of Nauru, Mr President, members of the Tribunal, in connection with rising sea levels. The devastating effects of sea-level rise caused by the emission of anthropogenic greenhouse gases could almost make one doubt the wisdom of the Preacher in Ecclesiastes who said that “all the rivers run into the sea; yet the sea is not full”.¹⁰

Nauru has lived for some time with the realities of rising seas caused by climate change. One of the initiatives that have already become necessary in Nauru is the Higher Ground Initiative. This entails the planned and managed migration of Nauru’s population to the higher elevations of the island. It is an attempt, in a situation that is growing perfectly desperate, to adapt to the threat of sea-level rise, all the while seeking, so far as possible, to safeguard national security and the vital needs of our population as the earth is disappearing under our feet.¹¹

It seems, Mr President, members of the Tribunal, that even the words of the Preacher to the effect that “the earth abideth for ever”¹² are cast into doubt in the face of the destruction of human-made climate change.

⁶ *Ibidem*.

⁷ GA res. A/RES/63/281 (2009), preambular para. 9.

⁸ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 1 February 2016, A/HRC/31/52, para. 29; see also written statement of Chile, para. 70.

⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen, I.C.J. Reports 1993*, p. 74, para. 80; ILC, Sea-level rise in relation to international law, A/CN.4/761, 13 February 2023, para. 154

¹⁰ Ecclesiastes 1:7.

¹¹ See also the written statement of the Pacific Community (SPC), paras. 31–32.

¹² Ecclesiastes 1:4.

Secondly, ocean acidification is of great concern to Nauru. Reefs and marine life are being eroded owing to ocean acidification. Fisheries are vital for the subsistence of our population and a major source of funds, one of the very few, for our national treasury. As is well documented, ocean warming has decreased sustainable yields of certain fish populations.¹³ This effect is especially pronounced in the Pacific Ocean.¹⁴ The Intergovernmental Panel on Climate Change estimates that a 20 per cent decline in fish production from coral reefs by 2050 could threaten nutritional security.¹⁵

I come to the end of my presentation. The International Court of Justice observed in its Advisory Opinion in *Nuclear Weapons* that “the environment is under daily threat”.¹⁶ It also recognized that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings”.¹⁷

The same can be said for the *marine* environment. And the marine environment is not an abstraction either. For Nauru, the marine environment represents – it *is* – our living space, our quality of life, and the very health of the human beings that make up our island population. And the marine environment, in all of these aspects, is indeed under daily threat.

Mwa tubwa kor, Mr President, members of the Tribunal, I thank you. And I now ask that you give the floor to Professor Bjorge.

THE PRESIDENT: Thank you, Ms Adire.

I now give the floor to Mr Bjorge to make his statement. You have the floor, Sir.

¹³ IPCC, Working Group II, Chapter 3: Oceans and Coastal Ecosystems and Their Services, Sixth Assessment Report: Impacts, Adaptation and Vulnerability (2022), Technical Summary, p. 48 (TS.B 3.1).

¹⁴ See the written statement of the Pacific Community (SPC), paras. 14–15.

¹⁵ IPCC, Working Group II, Chapter 15: Small Islands, p. 2065.

¹⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241-42, para. 29.

¹⁷ *Ibidem*.

STATEMENT OF MR BJORGE

NAURU

[ITLOS/PV.23/C31/8/Rev.1, p. 24–30]

Mr President, distinguished members of the Tribunal, it is a privilege for me to appear before you and an honour to have been entrusted with the presentation of this part of Nauru's oral statement.

I shall deal with three points: first, that the law of the sea has, given the nature of the sea as a hub for interconnection and communication, always been at the cutting edge of international law; secondly, I shall come to one aspect of the interpretation of UNCLOS; and, thirdly and finally, I shall turn to an aspect of the applicable law in these proceedings.

I come then to my first point. The sea, as prominent authors have put it, is “a meeting place and a site of encounter, where the third parties affected by the acts or events to which the sea is subject are particularly numerous”.¹

The insight that what one State does in the context of ocean space affects a large number of third parties was not lost on the Third United Nations Conference on the Law of the Sea. The whole Convention, the whole of UNCLOS, is instinct with this fundamental understanding. As has already been pointed out in these proceedings, it is reflected already in the Preamble of UNCLOS, which provides that “the problems of ocean space are closely [inter]related”; they must therefore, it continues, “be considered as a whole”.² And, as the International Court of Justice recently observed, this understanding was so evident to the negotiators that the very “method of negotiation at the Conference was designed against this background”, the outcome of which, of course, was a Convention that was, said the Court, “a comprehensive and integrated text”.³

Now, that is a sensible reflection of the fact that in scarcely *any* other field of activity will the acts of one State, or a group of States, affect other States more than in the context of ocean space. The manner in which a State draws baselines around its coasts, or otherwise purports to delimit its maritime zones, inevitably affects other States, as well as their populations and potentially the latter's means of subsistence. Similarly, when a State fails to comply with its obligations to protect and preserve the marine environment, that, too, affects other States, their populations and the latter's means of subsistence.

It is implicit in the logic of the maxim *ubi societas, ibi jus* that a high level of interrelated and interdependent activity is likely to lead to an ample and sophisticated production of legal norms. No doubt this is why, whether one looks to questions such as the identification of customary international law,⁴ the development of concepts such as notification, acquiescence or protest,⁵ or general principles of law such as “elementary considerations of humanity”,⁶ the

¹ L. Lucchini & M. Vœckel, *Droit de la mer Tome I* (Pedone 1990) 53 (“[l]a mer étant un espace de liaison, de communication, les tiers concernés par les actes ou les faits dont elle est l'objet sont particulièrement nombreux”).

² Third preambular recital, UNCLOS.

³ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

⁴ *SS Lotus*, Judgment of 7 September 1927, P.C.I.J., Series A, No. 10, 28; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 44, para. 77; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 77.

⁵ *Fisheries (United Kingdom v. Norway)*, I.C.J. Reports 1951, p. 116; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 246; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, I.C.J. Reports 1992, p. 351; L. Lucchini & M. Vœckel, *Droit de la mer Tome I* (Pedone 1990) 53–54.

⁶ *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, p. 22; *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 10, 62; *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; *“Enrica Lexie” (Italy v. India)*, Provisional Measures, Order of 24 August

law of the sea has, since at least the beginning of the 20th century, been perhaps *the* most productive branch of international law as regards confronting new phenomena and new situations as they arise in international life.

For is it not true to say that the law of the sea has tended to be the area of law where international law developments have crystallized the first? And where they have been judicially identified the first? Of course it is.

As one authority, Professor Laurent Lucchini, put it, the law of the sea has always served as a research laboratory for international law more generally.⁷ And, in the work of this sophisticated “*laboratoire d’essai*”, the trials have, over time, come to focus on what already the Permanent Court of International Justice, in a case between France and Turkey, referred to as principles of law established by independent States in order to regulate their “co-existence” or, said the Court, “with a view to the achievement of common aims”.⁸ It is exactly such principles of law, and the fundamental values of co-existence and the achievement of common aims, that the Tribunal is invited to advise on in the present proceedings.

Given the background I have just set out, it is hardly surprising that the questions with which we are concerned in these proceedings should come to a head in the present context of the law of the sea, and it is this vital and time-honoured tradition of the law of the sea, one that charts a course for international law more generally, that you, the Tribunal, are being invited to uphold and to continue in these proceedings.

I come then, Mr President, members of the Tribunal, to my second point. The contention has been made in certain quarters, indeed here before the Tribunal today, that during the time of the Third Conference on the Law of the Sea, climate change was not part of the law of the sea agenda, and that the Convention therefore does not apply to the issue of climate change. It has also been contended that the question of the impact of climate change on the marine environment goes beyond the legal interpretation of the provisions of UNCLOS.

But, even leaving aside the question of the historical record, such an approach to the interpretation of the Convention, and its articles 1(1)(4), 192 and 194, would be quite defective and unsatisfactory as a matter of the law of treaties. In the words of the Permanent Court of International Justice in its Advisory Opinion in *Employment of Women during the Night*, where the Court was interpreting the 1919 Washington Convention on Night Work for Women:⁹

“The mere fact [said the Court] that at the time when the Convention ... was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.”¹⁰

In the context of the law of the sea, this statement of principle was relied on by the arbitral tribunal in the dispute concerning *Filleting within the Gulf of St Lawrence* between Canada and France.¹¹ And it applies in the present proceedings too. The general terms used in

2015, *ITLOS Reports 2015*, p. 204, para. 133; R.E. Fife, “The Duty to Render Assistance at Sea: Some Reflections after *Tampa*” in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

⁷ L. Lucchini, “L’État insulaire” (2000) 285 *Hague Recueil* p. 261 (“*Le droit de la mer — branche à part entière du droit international — sert fréquemment de laboratoire d’essai à celui-ci.*”).

⁸ *SS Lotus, Judgment of 7 September 1927, P.C.I.J., Series A, No. 10*, 18 (French original: “*la co-existence de ces communautés indépendantes*” and “*en vue de la poursuite de buts communs*”); A Pellet, “*Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale*” in *Mélanges en l’honneur de Jean-Pierre Puissochet: l’État souverain dans le monde d’aujourd’hui* (Pedone 2008) 215, 222.

⁹ 28 November 1919, ILO Convention No 4.

¹⁰ *Employment of Women during the Night, 1932, P.C.I.J., Series A/B, No. 50*, 377; see H. Lauterpacht, “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26 *B.Y.I.L.* 48, 79.

¹¹ *Filleting within the Gulf of St Lawrence (Canada/France, 1986), I.L.R., Vol. 82*, p. 653, para. 60.

the provisions of UNCLOS are, in their ordinary meaning, wide enough to cover climate change. They do so whether climate change was specifically thought of during the Conference or not.¹²

But there is, Mr President, a more fundamental point. As the Supreme Court of the United Kingdom put it in the case of *Basfar v Wong*, the process of treaty interpretation, and of identifying the common intention of the parties, “is not one of trying,” said the Court, “to divine what was inside the minds of the parties’ representatives when they negotiated or signed the treaty, let alone what would then have been inside their minds if they would have been confronted with a question they did not in fact consider. It is simply a process of applying articles 31 to 33”¹³ of the Vienna Convention on the Law of Treaties,¹⁴ observed the Court, and no doubt that is what the Tribunal will do.

In doing so, the Tribunal could do worse than to follow the approach set out by the eminent arbitral tribunal in the *Rhine Chlorides (Netherlands/France)* case.¹⁵ The arbitral tribunal in that proceeding summarized the process in articles 31 to 33 of the Vienna Convention in the following way:

The ordinary meaning of the terms must be determined in good faith, in the light of the context, as well as the object and purpose of the treaty. The importance of one element in relation to the others of course will depend on the case ... international law “does not sanction any absolute and rigid method of interpretation”.¹⁶

I come, then, to my third point: the question of applicable law. Article 293 provides that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”

The applicable law in the present proceeding, therefore, is constituted by the Convention itself and other relevant rules of international law not incompatible with it. In this connection, Nauru agrees with what the Tribunal observed in *Norstar*: article 293 may not be used to extend the *primary jurisdiction* of the Tribunal.¹⁷

But, as the arbitral tribunal observed in *Chagos*, the Tribunal’s jurisdiction also extends to making “such ... ancillary determinations of law as are necessary” in order for the Tribunal to discharge its task of interpreting and applying the Convention.¹⁸ The logic of this general principle has been applied by international courts and tribunals in *advisory* proceedings just as naturally as it has been applied in *contentious* proceedings,¹⁹ and we set this out in our written

¹² A. Boyle, “Protecting the Marine Environment from Climate Change: the LOSC Part XII Regime” in E. Johansen, S. Veierund Busch, and I.U. Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (CUP 2020) 81, 83–84.

¹³ *Basfar v Wong* [2022] UKSC 20; [2022] 3 W.L.R. 208, 229, para. 69 (Lord Briggs and Lord Leggatt).

¹⁴ 22 May 1969, 1155 U.N.T.S. 331.

¹⁵ *Rhine Chlorides (Netherlands/France, 2004)*, I.L.R., Vol. 144, p. 294, paras. 62–65 (Professor Skubiszewski, President; Judges Kooijmans and Guillaume, Members).

¹⁶ *Ibid.* p. 294, para. 64, citing *Lake Lanoux (France v. Spain, 1957)*, I.L.R., Vol. 24, p. 121.

¹⁷ *M/V “Norstar” (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 47, para. 136.

¹⁸ *Chagos Islands (Mauritius v. United Kingdom, 2015)*, I.L.R., Vol. 162, p. 157, para. 220. See also *Enrica Lexie (Italy v. India)*, Award, 21 May 2020, para. 809; *Arctic Sunrise (The Netherlands v. Russian Federation, 2015)*, I.L.R., Vol. 171, p. 82, para. 197; *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, P.C.I.J., 1925, Ser. A, No. 6, p. 18; *Guano (Chili/France, 1901)*, U.N.R.I.A.A., Vol. 15, p. 100; *Kunkel (1925)*, Rec. T.A.M., Vol. 6, p. 977; *Gold Looted by Germany from Rome 1943 (1953)*, U.N.R.I.A.A., Vol. 12, p. 35.

¹⁹ *Effect of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, p. 56; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 45, para. 89 *et seq*; *Prosecutor v. Tadic (1995)*, I.L.R., Vol. 105, p. 462, para. 21.

statement. This means that, contrary to what some seem to have argued,²⁰ if it is incidental to a point in regard to which the Tribunal has primary jurisdiction, then the Tribunal can identify obligations, as well as rights, for that matter, that are not contained in UNCLOS.

Furthermore, whilst a regularly seised tribunal must not exceed the jurisdiction conferred upon it, it must, as the International Court observed in *Libya/Malta*, “also exercise that jurisdiction to its full extent”.²¹ Nauru is confident that the Tribunal *will* exercise its powers to the full extent of its jurisdiction: no more, but certainly no less.

As regards a provision such as article 192, the dynamic I have just set out is further reinforced by the fact that, by its nature, the provision *itself* is “informed by the other provisions of Part XII and other applicable rules of international law”.²² That is in keeping with the proposition that the problems of ocean space are closely interrelated and must be considered as a whole.²³ It is, furthermore, in keeping with the “comprehensive and integrated”²⁴ nature of the Convention.

This means, on the one hand, that, as we have heard, “[t]he corpus of international law relating to the environment ... informs the content of the general obligation in article 192”.²⁵ And several participants, especially Chile and Portugal, have skilfully addressed this point earlier today. You have Nauru’s written submissions in this regard.²⁶ We affirm and rely on them.

On the other hand, it also means that the corpus of international law *relating to human rights* similarly informs the content of the general obligation in article 192. In previous cases where it has been interpreting and applying UNCLOS, this Tribunal has had occasion to stress that “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law”.²⁷

Of course, like any international court or tribunal exercising its advisory jurisdiction, the Tribunal must make a determination in these proceedings as to what is, as the International Court observed in *Nuclear Weapons*, “the most directly relevant applicable law governing the question” of which it has been seised.²⁸

And it is Nauru’s contention that, in this regard, the most directly relevant consideration of humanity is to be found in the principle codified in Common Article 1, paragraph 2, of the International Covenant on Civil and Political Rights²⁹ and the International Covenant on Economic, Social and Cultural Rights.³⁰ That is the principle – part and parcel of the

²⁰ Written statement of France, para. 18.

²¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Reports 1985, p. 23, para. 19; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J. Reports 2012, p. 671, para. 136; Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 12.

²² *South China Sea (Philippines v. People’s Republic of China, 2015)*, I.L.R., Vol. 170, p. 564, para. 941; also *Arctic Sunrise (The Netherlands v. Russian Federation)*, I.L.R., Vol. 171, p. 79–80, para. 191.

²³ Third preambular recital, UNCLOS.

²⁴ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

²⁵ *South China Sea (Philippines v. People’s Republic of China, 2015)*, I.L.R., Vol. 170, p. 564, para. 941.

²⁶ written statement of Nauru, paras. 45–50 and 53–56.

²⁷ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 62, para. 155 (citing *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, p. 22); *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 101, para. 359; “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 204, para. 133.

²⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 243, para. 34.

²⁹ 16 December 1966, 999 U.N.T.S. 171.

³⁰ 16 December 1966, 993 U.N.T.S. 3.

fundamental human right of self-determination of peoples³¹ – that: “In no case may a people be deprived of its own means of subsistence.”

Other participants have touched on this, too, and have argued that the Tribunal must take into account human rights obligations such as the right to self-determination.³² Indeed, we heard about this this morning from Chile. Nauru is of the same view.

The principle codified in Common Article 1, paragraph 2, is part of what the tribunal in *Arctic Sunrise* called the “general international law in relation to human rights”.³³ It is, furthermore, as is evident from the human rights covenants themselves and their structure, a collective right.³⁴ As such, it is not subject to the jurisdictional limitations as to extraterritoriality to which the other rights – the individual rights – of the human rights covenants are subject.³⁵

One reason why this principle is part of the most directly relevant applicable law in these proceedings is that it has, in various guises and various formulations, found particular application within the field of the law of the sea.³⁶ Now, that is not surprising, you may well think, given the interrelated nature of the problems of ocean space.

In the *Fisheries* case of 1951, the International Court stressed the importance of what it called “the vital needs of the population” of Norway.³⁷ That meant, in the context of that case, that the interpretation and application of the general rule as regards the drawing of baselines was influenced by the fundamental value of protecting the vital needs of the coastal population, or as Norway had put it some decades previously, the “vital necessity for Norway to be able herself to preserve and maintain for the inhabitants of her long and tempest-worn coasts, whose existence almost everywhere depends on fishery, the exclusive right to certain important fisheries ... with which [the population’s] means of subsistence are so indissolubly connected”.³⁸ Who says there is no poetry and no beauty in international law?

And in a similar vein, the Chamber of the International Court in *Gulf of Maine* emphasized the need to avoid, in the interpretation and application of the general rules of maritime boundary delimitation, a situation that would have, as the Chamber put it, “catastrophic repercussions for the livelihood and economic well-being of the population”.³⁹ A similar focus on safeguarding what has been called the “means of subsistence” of coastal populations as well as “vital economic resources in their seas” can be found in treaty practice, as we have set out, alongside other examples, in our written statement.⁴⁰

³¹ See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 131, para. 144.

³² Written statement of Chile, para. 70; written statement of the Federated States of Micronesia, para. 64.

³³ *Arctic Sunrise (The Netherlands v. Russian Federation, 2015)*, I.L.R., Vol. 171, p. 82, para. 197.

³⁴ See “Part I”, ICCPR, which consists only of Art. 1.

³⁵ See “Part II”, ICCPR, to which the jurisdictional provision in Art. 2(1) applies.

³⁶ Written statement of Nauru, para. 64.

³⁷ *Fisheries*, I.C.J. Reports 1951, p. 142; also *Eritrea/Yemen (Phase Two: Maritime Delimitation, 2001)*, I.L.R., Vol. 119, p. 436, para. 50; C. de Visscher, *Problèmes de confins en droit international public* (Pedone 1969) 111; A. Pellet and B. Samson, “La délimitation des espaces marins” in M. Forteau and J.M. Thouvenin (eds.) *Traité de droit international de la mer* (Pedone 2017) 565, 589.

³⁸ League of Nations Committee of Experts for the Progressive Codification of International Law, C.196.M.70, Annex II, “Norway. Questionnaire No. 2 — Territorial Waters, Letter of 3 March 1927”, 173; G. Gidel, *Le droit international public de la mer Tome III* (Châteauroux 1934) 645 & 648.

³⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 342, para. 237. See also S. Rosenne, “The Perplexities of Modern International Law: General Course of Public International Law” (2001) 291 *Hague Recueil* p. 328; *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon, 1992)*, I.L.R., Vol. 95, p. 675, para. 84; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment*, I.C.J. Reports 1993, p. 71–72, para. 75; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, I.C.J. Reports 2009, p. 126, para. 198; *Territorial and Maritime Dispute (Nicaragua v. Columbia)*, I.C.J. Reports 2012, p. 706, para. 223.

⁴⁰ Consideration 3, Declaration on the Maritime Zone, 18 August 1952, 1006 U.N.T.S. 326; written statement of Nauru, paras. 53–64.

REQUEST FOR ADVISORY OPINION – COSIS

Mr President, members of the Tribunal, that brings to an end my part of Nauru's oral statement. I thank you and ask that you invite Ms Adire to take the floor to conclude Nauru's oral statement.

MR PRESIDENT: Thank you, Mr Bjorge.

I now give the floor once more to Ms Adire to continue her statement. You have the floor, Madam.

STATEMENT OF MS ADIRE (continued)

NAURU

[ITLOS/PV.23/C31/8/Rev.1, p. 31–33]

Mr President, members of the Tribunal, it falls on me to conclude Nauru's oral statement. The upshot of Nauru's oral submissions can be formulated as two successive propositions.

First, as Professor Bjorge has set out, the ocean connects. It is a site of encounter between States and their activities. But, as Small Island Developing States know all too well, if the ocean space is a hub of interconnection and communication, that also means that what one State does will almost inevitably affect other States, their populations and potentially the means of subsistence of those populations.

As you have heard, the intense interaction between States on the sea has always meant that the law of the sea has been at the cutting edge of international law. Learned professors have described the law of the sea as a "research laboratory" for international law.¹ Those of us who, far from the groves of academe, are law of the sea practitioners in Chancelleries and Diplomatic Missions around the world, however, know the law of the sea to be an eminently *practical* field of law. The law of the sea and its crowning achievement, UNCLOS, "the Constitution of the Oceans",² have always, in our experience, operated to meet the practical challenges facing States in the real world of ocean space.

If the pressing question of climate change is now before your Tribunal before it has come to a tribunal of general jurisdiction, that is hardly a surprise. It is testament to the confidence that States have in the law of the sea as an instrument to meet the challenges of the day in a practical and equitable manner. It speaks, furthermore, to the very great faith that States, such as Nauru, have in your jurisdiction; faith that you will – as the law of the sea has always been known to – chart a course for general international law.

Secondly, as you have heard, climate change is already undermining and threatening Nauru's ability to deliver basic services to its population and to cater to the vital needs of the population.³ The population of Nauru depends, for its subsistence and economic developments, on the marine environment. Climate change and the concomitants of rising sea levels pose an existential threat to the population of a Small Island Developing State such as Nauru.

You have heard that the lower reaches of the island are becoming submerged and uninhabitable. The population, like its government, is having to retreat to higher ground, running to the hills, as if expelled or transferred from their own lands by an external invading enemy. Awn Al-Khasawneh, later Judge and Vice-President of the International Court, made the point in 1997 that, and I quote: "In the context of population transfers, paragraph 2 of Common Article 1 is of particular relevance: '... In no case may a people be deprived of its own means of subsistence'."⁴

That a population should be deprived of "their land, natural wealth and resources"⁵ is among the ills that the principle in Common Article 1, paragraph 2, prohibits. The principle is, as the Human Rights Committee has observed, a right that "entails corresponding duties for all

¹ L. Lucchini, "L'État insulaire" (2000) 285 Hague *Recueil* p. 261.

² T. Koh, "A Constitution for the Oceans" in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea* (United Nations 1983) xxxiii, xxxvii; H. Corell, "Speech Delivered at the Inaugural Session of the Tribunal of the Law of the Sea" (1996–97) 1 *ITLOS Yearbook* 1, 13.

³ Statement delivered by H.E. Margo Deiye, Permanent Representative of the Republic of Nauru to the United Nations, 2nd United Nations Ocean Conference, Plenary Session, 30 June 2022.

⁴ "Human Rights and Population Transfer: Final Report of the Special Rapporteur, Mr. Al-Khasawneh", E/CN.4/Sub.2/1997/23, 27 June 1997, para. 50.

⁵ *Ibidem*.

States and the international community”.⁶ In Nauru’s contention, that right and the corresponding duties are nothing if not relevant in the present advisory proceedings.

You have heard, therefore, that the principle that “in no case may a people be deprived of its own means of subsistence” is part of the most directly applicable law governing the question of which you are seised. It necessarily informs the interpretation of general provisions of Part XII, such as article 192.

For you to give effect to this principle of human rights law will be no more than a continuation of your general jurisprudence to the effect that “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law”.⁷ You are not being asked to apply all manner of human rights principles in answering the questions asked of you, but instead a fundamental principle that is expressive of general international law, which has found useful and repeated application specifically in the law of the sea.⁸

As the *Fisheries* case between the United Kingdom and Norway showed in 1951,⁹ the respondent State was right in that case to put its faith and confidence in international law and the belief that the law of the sea would not countenance an outcome that deprived its coastal population of its very means of subsistence.

Similarly, it is Nauru’s contention that the law of the sea, and today UNCLOS, its foremost instrument, cannot possibly countenance an outcome whereby activities by polluting States, which have the effect of threatening the very means of subsistence of the populations of Small Island Developing States, can possibly be legal under the provisions of Part XII of UNCLOS.

This means that the specific obligations of States Parties to UNCLOS to protect and preserve the marine environments in relation to climate change, including ocean warming and sea-level rise, necessarily operate to avoid depriving any people of its own means of subsistence.

That is in keeping with the emphasis laid, in the Preamble of UNCLOS itself, on the maintenance of “justice and progress for all peoples of the world”¹⁰ and, even more to the point, the contribution the States Parties to UNCLOS sought to make “to the realization of a just and equitable economic order, which takes into account the interests and needs of mankind as a whole and, in particular, the special interests of developing countries”.¹¹

Mr President, distinguished Members of the tribunal, that brings to an end Nauru’s oral statement in these proceedings. I thank you.

THE PRESIDENT: Thank you, Ms Adire.

This brings to an end this afternoon’s sitting. The Tribunal will sit again tomorrow morning at 10:00 a.m. when it will hear statements made on behalf of Indonesia, Latvia, Mauritius and the Federated States of Micronesia. This sitting is now closed.

(The sitting closed.)

⁶ CCPR General Comment No 12: Article 1 (Right to Self-determination), 13 March 1984, para. 5.

⁷ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *ITLOS Reports 1999*, p. 62, para. 155 (citing *Corfu Channel (United Kingdom v. Albania)*, *I.C.J. Reports 1949*, p. 22); *M/V “Virginia G” (Panama/Guinea-Bissau)*, *ITLOS Reports 2014*, p. 101, para. 359; “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 204, para. 133.

⁸ *Fisheries*, *I.C.J. Reports 1951*, p. 142; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *I.C.J. Reports 1984*, p. 342, para. 237; *Eritrea/Yemen (Phase Two: Maritime Delimitation, 2001)*, *I.L.R.*, Vol. 119, p. 436, para. 50; Consideration 3, Declaration on the Maritime Zone, 18 August 1952, 1006 U.N.T.S. 326; Art. 7(5), UNCLOS.

⁹ *Fisheries (United Kingdom v. Norway)*, *I.C.J. Reports 1951*, p. 116.

¹⁰ First preambular recital, UNCLOS.

¹¹ Fifth preambular recital, UNCLOS.

PUBLIC SITTING HELD ON 15 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Indonesia

Mr L. Amrih Jinangkung, Director General for Legal Affairs and International Treaties, Ministry of Foreign Affairs
Mr Arif Havas Oegroseno, Ambassador of the Republic of Indonesia to the Federal Republic of Germany
Mr Ahmad Bawazir, Minister Counsellor, Embassy of Indonesia in Berlin
Mr Malvino Aprialdy Mazni, First Secretary, Embassy of Indonesia in Berlin
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Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCIOLLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

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THE PRESIDENT: Good morning. Today we will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

This morning we will hear oral statements from Indonesia, Latvia, Mauritius and the Federated States of Micronesia.

I now give the floor to the representative of Indonesia, Mr Amrih Jinangkung, to make his statement. You have the floor, Sir.

STATEMENT OF MR JINANGKUNG
INDONESIA

[ITLOS/PV.23/C31/9/Rev.1, p. 1–8]

Mr President, Mr Vice-President, distinguished members of the Tribunal, it is an honour for me to appear before this Tribunal on behalf of the Government of Indonesia to deliver Indonesia's views on the *Request for the Advisory Opinion by the Commission of Small Island States on Climate Change and International Law*.

As a Party to the 1982 UN Convention on the Law of the Sea, which I will refer to as “the Convention”, Indonesia is committed to put into action the provisions of the Convention. In this regard, Indonesia commends the work of the Tribunal in safeguarding and ensuring the implementation of the Convention.

As an archipelagic State, in which 60 per cent of its territory consists of waters, Indonesia is not immune to the multidimensional impact and existential threats of climate change caused by greenhouse gas emissions; on the contrary, the impacts of climate change are even more pertinent to Indonesia's vast marine environment.

Indonesia, therefore, wishes to reiterate its continued support to the Tribunal in the deliberation of this current case, which would shed the light on one of humankind's most challenging issues. In this spirit, Indonesia has submitted its written statement in June 2023 and wishes to take this opportunity to provide corresponding views to further elaborate its written statement.

I will address three main issues before the Tribunal: first, the imminent threat of climate change and Indonesia's relentless commitment to deal with it; second, Indonesia's submission affirming that the Tribunal indeed has jurisdiction to render the requested advisory opinion; and, third, the obligations of States Parties on pollution to the marine environment caused by climate change through anthropogenic greenhouse gas emissions.

Mr President, on the first issue, I wish to stress that Indonesia is deeply concerned with the existential dangers posed by climate change. The increase of greenhouse gases emissions significantly affect the marine environment and biological diversity, especially through the rising of sea levels, ocean warming and ocean acidification. The phenomenon also poses threats to the production of marine life and fisheries, which may lead to gradual reduction of the fisheries' stocks.

Indonesia, as the largest archipelagic State with extensive low-lying area, is especially vulnerable to the impacts of climate change that may severely threaten our marine and coastal ecosystems.

It is predicted that, because of sea-level rise, Indonesia will lose its land territory by more than 30,000 square kilometres in 2050, and by the year 2100, 115 of Indonesia's islands will be underwater. The total populations likely to be affected by the flooding caused by sea-level rise will reach over 4.2 million people in the year 2100.

As a home to rich marine biodiversity, Indonesia's archipelago hosts almost 20 per cent of the world's coral reefs. Unfortunately, ocean warming and ocean acidification induced by

climate change has endangered this environment, causing extinction of coral reefs and further reduction of fisheries' stocks.

Changes to the marine environment because of climate change also affects the coastal communities, whose livelihoods depend on the ocean. This is especially concerning, considering that Indonesia itself is the fifth highest country with people inhabiting lower-elevation coastal zones. Approximately 62 million of the Indonesian population will be living in coastal areas by 2030.

With these concerns in mind, I shall underline that Indonesia shares similar concerns of many States, particularly the Small Island Developing States, on the catastrophic impacts of climate change.

Mr President, it has been scientifically proven that the ocean and climate change are closely interrelated, specifically the effects of climate change to the ocean and the ocean's role in the efforts to address climate change. This issue has also been recognized during the 1992 Rio Conference and the subsequent meetings of the Conference of the Parties.

The ocean is integral to international efforts to reach international goals: (1) to hold the temperature increase well below 2°C above the pre-industrial level; and (2) to limit the temperature increase to 1.5°C.

In this context, as an archipelagic State, Indonesia continuously promotes ocean-based climate action nationally as well as internationally. Indonesia, as a State Party to the Paris Agreement, is committed to implement the Agreement and fulfil its commitments by including the reduction of greenhouse gas emissions within the oceans and marine sectors as part of its Nationally Determined Contribution.

In this regard, the ocean and marine sectors are included in Indonesia's latest Enhanced NDC Submission of September 2022, in which it enhances its commitment to reduce emissions from previously 29 per cent to 31.89 per cent, unconditionally, and from previously 41 per cent to 43.20 per cent, with international assistance by 2030.

I would like to highlight the fact that Indonesia's Enhanced NDC has already exceeded its ocean-based commitments. Some measures to implement this Enhanced NDC in the ocean and marine sectors include, among others:

first, the expansion of its marine protected area to 28.4 million hectares, exceeding its commitment of 20 million hectares;

(2) the establishment of an ocean sector road map for climate solution, rehabilitation of mangroves as well as enhancement of ocean pollution control from sources such as marine litter and plastic debris;

(3) the ratification of the International Convention for the Prevention of Pollution from Ships, including Annex VI concerning prevention of air pollution from ships, through the Presidential Regulation No. 29 of 2012;

(4) the adoption of ministerial level regulations to prevent, reduce and control anthropogenic greenhouse gas emissions into the atmosphere within the context of shipping activities, especially the Minister of Transport Regulation No. 24 of 2022 on the Prevention of Maritime Pollution.

Indonesia also supports the continuous integration of ocean areas as one of the most important areas in climate change mitigation and adaptation measures. Moreover, Indonesia has consistently demonstrated its position on the importance of cooperation and partnership in ocean-based climate action, particularly in mobilizing means of implementation in support of archipelagic States and Small Island Developing States in their mitigation and adaptation efforts in the marine sector.

Indonesia promotes and invites cooperation among States, especially in capacity-building and resilience improvement of developing States, to address the impacts of climate change to the ocean, through transfer of technology, financial assistance, research and data-

collection cooperation, and development of special measures to address the impact of sea-level rise.

Another concrete example of Indonesia’s effort to address this matter collectively is Indonesia’s initiative to establish the Archipelagic and Island States (AIS) Forum, which brings together 51 archipelagic and island nations, regardless of their size or level of development. This forum is envisioned to address common challenges including climate change. The forum organizes various collaborative programmes, ranging from research and development to public awareness outreach.

Indonesia has also encouraged the nexus of the oceans and climate change to gain wider international attention during the subsequent meetings of the Conference of the Parties to the UN Framework Convention on Climate Change, or the UNFCCC, such as the 26th Conference of the Parties in Glasgow. Indonesia emphasized the importance for all States to ensure integrity of all ecosystems, especially the oceans and cryosphere, in carrying out measures to address climate change. Indonesia also highlighted its readiness to continue supporting and strengthening discussions and cooperation on the nexus between the climate change and the oceans in the subsequent climate forums.

One of the forums is the Ocean and Climate Change Dialogue 2022, where Indonesia once again reiterated that ocean-based actions must be integrated into the Nationally Determined Contribution, National Adaptation Plan (NAP) and other UNFCCC processes. Indonesia suggested that this can be done by strengthening scientific work through research and development, and improving marine modelling and observations for data management and collection.

I wish to underline that the ocean-based climate action was one of Indonesia’s priorities during its G20 presidency. Ocean-based climate action was one of the focuses in the G20 Environment Deputies Meeting and Climate Sustainability Working Group in 2022.

Furthermore, the G20 leaders expressed their commitment in the promotion of scientific knowledge-sharing, raising awareness and capacity-building to advance the ocean-based climate action. As a step forward, the G20 November 2022 Summit also resulted in a decision to launch “Ocean 20” as the G20 Engagement Group aimed at producing actionable policy recommendations and strategies for cooperation, especially on the relationship between ocean and climate change.

The legacy of incorporating ocean-based climate action in G20 meetings was further included in the Outcome Document and Chair’s Summary of the G20 Environment and Climate Ministers’ Meeting held in Chennai, India, this year.

I wish to stress that during its ASEAN Chairmanship of 2023, Indonesia also put particular importance to the ocean-based climate action. The ASEAN Summit held in Jakarta on 5 September 2023 issued, among others, an ASEAN Joint Statement on Climate Change to the 28th Session of the Conference of the Parties to the UNFCCC.

The Joint Statement stressed, among others, that ASEAN:

Consider, as appropriate, incorporation of ocean-based climate action in their national climate goals and in the implementation of these goals, including but not limited to nationally determined contributions, long-term low greenhouse gas emissions development strategies and adaptation communications.

The aforementioned information well demonstrate that Indonesia has been steadfast in its commitments and consistent in incorporating ocean-based climate action to fulfil its obligations under the designated climate instruments.

Mr President, on the second matter regarding jurisdiction, Indonesia noted that certain States Parties, in their written statements, have suggested that the Tribunal does not have

jurisdiction to give the advisory opinion and there is compelling reason for the Tribunal to refuse the request for an advisory opinion. Indonesia wishes to take this opportunity to further elaborate its observation on the Tribunal's competence to render the requested advisory opinion.

Indonesia is of the opinion that article 288 of the Convention, article 21 of the Statute of the Tribunal, and article 138 of the Rules of the Tribunal provide solid bases for the jurisdiction of the Tribunal to render an advisory opinion in this present case. Many States Parties, including Indonesia, have submitted their argument in the written statements to support this position.

I wish to underline that the Tribunal, in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (the Case No. 21), had eloquently provided its clarification on the relationship between the Statute in the Annex VI to the Convention and the Convention itself. The Tribunal asserted that, based on article 318 of the Convention, the Statute enjoys the same status as the Convention.

Further clarification has also been provided by the Tribunal on how the terms “all matters” and “other agreement” in article 21 of the Statute shall be interpreted. As contained in paragraph 58 of the Advisory Opinion in Case No. 21, the Tribunal asserted that, and I quote:

All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal does not by itself establish the advisory jurisdiction of the Tribunal. In terms of article 21 of the Statute, it is the ‘other agreement’ which confers such jurisdiction on the Tribunal.

In line with the argument of the Tribunal in Case No. 21 above, Indonesia is of the view that the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law satisfies the requirements of article 21 of the Statute of the Tribunal and article 138 of the Rules of the Tribunal, establishing the advisory jurisdiction of the Tribunal in the present case.

Mr President, members of the Tribunal, on the third matter, Indonesia would like to take this opportunity to underline its position with regards to the specific obligations of States Parties to prevent, reduce and control pollution of the marine environment that result from, or are likely to result from, climate change, which are caused by anthropogenic greenhouse gas emissions into the atmosphere.

Indonesia notes that Part XII of the Convention covers the general obligation of States Parties to protect and preserve the marine environment, as well as to take measures necessary to prevent, reduce and control pollution of the marine environment.

It specifically prescribes the sources of pollution, which consist of land-based sources, seabed activities within national jurisdiction, activities in the Area, dumping, pollution by vessels and pollution through and from the atmosphere.

In this regard, Indonesia shares the views expressed by several States Parties in their statements, in which the Paris Agreement and the UNFCCC are the most relevant international legal instruments in addressing climate change and the marine environment. The Convention, including Part XII, does not provide any obligation explicitly addressing the issue of climate change. As a matter of fact, the Convention does not have articles expressly referring to climate change or global warming.

Therefore, the Tribunal's interpretation of the Convention is particularly important in rendering the advisory opinion. The Tribunal has to apply the principles of treaty interpretation as enshrined in the Vienna Convention on the Law of Treaties (VCLT).

Indonesia wishes to provide its observation on the application of the provisions of the VCLT to interpret a treaty from its contextual perspective, considering the original approach when the treaty was negotiated, and also its intended objective.

VCLT prescribes, especially in article 31, that the interpretation of a treaty can be based on any agreement relating to the treaty; or instrument in connection with the conclusion of the treaty accepted by the parties as an instrument related to the treaty; subsequent agreement and practice on the interpretation or application of the treaty; and any relevant rules of international law applicable in the relations between the parties.

In this regard, Indonesia views that, in exercising its authority to interpret the Convention, the Tribunal shall identify the agreements that fulfil the criteria outlined by the VCLT. As mentioned in its written statement, Indonesia has identified those international agreements in conformity with such criteria of the VCLT and not incompatible with the Convention.

With regard to the subsequent agreement, Indonesia notes with pleasure the completion of the negotiations of the Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (or the “BBNJ”), as an essential subsequent agreement of the Convention. Indonesia is pleased to see that the Convention, being the “Constitution of the Oceans”, will now be supplemented with an important instrument to conserve the marine biological diversity.

Mr President, distinguished members of the Tribunal, Indonesia observes the complex relationship between climate change and the ocean that is holistic and multidimensional in nature. As I stated earlier, Indonesia recognizes the UNFCCC and Paris Agreement as the primary instruments regulating specific obligations of States concerning climate change, with full understanding of the common but differentiated responsibilities and respective capabilities of States.

Indonesia notes that the States Parties to the Convention are also States Parties to the UNFCCC and Paris Agreement. States Parties to the Convention, by virtue of their membership to the international climate change framework, are also bound by the obligations under the UNFCCC and Paris Agreement which they are party to, to integrate ocean-based climate actions within their plans to reduce greenhouse gas emissions.

In this regard, pollution to the marine environment caused by climate change resulting from greenhouse gas emissions may be addressed under the ambit of the UNFCCC and Paris Agreement.

As mentioned before, an important feature of the issue of climate change is the recognition of the principle of common but differentiated responsibility, which was included in the Preamble and the operative text of the UNFCCC as well as the Paris Agreement.

Indonesia notes that the principle of common but differentiated responsibility serves as the basis of obligations under the UNFCCC, which paves ways for countries to take measures in accordance with their respective capabilities in addressing the climate change issue.

This view is encapsulated in the provisions under the UNFCCC, which expressly mentioned the specific obligations of developed country Parties to limit their anthropogenic emissions of greenhouse gases, and protect and enhance their greenhouse gas sinks and reservoirs; while all countries – taking into account the common but differentiated responsibilities, as well as respective capabilities and their specific national and regional development priorities, objectives and circumstances – shall promote and cooperate in the development, application and diffusion including transfer of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases. These differences are also carried in the Paris Agreement which obligate the States Parties to set a national target to reach the temperature goal contained within the Agreement.

Addressing climate change requires consistent and gradual efforts by all countries in accordance with their capabilities to address it. In addition, the international climate change framework, especially the UNFCCC and the Paris Agreement, shares a differing nature of responsibility and liability. It has no mention of States' liabilities should they fail to fulfil their international obligation.

The Paris Agreement, for example, does not include any clause or article on liabilities should countries fail to reach their NDCs. Instead, the Paris Agreement encourages collaboration and international cooperation to support countries, especially developing countries, to reach their climate goals. There is also no clause specifying the obligations of States on reparations, remedial actions or compensation if they are unable to meet their obligations under the UNFCCC and Paris Agreement.

On the other hand, under the Convention, addressing pollution to the marine environment may not require collective effort. It can be done by each State Party individually. The Convention does not recognize the concept of common but differentiated responsibility principle either. The principle cannot serve as a basis in considering liability issues from the violation of the Law of the Sea provisions when pollution to the marine environment occurs. The Convention clearly stipulates in article 235, for example, that States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and that they shall be liable based on international law. This includes the obligation of States to provide remedy or compensation should damages occur as a result of marine pollution.

As a State Party to both the Convention and the international climate change framework, Indonesia is committed to carry out its obligations under both arrangements. Indonesia is committed to implement the general obligations to protect and preserve the marine environment, as well as to prevent, reduce and control the pollution to the marine environment, in accordance with the terms and provisions outlined in the Convention. At the same time, Indonesia will fulfil its specific obligations outlined in the international climate change framework to implement its ocean-based climate action commitments to preserve and protect the marine environment.

Mr President, members of the Tribunal, before concluding this oral statement, Indonesia firmly believes that the Tribunal's interpretation of the Convention made within the context of this advisory opinion could play an important role in strengthening the law of the sea, without necessarily expanding the obligation of States Parties to the Convention beyond their consent. That is why the Tribunal has an important task ahead of it.

Should the Tribunal render its opinion on the present case, Indonesia wishes that the Tribunal will provide greater clarity to the matters that have been placed before it. In this perspective, and as a strong supporter of the Law of the Sea Convention, Indonesia wishes that the advisory opinion of the Tribunal would not be counterproductive to the States Parties' compliance to the Convention.

It is our fervent hope that the information and observations furnished by Indonesia in its written statements, and again today in these oral proceedings, will be of assistance to the Tribunal.

Mr President, members of the Tribunal, that concludes Indonesia's statement.

I thank you for your attention

MR PRESIDENT: Thank you, Mr Amrih Jinangkung.

I now give the floor to the representative of Latvia, Ms Līce, to make her statement. You have the floor, Madam.

STATEMENT OF MS LĪCE

LATVIA

[ITLOS/PV.23/C31/9/Rev.1, p. 8–10]

Good morning. Mr President, members of the Tribunal, it is an honour for me to appear before you today as the Agent of the Republic of Latvia in the first case Latvia has taken part in proceedings before the Tribunal. Latvia's choice to participate reflects the particular importance of the issues raised by the request for the advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law (COSIS). I note the powerful explanations of this importance given on Monday by Prime Minister Browne, Prime Minister Natano, Attorney General Loughman and Ms Fifita.¹

I will address two issues in my presentation: first, jurisdiction and admissibility; and, secondly, the scope of the questions posed in the request. Professor Mārtiņš Paparinskis will then address the substance of the questions posed.

I turn first to the jurisdiction of the Tribunal and the admissibility of the request for the advisory opinion submitted by COSIS.

In Latvia's submission, the Tribunal has jurisdiction and the request is admissible.² The jurisdictional criteria set out in article 21 of the Tribunal's Statute and article 138 of its Rules, as explained by the Tribunal in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, are satisfied.³ There is also no compelling reason for the Tribunal to use its discretion not to give an advisory opinion.⁴

This conclusion reflects the cumulative effect and elements peculiar to this case, and is without prejudice to the position on jurisdiction and admissibility that Latvia may take in future advisory proceedings before the Tribunal or other international courts and tribunals.

I turn next to the scope of questions posed in the request by COSIS. As Professor Paparinskis will explain shortly, customary principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties require the Tribunal to draw upon several instruments other than the United Nations Convention on the Law of the Sea (UNCLOS) to answer these questions.⁵

There are, however, two bodies of rules that are *not* implicated: first, rules of international human rights law. These are not mentioned either in the request of the COSIS⁶ or

¹ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Verbatim Record ITLOS/PV.23/C33/1 - 11 September 2023 a.m) 4-19, 29-33.

² *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (written statement of Latvia of 16 June 2023) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-14-Latvia_01.pdf> [4]-[9].

³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] *ITLOS Reports* 4 [58], also [56].

⁴ *Ibid* Chapter III.

⁵ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* [2023] *ICJ Rep* <<https://icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf>> [87].

⁶ Cf. UN General Assembly, 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' (29 March 2023) UN Doc A/RES/77/276.

in most written statements,⁷ including that of COSIS itself.⁸ The relationship between climate change and human rights is an important question, and, as such, should be discussed not incidentally but directly and thoroughly, as, for example, in a case shortly to be heard by the Grand Chamber of the European Court of Human Rights: the case of *Duarte Agostinho and Others v Portugal and 32 Other States*, where I will appear as the Agent for Latvia.⁹ This case before the Tribunal, conversely, does not seem an appropriate occasion for addressing such concerns.

Secondly, the questions posed relate exclusively to primary obligations and not secondary obligations. The Tribunal has explained that terms such as “liable” or “liability” are to be used to refer to the law of State responsibility.¹⁰ COSIS has not used such terms in drafting the questions posed.

Mr President, members of the Tribunal, I thank you for your kind attention and ask that you invite to the podium Professor Paparinskis.

THE PRESIDENT: Thank you, Ms Līce.

I now give the floor to Mr Paparinskis to make his statement. You have the floor, Sir.

⁷ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (written statement of Poland of 16 June 2023); *ibid* (written statement of New Zealand of 15 June 2023); *ibid* (written statement of Japan of 15 June 2023); *ibid* (written statement of Norway of 16 June 2023); *ibid* (written statement of Italy of 15 June 2023); *ibid* (written statement of China of 15 June 2023); *ibid* (written statement of the European Union of 15 June 2023); *ibid* (written statement of Australia of 16 June 2023); *ibid* (written statement of Indonesia of 15 June 2023); *ibid* (written statement of Singapore of 15 June 2023); *ibid* (written statement of Korea of 16 June 2023); *ibid* (written statement of Egypt of 16 June 2023); *ibid* (written statement of France of 16 June 2023); *ibid* (written statement of Bangladesh of 16 June 2023); *ibid* (written statement of Belize of 16 June 2023); *ibid* (written statement of Canada of 16 June 2023); *ibid* (written statement of Guatemala of 16 June 2023); *ibid* (written statement of the United Kingdom of 16 June 2023); *ibid* (written statement of the Netherlands of 16 June 2023); *ibid* (written statement of the International Maritime Organization of 16 June 2023); *ibid* (written statement of the International Seabed Authority of 16 June 2023); *ibid* (written statement of the Food and Agriculture Organization of 16 June 2023); *ibid* (written statement of Vietnam of 16 June 2023).

⁸ The Commission only notes its involvement in advisory proceedings before the Inter-American Court of Human Rights, *ibid* (written statement of the Commission of Small Island States on Climate Change and International Law of 16 June 2023) [22]. See similarly (Verbatim Record ITLOS/PV.23/C33/1 - 11 September 2023 a.m) 5 (Browne), 23 (Akhavan), 30, 32 (Fifita).

⁹ ‘Forthcoming Hearings’ (31 August 2023) <<https://www.echr.coe.int/w/forthcoming-hearing-1>>.

¹⁰ *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] *ITLOS Reports* 10 [66], [70]; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] *ITLOS Reports* 4 [145].

STATEMENT OF MR PAPARINSKIS
LATVIA
[ITLOS/PV.23/C31/9/Rev.1, p. 10–14]

Mr President, members of the Tribunal, it is an honour for me to appear before you on behalf of the Republic of Latvia.

I will address the substance of the questions before you. As you will hear, Latvia’s approach is, in several important respects, similar to that presented by COSIS earlier this week.

I will make two submissions: first, I will identify the provisions of UNCLOS and other legal instruments that the Tribunal should consider in answering the questions; secondly, I will address the content of the relevant provisions in Part XII of UNCLOS, with a particular focus on the notion of due diligence.

Before doing so, I will make three preliminary points which may inform the Tribunal’s approach.

My first preliminary point is that UNCLOS is a *framework* convention, which does not purport to address in detail every legal issue affecting the ocean. It has always been understood that law of the sea must respond to new circumstances and developments in scientific and technical knowledge that might require legal solutions more concrete than a general, comprehensive convention could hope to achieve.

Part XII, at issue before the Tribunal, is no exception. It contains broadly framed, general obligations, such as article 192, and provisions that contain so-called “rules of reference”, such as article 214, and also envisions, in article 237, that Parties may create, on a global or regional basis, more specific rules for addressing particular environmental challenges.

It is in this spirit of openness, buttressed by the custom-reflecting principle of treaty interpretation expressed in article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties, that the interpretation of the Convention must be approached to ensure its continued relevance.¹ The practical effect of this is that, when interpreting article 192 and other similar provisions in Part XII, their content is to be informed by the relevant rules of international environmental law.² The two particularly relevant instruments in the context of climate change are the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.³

The second preliminary point relates to the definition of the “pollution of the marine environment” in article 1, paragraph 1(4) of UNCLOS. In Latvia’s submission, this definition must be read to include greenhouse gas (GHG) emissions. This is consistent with its textual expression as well as the object and purpose of the Convention, which overtly seeks to promote the protection and preservation of the marine environment.⁴

The effective protection and preservation of the marine environment requires taking account of the evolving state of the scientific and factual knowledge of the risks of harm, regardless of their sources, and the multiple ways in which climate change in particular may affect the marine ecosystems.

The third preliminary point, Mr President, is that the questions before the Tribunal are intertwined. The general obligations relating to the protection and preservation of the marine

¹ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* [2023] ICJ Rep <<https://icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf>> [87].

² *The South China Sea Arbitration (The Philippines v. The People’s Republic of China)* (Award of 12 July 2016) [2016] 33 RIAA 153 [945] and [956]-[957].

³ See also Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc A/CONF.232/2023/4* (reissued 30 June 2023).

⁴ United Nations Convention on the Law of the Sea, Preamble, 4th recital.

environment in Part XII of UNCLOS lay out a framework within which more granular obligations concerning the prevention, reduction and control of different sources of marine pollution operate in a mutually reinforcing manner. Together, they respond comprehensively to evolving threats to the marine environment, including climate change. They will therefore be also addressed together in Latvia’s substantive submissions.

I now turn to the first substantive submission, which will identify the relevant provisions that may assist the Tribunal in answering the questions before it.

The questions posed by COSIS mirror the wording of articles 192 and 194 of UNCLOS.⁵ Article 192, as explained in the *South China Sea* arbitration, provides for an obligation with an ambit that “extends both to ‘protection’ of the marine environment from future damage and ‘preservation’ in the sense of maintaining or improving the present condition.”⁶

To that end, it entails both “the *positive* obligation to take active measures to protect and preserve the marine environment” and “the *negative* obligation not to degrade the marine environment”.⁷ Article 194 elaborates on this, imposing an obligation upon Parties to take, individually or jointly, measures to prevent, reduce and control pollution of the marine environment.

Articles 192 and 194 do not operate in a legal vacuum and must be read together with the rest of Part XII. This includes Section 5, which addresses international rules and national legislation to prevent, reduce and control marine pollution, and Section 6, which deals with the enforcement of laws and regulations so adopted. Specific provisions of Part XII also play a role. In Latvia’s view, the key obligations in this respect include articles 195, 196, 197, 204, 206, 207, 212, 213 and 222.

Latvia would particularly emphasize the duty to cooperate in article 197. To quote this Tribunal, “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention”.⁸ The duty may entail several possible substantive and procedural elements, identified in the decisions of the Tribunal and other international courts and tribunals, such as notification, exchange of information, the undertaking of consultations and negotiations, as well as environmental impact assessment and communication of its results to affected parties.⁹ In the context of climate change, this duty requires cooperation with and participation in international processes to coordinate the appropriate collective action to prevent, mitigate and adapt to the various diffuse, global challenges it poses.

Finally, a proper and complete interpretation of Part XII must take account of the rules and standards found in instruments of international law that are specifically related to the particular environmental challenges that climate change poses to the oceans. Two non-exhaustive examples are the UNFCCC and the Paris Agreement, which, together, lay out the most specific and up-to-date legal framework in respect of the greenhouse gas emissions.

⁵ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (written statement of Latvia of 16 June 2023) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-14-Latvia_01.pdf> [10].

⁶ *The South China Sea Arbitration (The Philippines v. The People’s Republic of China)* (Award of 12 July 2016) [2016] 33 RIAA 153 [941].

⁷ *Ibid* [941] (emphasis added).

⁸ *The Mox Plant Case (Ireland v. United Kingdom) (Provisional Measures) (Order)* [2001] ITLOS Rep 95 [82].

⁹ *Ibid* [84]; *The South China Sea Arbitration (The Philippines v. The People’s Republic of China)* (Award of 12 July 2016) [2016] 33 RIAA 153 [988]. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Judgment) [2015] ICJ Rep 665 [173]; and more recently, *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)* (Judgment of 1 December 2022) <<https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf>> [83].

With 198 and 195 Parties, respectively, these treaties reflect the overwhelming consensus of the international community on how to address climate change. Any interpretation of Part XII, therefore, should be informed by the obligations contained within those treaties and mindful of the processes adopted by the Conferences of Parties to implement them. Latvia notes that several other participants in the present proceedings appear to share the same position.¹⁰

I now turn to my second submission, namely, that the key rules contained in Part XII of relevance to this case are, to employ the terminology of the Tribunal in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, “due diligence obligations”.¹¹

The relevant rules are obligations of conduct and not result.¹² Article 194, paragraph 1, requires that Parties take “all measures” necessary to prevent, reduce and control pollution of the marine environment, while “using for this purpose the best practicable means at their disposal”. Other provisions of Part XII contain similar wording, including “as far as practicable” (in articles 204 and 206) or “shall endeavour” (in article 207, paragraph 3).

By such language, Parties are required, as the Tribunal put it, “to deploy adequate means, to exercise best possible efforts, to do the utmost” to achieve or avoid a particular outcome.¹³ The International Court of Justice similarly noted in more general terms that “[a] State does not incur responsibility simply because the desired result is not achieved; responsibility is, however, incurred if the State manifestly failed to take all measures ... which were within its power”.¹⁴ It is the notion of “due diligence” that is of “critical importance”.¹⁵

Due diligence is, as this Tribunal has recognized, “a variable concept”.¹⁶ In Latvia’s submission, the content of the standard is informed by the specific instruments that govern the particular environmental issues. As I noted earlier, for greenhouse gas emissions and climate change, these are the UNFCCC and the Paris Agreement.

I will highlight three further considerations relating to due diligence that inform the content of Part XII obligations and their application to greenhouse gas emissions. Latvia notes that several other participants in the present proceedings appear to share the same position regarding the relevance of these considerations.¹⁷

¹⁰ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) (written statement of the Democratic Republic of the Congo of 13 June 2023) [96]-[97]; *ibid* (written statement of New Zealand of 15 June 2023) [66], [71]; *ibid* (written statement of Australia of 16 June 2023) [40]; *ibid* (written statement of Republic of Mauritius of 16 June 2023) [38]-[52]; *ibid* (written statement of the Republic of Korea of 16 June 2023) [16], [20]; *ibid* (written statement of the Republic of Chile of 16 June 2023) [59]-[60]; *ibid* (written statement of the Federative Republic of Brazil of 15 June 2023) [20]; *ibid* (written statement of the Republic of Sierra Leone of 16 June 2023) [21], [53]; *ibid* (written statement of the Republic of Singapore of 16 June 2023) [37]; *ibid* (written statement of the European Union of 15 June 2023) [26]-[31]; *ibid* (written statement of the African Union of 16 June 2023) [15]; *ibid* (written statement of the Commission of Small Islands States on Climate Change and International Law of 16 June 2023) [353].

¹¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] *ITLOS Rep* 4 [129]-[131].

¹² See *Responsibilities and Obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] *ITLOS Rep* 10 [110]-[112].

¹³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] *ITLOS Rep* 4 [129].

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] *ICJ Rep* 43 [430].

¹⁵ *Ibid*.

¹⁶ *Responsibilities and Obligations of States with respect to activities in the Area* (Advisory Opinion) [2011] *ITLOS Rep* 10 [117].

¹⁷ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Request for Advisory Opinion submitted to the Tribunal) *ibid* (written statement by the European Union of 15 June 2023) [17]-[20]; *ibid* (written statement of the African Union of 16 June 2023) [170]-

The first consideration is the greatly varying capacity of States.¹⁸ UNCLOS reflects this proposition in article 194, paragraph 1, in the context of the marine pollution.¹⁹

Secondly, the “assessment *in concreto*” will also take into account other parameters.²⁰ These include the nature and seriousness of the risk related to the activity at stake, the state of the scientific knowledge of the risks in question, and the passage of time, identified by the Tribunal in the advisory opinion concerning *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*.²¹

Thirdly, obligations implicating due diligence will not be satisfied merely because a Party to UNCLOS enacts a legal framework for averting harm to the marine environment. Due diligence requires “a certain level of vigilance in the enforcement and the exercise of administrative control”.²² This applies both to activities directly undertaken by Parties themselves, but also in “ensuring [that] activities within their jurisdiction and control do not harm the marine environment”.²³

To conclude my second submission: when considering the content of the relevant obligations of conduct in Part XII in respect of the prevention and protection of harm to the marine environment caused by climate change, Parties should act with due diligence, as that notion has been understood in international law.

Mr President, members of the Tribunal, this concludes the submissions of Latvia. I thank you for your kind attention.

MR PRESIDENT: Thank you, Mr Papaninskis.

I now give the floor to the representative of Mauritius, Mr Koonjul, to make his statement. You have the floor, Sir.

[174]; *ibid* (written statement of Canada) [54]-[59]; *ibid* (written statement of France of 16 June 2023) [103]-[119]; *ibid* (written statement of the Republic of Djibouti of 16 June 2023) [45]-[46]; *ibid* (written statement of the People’s Republic of Bangladesh of 16 June 2023) [37]; *ibid* (written statement of the Republic of Singapore of 16 June 2023) [29]-[37]; *ibid* (written statement of the African Union of 16 June 2023) [18]; *ibid* (written statement of Belize of 16 June 2023) [68]-[71].

¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [430].

¹⁹ United Nations Convention on the Law of the Sea art 194(1).

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [430].

²¹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 [117]. See also on precautionary approach: *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures) (Order) [1999] ITLOS Rep 280 [77]; *M/V ‘Louisa’ (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Provisional Measures) (Order) [2008-2010] ITLOS Rep 58 [77]; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Cote d’Ivoire)* (Provisional Measures) (Order) [2015] ITLOS Rep 146 [72].

²² *The South China Sea Arbitration (The Philippines v. The People’s Republic of China)* (Award of 12 July 2016) [2016] 33 RIAA 153 [944]; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] ITLOS Rep 4 [131].

²³ *The South China Sea Arbitration (The Philippines v. The People’s Republic of China)* (Award of 12 July 2016) [2016] 33 RIAA 153 [944].

STATEMENT OF MR KOONJUL
MAURITIUS
[ITLOS/PV.23/C31/9/Rev.1, p. 14–17]

Mr President, members of the Tribunal, it is an honour for me to appear before you in my capacity as Representative of the Republic of Mauritius.

Mauritius is participating in these important proceedings because of the grave and urgent threat posed by the impacts of climate change. We are thankful to the Commission of Small Island States for taking the initiative to request this advisory opinion.

The detrimental effects on the marine environment are already being felt and cannot be overstated, and they are predicted to become significantly worse. The importance of the issues raised by way of this request, and the urgency with which they need to be addressed, is reflected in the unprecedented participation in these proceedings. Fifty-three UNCLOS States Parties have filed written statements (including via the European Union), together with eight intergovernmental organizations, including the United Nations, the African Union, the Pacific Community, amongst others.

As a Small Island Developing State and a founder member of the Alliance of Small Island States back in 1990, Mauritius is acutely vulnerable to climate change-induced events, including sea-level rise, coastal degradation and coral bleaching. Over the last three decades, Mauritius was experiencing mean sea-level rise of approximately 5 millimetres per year. But, during the last decade, from 2011 to 2020, this rate increased to almost 12 millimetres per year.¹

This is considerably higher than the average rate of change for sea-level rise in the Indian Ocean. By the end of this century, it is estimated that sea-level rise will reach at least 49 centimetres. This will be a direct result of the emissions of greenhouse gases over two centuries, for which Mauritius bears but a miniscule responsibility, if any at all.²

Sea-level rise and the other consequences of warming temperatures, not least for marine biodiversity, pose an existential threat to large parts of Mauritius, including the whole of the Chagos Archipelago, which this Tribunal recently confirmed to be an integral part of my country, as well as the islands of Cargados Carajos, Agalega and Tromelin. Many of these islands are flat and low-lying, on average no more than one or two metres above mean sea level. Around the main island of Mauritius and Rodrigues, coastal areas are shrinking dramatically due to the rising sea levels and accelerated beach erosion.

Mauritius has also experienced, and is continuing to experience, above-average rises in sea surface temperature. In 2018 and 2019, 60 per cent of the coral around the island of Mauritius suffered from recurrent bleaching events due to increasing sea surface temperatures. These impacts are by no means unique to Mauritius, but we feel them acutely, as do, no doubt, many other Small Island Developing States. It is in that regard that we consider what was said yesterday by Chile and Nauru, in respect of self-determination and the right of peoples not to be deprived of its own means of subsistence, to be extremely pertinent. Mauritius fully supports this principle.

Mr President, Mauritius also participates in these proceedings because of the unwavering faith it has in this Tribunal and in the international rule of law to make a real and tangible difference. Over the course of more than 25 years, ITLOS has evolved into the principal judicial guardian of the legal order of the oceans. More than 30 UNCLOS States Parties have already appeared before this Tribunal in contentious proceedings, and no less than 41 States Parties have opted for ITLOS pursuant to article 287(1) of the Convention as a means

¹ Written statement of the Republic of Mauritius, 16 June 2023, para. 23.

² Updated National Climate Change Adaptation Policy Framework of the Republic of Mauritius (2021), p. 21, available at: <https://unfccc.int/NDCREG> (last accessed 13 June 2023).

of settling disputes under Part XV of UNCLOS.³ States are also increasingly turning to the Tribunal by way of special agreements to resolve their differences, as Mauritius did recently with regard to the delimitation of its maritime boundary with Maldives.⁴

I take this opportunity to express the deep gratitude of my country for the Tribunal's assistance in helping resolve a long-standing dispute. All this clearly shows that the international community has the utmost confidence in the Tribunal's exercise of its vital jurist function.

In fact, in our view the Tribunal is uniquely positioned to provide an authoritative statement in respect of the legal obligations of UNCLOS States Parties with regard to the effects and impacts of climate change: authoritative for UNCLOS States Parties; authoritative for all countries and international organizations; for national courts charged with addressing issues of climate change; as well as for international courts before which other climate change proceedings are currently pending or may arise in the future.

Mr President, Mauritius is mindful that the Tribunal's determinations in these proceedings will have legal effects for UNCLOS States Parties and beyond, notwithstanding that an advisory opinion is not binding as such. In its recent Judgment on Preliminary Objections in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, a distinguished ITLOS Special Chamber ruled that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law."⁵ In that case, the Special Chamber was referring to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Mr President, Mauritius considers that the same considerations apply with equal force to the ITLOS advisory opinions which this Tribunal will, in due course, hand down.

Mr President, the Tribunal has been tasked with answering two legal questions. Mauritius considers that before those questions can be answered, the Tribunal will, first and foremost, need to make determinations of fact. In this case, the facts comprise the large body of scientific evidence which has been put before the Tribunal. It is this scientific evidence, largely but not exclusively emanating with particular authority from the IPCC, which informs the specific obligations of States Parties under Part XII of the Convention on the threats posed by climate change to the marine environment.

Professor Sands will address the Tribunal on what Mauritius considers to be some of the salient aspects of the relevant and applicable scientific evidence. Ms Cook will then address you on the legal implications of the scientific evidence for the interpretation of Part XII of UNCLOS, taking into account relevant rules of international law, in particular the UN Framework Convention on Climate Change and the Paris Agreement. These are the primary legal instruments which lay down rules of international law with regard to climate change.

Indeed, pursuant to article 293(1) of the Convention, the UNFCCC and the Paris Agreement form part of "other rules of international law" which are not incompatible with the Convention. As explained in our written statement, UNCLOS, UNFCCC and the Paris Agreement all bear upon a single issue with respect to the protection of the marine environment from harmful effects of climate change.⁶ Mauritius therefore invites the Tribunal to adopt a

³ See: https://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm (last accessed 29 August 2023)

⁴ *Dispute concerning the delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, ITLOS Case No. 28.

⁵ *Dispute concerning the delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, ITLOS Case No. 28, Judgment on Preliminary Objections, 28 January 2021, para. 203.

⁶ Written statement of the Republic of Mauritius, 16 June 2023, para. 46.

harmonized approach, furthering a relationship between UNCLOS and the climate change regime, as well as general international law, based on systemic integration.

Professor Sands will then return to examine the specific obligations arising under the Convention, focusing, in particular, on six areas: (1) the relationship between the internationally agreed 1.5°C temperature goal and Part XII; (2) the obligation of due diligence in the context of preventing, controlling and reducing greenhouse gas emissions, including environmental assessment; (3) the duty of cooperation in the context of addressing gaps in the regulation of greenhouse gases; (4) the obligation of due diligence in the context of adapting to the impacts of climate change on the marine environment, taking into account the rights of those affected by such impacts, including matters of technical and financial assistance; (5) the implications of the rules on State responsibility for breach of obligations under Part XII; and (6) the potential impact of climate change on baselines, maritime entitlements and boundaries.

Mr President, I thank you and the members of the Tribunal for the kind attention, and respectfully request that you invite Professor Sands to the podium.

THE PRESIDENT: Thank you, Mr Koonjul.

I now give the floor to Mr Sands to make his statement. You have the floor, Sir.

STATEMENT OF MR SANDS
MAURITIUS
[ITLOS/PV.23/C31/9/Rev.1, p. 17–22]

Thank you, Mr President and members of the Tribunal. It is an honour to appear before you in these proceedings. As Ambassador Koonjul has noted, Mauritius is greatly concerned by the threat posed by climate change. Along with other Small Island Developing States and countries that are low-lying, Mauritius is already experiencing the effects of human-induced climate change on the marine environment.

Mr President, with your permission before proceeding, I hope that I might use this occasion to pay tribute to my colleague and friend Professor Alan Boyle, who has passed away very recently. Professor Boyle, I think, is very well known to the Tribunal. He has done so very much to forge the field of international environmental law and to promote this Convention. He played a very key role in bringing this matter to the Tribunal, for which we are grateful. He was a wonderful colleague; I taught with him since 1989. He was, as many of you know, a most decent and generous person. I, and many in this room, will miss him very much. May I express the hope that this advisory opinion can come to be seen as a part of his very significant legacy.

Mr President, for many countries and people, climate change is an existential issue. The law alone will not change the behaviour of States: that requires political will, and more. But the language of international law, our common language, is indispensable in informing the conditions for behaviour and actions. Your opinion can offer an authoritative statement to assist national and international courts, for States, for international organizations, corporations and non-State actors.

The law turns on the facts. Always. On this matter, the facts are principally the science to guide the interpretation and application of the law. If the Tribunal does one significant thing in its advisory opinion, it will be to affirm the centrality of science to the life of the Convention. Indeed, the basic science has been known for decades, since at least the Second World Climate Conference held in Geneva in November 1990, where I, and some others present in the room, were privileged to be present. It was the moment, in fact, when the Alliance of Small Island States was founded, under the leadership of Vanuatu and Ambassador Robert Van Lierop. In 1990, the very real threats that lay ahead were known, and they of course catalyzed the negotiations for the 1992 Framework Convention on Climate Change.

Thirty-three years have passed. The science of climate change is clear; it is not in dispute, even if the scale and timing of the effects of climate change are not entirely clear. The IPCC is the best available science: climate change is a real and present danger; it is happening; and it will cause a catastrophe for the maritime environment, for biodiversity, for humans and for States.

As temperatures rise, so do the oceans. As fossil fuels are burned and as concentrations of greenhouse gases increase, so do corals, and other forms of marine life die. The risk of critical thresholds – tipping points they are called – being crossed is now tangible and real, with irreversible harm to the marine environment.¹ This Tribunal cannot run away from the science,² it cannot ignore what is happening, and it must make clear that in the face of grave uncertainties as to the consequences, precaution is required.

Mr President, every advisory opinion deals with the facts and, for this one, there are two key elements: first, the likely impacts of climate change on the marine environment on the basis of different temperature rises; and second, the urgent actions needed to protect and

¹ IPCC AR6 SYN SPM B.3.2.

² IPCC AR6 SYN SPM C.2.

preserve the marine environment, in particular deep and immediate reductions in the emission of greenhouse gases.

Mauritius and many other participants have addressed the science in detail in their written statements in these proceedings.³ The science is not in dispute. The IPCC has warned that on current trajectories, the marine environment is catastrophically threatened by ocean warming, acidification, deoxygenation, sea-level rise and substantial loss of coastal and ocean ecosystems. For Mauritius, fragile marine ecosystems, including warm water coral reefs, are already today at risk of total destruction.⁴

The IPCC has recommended, in the strongest possible terms, that global temperature rises must be limited to 1.5°C. Even this level will not avert all harm to the marine environment, but an even higher increase will cause even more extreme harms.⁵ A rise of 1.5°C threatens to destroy 70 to 90 per cent of our coral reefs, but 2°C likely means total destruction.⁶ Everything. 1.5°C must therefore be the Tribunal’s lodestar, to reduce risks to marine biodiversity, fisheries and ecosystems, and their functions and services to humans.⁷

In 2019, the IPCC published its Special Report on the Ocean and Cryosphere in a Changing Climate. Let me read the brutal conclusion; I quote:

Over the 21st century, the ocean is projected to transition to unprecedented conditions with increased temperatures (virtually certain), greater upper ocean stratification (very likely), further acidification (virtually certain), oxygen decline (medium confidence), and altered net primary production (low confidence) ... The rates and magnitudes of these changes will be smaller under scenarios with low greenhouse gas emissions (very likely).⁸

The IPCC has also addressed the social and economic consequences of these impacts.⁹ They include food security, physical and mental health, and forced climate migration. The IPCC says that as temperatures rise, the effects are going to cascade and become increasingly difficult to manage.¹⁰ And Mauritius is already seeing, as you have heard, extreme weather events, sea-level rise and, most significantly for a fishing community, adverse impacts on fisheries as fish migrate to colder waters. The best scientific advice is that much, much worse is yet to come, without action under the law.¹¹

The science is equally clear on the actions needed to limit temperature rises to 1.5°C, and on the measures needed to mitigate and adapt to climate change. The IPCC has told us that to prevent the worst impacts of climate change, emissions of greenhouse gas emissions must be reduced to the point where they reach net zero by 2050; that is just 27 years away.¹² The

³ Written statement of Mauritius, pp. 6-10.

⁴ IPCC AR6 SYN, B.3.2.

⁵ IPCC SR1.5, TS 5 p. 44: “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence).”

⁶ IPCC SR Ocean and Cryosphere, Ch. 4, 4.3.3.5.2, p. 379.

⁷ IPCC SR 1.5 Summary for Policymakers B.4. p. 10.

⁸ SROCC also addresses sea-level rise, A1.1, A.3, A.6, and the impact on biomass including fisheries, see A.5.2, A.8, B.5 and B.8, among other impacts.

⁹ IPCC AR6 SYN, Summary for Policy Makers, A.2.4.

¹⁰ IPCC AR6 SYN, Summary for Policy Makers, B.2. SROCC, Summary for Policymakers, B.8. p. 26 (see also 3.2.4, 3.4.3, 5.4.1, 5.4.2 and 6.4).

¹¹ Written statement of Mauritius, paras. 22-29.

¹² Net zero CO₂ emissions are achieved when anthropogenic CO₂ emissions are balanced globally by anthropogenic CO₂ removals (such as through natural carbon sinks, like the Amazon rainforest, or man-made technology, like carbon capture and storage) over a specific period, see UNEP written statement at para. 49(b) and notes therein.

world is not on track to meet this goal. The emissions reductions needed to meet that goal are not difficult to calculate, based on the remaining global carbon budget which must be allocated equitably between States.¹³ The rate at which that budget is currently being exhausted will not limit temperature rises to 1.5°C.¹⁴

What this means, Mr President, is that the current path, the one we are now on, means the end of the marine environment as we know it. What is needed – we are advised by our scientists – is to close the gap between current and planned emission levels, on the one hand, and the levels that are needed to protect the marine environment, on the other.

The IPCC has made it crystal clear that this puts fossil fuel production, combustion and related industrial processes at the heart of the threat to the marine environment.¹⁵ That reality cannot be escaped. To close the emissions gap, fossil fuel use and methane emissions have to be addressed. This is what the science requires, this is what is agreed by the Parties to the Paris Agreement, and this is what is reiterated now *ad nauseam* by the scientists for the IPCC and UNEP.

The UNEP Emissions Gap reports are particularly significant. They address the hugely important gap between emissions reductions promised thus far and the emissions reductions that are needed to achieve the temperature goal of the Paris Agreement. The 2022 report, very recent, (entitled *The Closing Window*), has noted, and I quote, the “very limited progress in reducing the immense emissions gap for 2030”.¹⁶ Seven years away. In other words, States need to do more. In other words, States are not meeting their obligations under this Convention to prevent grave harm to the marine environment.

And the situation is grave. The 2022 UNEP Report concluded that current policies will lead to global warming of 2.8°C by the end of this century; that is during the lives of our grandchildren, your grandchildren. The existing unconditional and conditional Nationally Determined Contributions under the Paris Agreement will do very little. They will only limit the rise in temperatures to between 2.4°C and 2.6°C.¹⁷

Relatedly, there is also a fossil fuel “production gap”. Unbelievably, despite the crystal-clear science, the 2019 UNEP Report found, and I quote: “The world is on track to produce far more coal, oil and gas than is consistent with limiting warming to 1.5°C or 2°C, creating a ‘production gap’ that makes climate goals much harder to reach.”

To meet 1.5°C, fossil fuel emissions must decline rapidly. What this means in practice, the report concludes, is that without “dramatic, unexpected advances in carbon capture and storage ... technology,” and I quote, “... most of the world’s proven fossil fuel reserves must be left unburned”. If you want to protect and preserve the marine environment and you want to follow the science, you are going to have to say something about fossil fuels being phased out.

¹³ The carbon budget represents the total net amount of carbon dioxide that human activities can still release into the atmosphere while keeping global warming to a specified level above pre-industrial levels, after accounting for the warming effects of other GHGs. See: IPCC, Working Group I, Chapter 5: Global Carbon and Other Biogeochemical Cycles and Feedbacks, AR6 (2021), p. 777.

¹⁴ In order to have a 50 or 67 per cent chance of limiting global warming to 1.5°C above pre-industrial levels, “the remaining carbon budgets amount to 500 and 400 billion tonnes of CO₂, respectively, from 1 January 2020 onward. Currently, human activities are emitting around 40 billion tonnes of CO₂ into the atmosphere in a single year.” See: IPCC, Working Group I, Chapter 5, Global Carbon and Other Biogeochemical Cycles and Feedbacks, AR6 (2021), p. 777.

¹⁵ IPCC, AR5, SPM 1.2, p. 5: “[e]missions of CO₂ from fossil fuel combustion and industrial processes contributed about 78 per cent of the total GHG emissions increase from 1970 to 2010, with a similar per centage contribution for the increase during the period 2000 to 2010 (high confidence)”.

¹⁶ UNEP, *The Closing Window* (2022), Executive Summary, p. IV, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/40932/EGR2022_ESEN.pdf?sequence=8&isAllowed=y (last accessed 13 June 2023).

¹⁷ *Ibid.*, p. X.

If the science is clear, so must be the law. There is no uncertainty or ambiguity as to what is needed. To have any chance of limiting warming to 1.5°C, the IPCC tells us that global carbon dioxide emissions must, by 2030, decrease by at least 48 per cent from 2019 levels, and they must then reach net zero by 2050. Emissions of non-CO2 greenhouse gases, in particular methane, must also decrease analogously.¹⁸

Mr President, the science also calls for far-reaching measures on mitigation and adaptation: measures to protect and restore coastal and ocean ecosystems; reduce coastal erosion and flooding; to increase the storage of carbon; and to address food security and the maintenance of biodiversity.¹⁹

In short, the current path leads to catastrophic harm to the marine environment. To avert disaster, the science-driven focus has to be on phasing out fossil fuel combustion and all related activities.²⁰ Anything less in your opinion will be seen as platitudes. The Tribunal has to address that scientific reality, as the Paris Agreement does, to meet IPCC recommendations.

Your task, Mr President, members of the Tribunal, in this advisory opinion, which may seem daunting, is to do no less than the science requires, as confirmed by the IPCC, as acted on by the Paris Agreement, informing the interpretation and application of the obligations under the Convention. The science may indeed require more under this Convention than the Paris Agreement currently provides for.

Mr President, all of this poses a very real challenge. What are judges to do, faced with such a scenario? Do you just bury your heads? Do you hope that somehow we are going to muddle along, that everything will just sort of be okay? To follow or not to follow the science, that is the question. Will the Tribunal “suffer the slings and arrows of catastrophe”, or will it, to take the words of William Shakespeare, “take arms against a sea of troubles”?²¹ The answer to these questions is clear. It has to be: follow the science and follow the law. A clear, firm, principled approach, an opinion that does not shirk from the science and does not blink.

And so, Mauritius invites this Tribunal to do what an increasing number of national tribunals have done, for example, as in the *Urgenda* case in the Netherlands: follow the science in applying and interpreting the law.²² If you do not, this Convention will be a dead letter, and so will the very idea of a rule of law in relation to the oceans.

Mr President, members of the Tribunal, science is the beating heart of the Convention and it must be the beating heart of the advisory opinion that this Tribunal hands down.

I thank you for your attention and, depending on the time available, invite you to call Ms Cook to the podium either before or after the break.

THE PRESIDENT: Thank you, Mr Sands.

I now give the floor to Ms Cook to make her statement. You have the floor, Madam.

¹⁸ The adoption at UNFCCC COP26 of the Global Methane Pledge signaled a greater international commitment to ensure that such gaps are addressed as a matter of urgency. Participants in the Global Methane Pledge commit to work together in order to collectively reduce global anthropogenic methane emissions across all sectors by at least 30 per cent below 2020 levels by 2030.

¹⁹ IPCC, AR6, SYN, SPM, C.3.6.

²⁰ IPCC, AR5, SPM, 1.2, p. 5: “[e]missions of CO2 from fossil fuel combustion and industrial processes contributed about 78per cent of the total GHG emissions increase from 1970 to 2010, with a similar per centage contribution for the increase during the period 2000 to 2010 (high confidence)”.

²¹ William Shakespeare, *Hamlet*, Act 3, Scene 1.

²² Supreme Court of the Netherlands, *Urgenda Foundation v State of the Netherlands*, no. 19/00135, Decision of 20 Dec. 2019.

STATEMENT OF MS COOK
MAURITIUS
[ITLOS/PV.23/C31/9/Rev.1, p. 22–25]

Mr President, members of the Tribunal, it is an honour to appear before this Tribunal and to do so on behalf of Mauritius.

Against the background of the science, I will now address the relationship between the 1982 Convention and the legal framework of the broader international climate regime.

That legal regime is largely set forth in the provisions of the 1992 UNFCCC and the 2015 Paris Agreement.¹ Under UNCLOS, the Tribunal is required to apply “other rules of international law not incompatible with the Convention”. Those rules clearly include the UNFCCC and the Paris Agreement, as well as customary rules, including the precautionary principle, the polluter-pays principle, and the principle of common but differentiated responsibility.

The objectives of the UNFCCC and the Paris Agreement² are to prevent dangerous anthropogenic interference with the climate system. That clearly covers interference with the marine environment. The Preamble to the Paris Agreement expressly references the commitment to ensure the integrity of ocean ecosystems, and biodiversity. Article 5(1) explicitly requires Parties to conserve and enhance oceans, and coastal and marine ecosystems, as sinks of greenhouse gases.³

Together, the UNFCCC and the Paris Agreement set out minimum steps that Parties must take to prevent dangerous anthropogenic interference with the climate system and, in this way, contribute to the protection of the marine environment. The relationship between the Convention and these treaties is based on a shared concern for the protection of the marine environment from climate change.

The Convention and these treaties are intertwined. It is not the case, as some have argued, that they are to be kept separate. The Convention is a living instrument, expressly framed to allow for the development of specific standards and rules, and to evolve in the light of evolving science.

It is not the case that the Convention does not address climate change because that subject was not expressly considered at the time of its adoption, nor because it is now addressed by other treaties.⁴ The obligations under the Convention to protect the marine environment from climate change are informed by those treaties but they are not limited by those treaties. Those treaties do not, and cannot, limit the obligations that arise under the Convention in the light of the science to which it expressly refers, and in the context of protecting the marine environment, a point I will return to shortly.

What the Convention and the climate treaties have in common is a requirement that States Parties must base their actions on science. The Convention makes no less than 158 references to science. It requires Parties to act on the basis of scientific evidence for the protection of the marine environment.⁵ Similarly, the UNFCCC refers to scientific evidence as the basis for climate action, as does the Paris Agreement,⁶ which recognizes the need for an

¹ Article 2 UNFCCC, the Paris Agreement being a related legal instrument of the UNFCCC.

² Article 2 UNFCCC, the Paris Agreement being a related legal instrument of the UNFCCC.

³ Article 4(1)(d) UNFCCC.

⁴ See *e.g.* written statement of Indonesia at para. 82(b): “There is no specific obligation of the States Parties to the Convention 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, as well as to protect and preserve the marine environment in relation to climate change impact.”

⁵ See *e.g.* articles 61, 119, 200-201, 204 and 234 of UNCLOS.

⁶ See articles 4(1) and (5), 7(5)(7) and 14(1) of the Paris Agreement.

effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge.⁷

Part XII of the Convention is therefore to be interpreted and applied on the basis of the best available scientific evidence. In this way, the scientific evidence identified by the IPCC, and measures indicated by the IPCC, must inform all actions to be taken to meet the requirements of the Convention.⁸

That evidence, and the measures indicated, include quantified indications of the deep emission reductions that are needed to close the emissions gap and avoid risks of catastrophic irreversible harm to the marine environment.⁹

The science informs the law and, accordingly, the law is about numbers, in relation to both Part XII obligations as well as those under the international climate regime. Those numbers include the quantities of greenhouse gases actually emitted and the scale of reductions required, down to net zero.

Article 300 of the Convention imposes upon the Parties an obligation to act in “good faith” and in the context of the emissions and production gaps to which Professor Sands has referred, good faith, as with the Paris Agreement, requires ambition and effectiveness.¹⁰ A lack of urgency would run counter to the science and, we say, counter to the law.

Mr President, science provides the basis for determining the rules and standards necessary for the prevention, reduction and control of greenhouse gas pollution, as required by article 194, and Section 5 of Part XII, taking into account articles 197, 200 and 201. Article 194 requires Parties to take “all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source”. What is “necessary” must be assessed objectively, on the basis of the science and the temperature goal, reinforced by the customary obligation to ensure that activities respect the environment of other States and areas beyond national control, as well as the principles I have already mentioned.

Emissions of greenhouse gases are a form of pollution within the meaning of article 1(1)(4) of the Convention, as the great majority of participating States agree. Mauritius invites the Tribunal to recognize expressly that greenhouse gas emissions are pollution within the meaning of the Convention, and that they therefore are governed by Part XII.

Mauritius further invites the Tribunal to confirm that the relationship between the Convention and the international climate regime is based on a coherent and harmonized approach, one that gives full effect to article 293, and also to article 31(3)(c) of the Vienna Convention on the Law of Treaties, which the International Law Commission Study Group has invoked in recognizing the dynamic nature of the international legal order.¹¹ Indeed, this Tribunal has always proceeded on the basis of seeking coherence between the Convention and other rules of international law.¹²

Coherence requires compliance with nationally determined contributions and related obligations under the Paris Agreement, including in relation to due diligence, but it also requires more. Nationally Determined Contributions may not currently address their implications for the marine environment. While some emissions, including those from vessels and aviation are not yet consistently included in Nationally Determined Contributions, due

⁷ Paris Agreement, Preamble.

⁸ See: written statement of the United Nations Environment Programme (UNEP), 16 June 2023, para. 22.

⁹ IPCC Special Report on Global Warming of 1.5°C, available at: <https://www.ipcc.ch/sr15/download/> (last accessed 9 September 2023), B.6.3, p. 13 and AR6.

¹⁰ Paris Agreement, articles 3, 4(3), 4(5), 4(11) and 6(1).

¹¹ ILC, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, A/CN.4/L.702 (18 July 2006), available at: https://legal.un.org/ilc/documentation/english/a_cn4_l702.pdf (last accessed 9 September 2023).

¹² *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 169 (and the cases cited therein).

diligence obligations under Part XII expressly require Parties to address greenhouse gases emissions from “all” sources. In this way, the obligations under the Convention go beyond current practice under the UNFCCC and the Paris Agreement.

Article 2(2) of the Paris Agreement provides that it will be implemented to “reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” Mauritius invites the Tribunal to confirm that this principle is applicable under the Convention. Small Island Developing States, like Mauritius, have contributed the least to global emissions of greenhouse gases but face existential threats as a result of those emissions.

The Tribunal has previously recognized the importance of precaution in taking actions under the Convention. Mauritius invites the Tribunal to confirm that in the face of uncertainty as to the effects of climate change, a precautionary approach is required under customary law, as reflected in Principle 15 of the Rio Declaration on Environment and Development.

Mr President, distinguished members of the Tribunal, in summary, what we are saying is that the requirements of the Convention are to be interpreted and applied taking into account the requirements of the UNFCCC and the Paris Agreement, but those treaties do not exclude the application of the Convention to climate change, and they do not limit the obligations that arise. Both regimes are informed by climate science presented by the IPCC and UNEP. The law can require, support and frame an effective response to climate change but only if it is based on the science and the international climate goals agreed in response to that science.

Mauritius invites the Tribunal to confirm that specific obligations under Part XII are informed by, and must be framed by, the science and the grave risks it has identified.

I thank you for your kind attention and invite you to call Professor Sands back to the podium.

THE PRESIDENT: Thank you, Ms Cook.

We have now reached 11:30. At this stage the Tribunal will withdraw for 30 minutes. We will continue at 12:00.

(Short break)

THE PRESIDENT: I now give the floor to Mr Sands to continue his statement. You have the floor, Sir.

STATEMENT OF MR SANDS (continued)
 MAURITIUS
 [ITLOS/PV.23/C31/9/Rev.1, p. 25–35]

Thank you very much, Mr President, members of the Tribunal, I turn now to the substantive responses to the questions posed in the request: what are the specific obligations of the Parties to the Convention? And you could say that these are innumerable. So we’re going to focus on what we consider to be those areas in which this Tribunal can perhaps offer the greatest assistance. And these are mostly in relation to Part XII, but not exclusively.

The first area, intimately related to the science, is the fundamental goal: to confirm that the IPCC’s 1.5°C temperature goal informs the interpretation and application of all obligations under Part XII. This is now an internationally agreed threshold under the Paris Agreement, and it is one that reflects a minimum commitment to prevent undue harm to the marine environment.¹ The goal is a specific expression of the UNFCCC’s objectives to prevent dangerous anthropogenic interference with the climate system.²

It is also an internationally agreed commitment to “significantly reduce the risks and impacts” of climate change.³ A failure to give effect to this goal will of itself be inconsistent with articles 192, 193 and 194 of the Convention, and will expose Parties to the risk of responsibility and liability under the Convention. Mauritius joins others in submitting that this temperature goal limits the Parties’ discretion under article 194 of the Convention.⁴

The temperature goal as an “international rule or standard” must be taken into account, as articles 207 and 212 require, and it must be complied with, as article 211 provides. Relatedly, the Part XII obligations may require, as Ms Cook said, even more actions informed by specific emission pathways that have been identified by the IPCC as necessary to achieve the temperature goal because, as the IPCC has made clear, and I quote, “even short periods of overshoot ... are expected to be extremely damaging to coral reefs”.⁵

Our second key area: Mauritius invites the Tribunal to confirm that the Convention requires all Parties to act with due diligence in relation to any activity that may give rise to greenhouse gas emissions that may harm the marine environment, directly or indirectly. This point is, of course, supported by the great majority of States participating in these proceedings who have also agreed – if I have listened with sufficient care – that the due diligence standard is to be an exacting one.

As the Tribunal itself has confirmed in an earlier advisory opinion – and I quote, “[t]he standard of due diligence has to be more severe for the riskier activities”,⁶ end of quote – burning fossil fuels is a most risky activity.

What this means is that as the risk increases, the standard of due diligence becomes more stringent. As many participating States have noted, the IPCC has expressed with a “high degree of confidence” that “[e]very increment of global warming will intensify multiple and concurrent hazards”.⁷ The additional risks posed by temperatures rising by more than 1.5°C

¹ The risks associated with four of the IPCC’s Reasons for Concern—extreme weather events, disproportionate distribution of impacts, global aggregate impacts, and large-scale singular events—moves from moderate to high once average global temperature rise exceeds 1.5°C above pre-industrial levels: SR 1.5, p. 254.

² Article 2(1)(a) of the Paris Agreement and article 2 of the UNFCCC.

³ Article 2(1)(a) of the Paris Agreement.

⁴ Written statement of Portugal, para. 67.

⁵ IPCC, SR 1.5, p. 230.

⁶ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), para. 117.

⁷ IPCC, AR6, SYN, B.1.

necessarily means that, if the emissions gap is to be closed, Part XII requires the due diligence standard to be applied strictly.⁸

What does due diligence mean in practice? On the basis of the science and of the Paris Agreement, it means that Part XII of the Convention, and article 194 in particular, requires each State Party to quantify all greenhouse gas emissions from any source. Such emissions must then be assessed and justified against the remaining carbon budget, as identified by the IPCC. This quantitative assessment – numbers – is required by the UNFCCC, the Paris Agreement and, we submit, also by this Convention. If there is any uncertainty as to specific impacts of climate change on the marine environment, then as we've said, precaution cuts in under the Convention and may require even more actions.

Quantified assessments are precautionary and necessary to determine whether a State Party has complied with the Convention, in particular whether it has utilized the best efforts and taken “all necessary measures” to protect the environment.⁹ We have taken note of the question about obligations of conduct or of result, and we're not sure that that much turns upon it. But unlike my good friend Professor Paparinskis, we would say, this is also an obligation of result.

The days of generalized commitments of waffle about article 192 and 194 are surely over. You must, in your advisory opinion, we respectfully submit, talk about numbers.

Due diligence has another element: to protect the marine environment, we say that every State Party must ensure that the measures it takes to reduce greenhouse gas emissions do not, of themselves, cause pollution by other means of the environment. This is required by articles 192 and 194, but also by article 195, which prohibits the transfer, directly or indirectly, of one type of pollution into another.

And this approach applies to all sources of greenhouse gas emissions. For example, land-based sources, which are relevant under the Convention, due diligence is governed by article 207(5), which requires measures “designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent”. It is not disputed that greenhouse gases are persistent in their effects.¹⁰

In relation to atmospheric pollution, the due diligence standard requires article 212 to be read consistently with the temperature goal and the mitigation framework established under the Paris Agreement.

There is another aspect of due diligence that is important. The Tribunal has stated that in exercising rights and performing duties under the Convention, States Parties must have regard to the rights and duties of one another.¹¹ Climate change is a common concern of humankind, which means that this obligation is all the more significant: reducing emissions, and closing the emissions gap, is an obligation that requires an individual effort and a collective effort.

And the due diligence standard is also closely connected to the obligation to assess activities before they are implemented. And in this regard, article 206, we say, is of singular importance. Any planned activities that will emit greenhouse gases – that includes the production and use of any fossil fuel – will contribute to causing “substantial pollution” and “significant and harmful changes to the marine environment”.

It follows that the Convention requires States to assess those potential effects from all sources and to do so before the activity takes place. This obligation is consistent with the Paris

⁸ See written statement of Belize, para. 89(b).

⁹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), para. 110.

¹⁰ IPCC, SR 1.5, C.2 p. 17.

¹¹ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Advisory Opinion, paras. 130-140.

Agreement and assessment obligations under international law more generally in relation to transboundary environmental harms.¹²

In short, due diligence under the Convention requires States Parties to assess cumulative greenhouse gases from all planned activities – projects, programmes, investments, financings, policies, absolutely everything. And this includes all Scope 1, Scope 2 and Scope 3 emissions.¹³ Assessments must also, to be clear, be carried out in a transparent manner.¹⁴

I turn to our third key point. Mauritius invites the Tribunal to underscore the cardinal importance of article 197 of the Convention: States Parties must cooperate, directly or through competent international organisations, on international rules and standards to protect and preserve the marine environment. In the *MOX Plant* case, the Tribunal rightly emphasized, we believe, the fundamental nature of this obligation to cooperate.¹⁵

And in this context, cooperation has at least three significant elements under the Convention.

First, Parties must engage constructively in efforts to develop more international rules and standards to prevent climate change so as to protect the marine environment against its adverse consequences.

Second, Parties must act consistently with relevant international rules and standards under the international climate regime, including technical and procedural standards for reporting all their greenhouse gas emissions.

And *third*, Parties must cooperate to ensure that all relevant sources of emissions of any greenhouse gases are covered. And this means, by way of example, that the venting and flaring of methane from offshore oil and gas infrastructures is subject to all of the constraints imposed by the Convention.

Mr President, I turn to the fourth key area: Mauritius invites the Tribunal to confirm that due diligence under the Convention also imposes obligations on adaptation to the impacts of climate change on the marine environment. What this means in practical terms is that special regard must be paid to those most affected by such impacts, including the most vulnerable States and communities, and that technical and financial assistance is required as a matter of binding legal obligation under the Convention.

Let's be clear again: the IPCC has told us that climate change is happening, and that the impacts on the marine environment are going to be grave and irreversible in some cases. Article 192 obliges States Parties to address all of those impacts, period. The nature and extent of those obligations are informed by the terms of the Paris Agreement and by the science: to enhance adaptive capacity, to strengthen resilience and to reduce vulnerabilities. The Paris Agreement requires Parties, in addressing adaptation, to act on the basis of the best available science and, as appropriate, very importantly for many countries and communities, traditional knowledge, knowledge of Indigenous peoples and local knowledge systems.¹⁶ These principles inform the obligations under Part XII. They inform, for example, the obligation under article 194(5), which is of particular significance to Mauritius, to protect and preserve fragile ecosystems, endangered species, and other forms of marine life.

¹² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, para. 104.

¹³ The GHG Protocol Corporate Standard classifies a company's GHG emissions into three "scopes". Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.

¹⁴ See articles 4(13) and article 13 of the Paris Agreement.

¹⁵ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, para. 82.

¹⁶ Article 7(5) of the Paris Agreement.

The IPCC has highlighted the impacts on those who depend for their well-being and livelihoods on the marine environment by increased exposure to extreme weather events, adverse impacts on fisheries, and coastal inundation and erosion resulting from sea-level rise.

Mauritius is already impacted by these events and we say that the Convention requires action to mitigate these and other effects of climate change to support increased resilience and to reduce the vulnerabilities. And in this regard, articles 202 and 203 of the Convention appear to us to be of singular importance, interpreted and applied in a manner that gives effect to the general principle under international law of common but differentiated responsibility. The Convention requires Parties to have regard to the needs of the most vulnerable and impecunious developing countries, by providing technical assistance and allocating appropriate funds.

On mitigation and adaptation, the Convention is not silent. It has to be interpreted and applied to give effect to the requirements of the Paris Agreement. Its article 2(1)(c) emphasizes the need for flows of finance to contribute to “low greenhouse gas emissions and climate-resilient development”.

Its article 9(1) requires developed country Parties to provide financial resources to assist developing country Parties for mitigation and adaptation. And the Standing Committee on Finance to the UNFCCC and Paris Agreement has recently emphasized that finance flows must reduce the likelihood of negative climate outcomes.¹⁷ For its part, the IPCC has emphasized that climate goals can only be met by financing adaptation and mitigation on a far greater scale than is already happening.¹⁸

Now, some may ask, what has all of this got to do with the Convention? We say this: articles 192 and 194 impose positive obligations on States Parties, and those obligations encompass an obligation to provide adequate investments to reduce greenhouse gas emissions, as well as an obligation not to finance those measures which will lead to emissions that are not consistent with the 1.5°C goal; for example, on the financing of fossil fuel reduction.

Article 202 is to be interpreted and applied to require States to provide appropriate assistance to developing States, to minimize the effects of climate change and to assist in preparing their environmental assessment.

Article 203 imposes an obligation to provide preferential treatment to developing States not as a matter of largesse or generosity, but by operation of law. The Tribunal’s affirmation of these points can go some considerable way in enhancing cooperation.

I turn to our fifth area. Mauritius invites the Tribunal to confirm that article 235 of the Convention, which is in Part XII, is engaged by climate change and its consequences. That provision makes clear that every State is responsible for the fulfilment of its obligations to protect and preserve the marine environment from the effects of climate change, and that a failure to meet its responsibilities will give rise to liability under international law.

Of particular importance is one cardinal principle: a failure to give effect to the best available scientific evidence, in this case the IPCC, will, we say, expose a State Party to the risk of liability under the Convention as well as general international law. And this Tribunal should be clear in what it says in relation to article 235. If you wish to avoid liability, follow the science. Ignore the science at your peril.

Now, some States – and we know who they are and why they say this – have suggested that this Tribunal should somehow avoid addressing article 235 even though it’s in Part XII.¹⁹ We respectfully disagree. The specific obligations to which the two questions refer are directly and pertinently relevant to matters of responsibility and liability under article 235(1) which

¹⁷ Report of the Standing Committee on Finance to the Conference of the Parties, 23 November 2018, FCCC/CP/2018/8, Annex II: Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows, para. 49.

¹⁸ IPCC, AR6, SYN, SPM, A.4.5.

¹⁹ See written statements of Australia and Portugal (amongst others).

makes clear that States are responsible for the fulfilment of their international obligations and shall be liable in accordance with international law. Those international obligations include the obligation under the Convention to prevent climate change and the adverse effects of emissions. Those obligations are informed by, but not limited to, obligations arising under the Paris Agreement.

Loss and damage, as you are aware, have become a central focus of the international agenda, including but not limited to, the Paris Agreement.²⁰ Parties to the Paris Agreement are required to avert, minimize and address loss and damage from climate change.²¹ Those commitments, Paris commitments, are entirely and juridically distinct from the requirements of article 235.

They do not seek to extinguish the application of that provision or other analogous provisions. And article 235 may come to assume particular importance to Small Island Developing States like Mauritius, amongst others, whose very existence may be threatened by the actions of others. The well-being of the marine environment and its coastal zones, and the need to avoid harm to human health and fishing and other activities, are all explicitly encompassed by the definition of pollution in article 1(1)(4) of the Convention. The IPCC has addressed these and other hazards.²² It has highlighted the threats to life and to human rights posed by the impacts of climate change on the marine environment, and the consequential need for early warning systems and coastal defences.²³

In the context of Part XII as a whole, and having regard to the International Law Commission's Draft articles on State Responsibility, in our submission, article 235 is engaged and imposes distinct obligations under the Convention, where a State Party fails to act with due diligence and on the basis of the best available science.²⁴ Of course, the application of article 235 will always turn on the facts of a particular situation, which we say necessarily includes historic emissions. But let us be clear: those States that have emitted the most since the age of industrialization bear the greatest responsibility to make the deepest cuts in emissions today.

Mauritius' contribution to the grave threat of climate change is miniscule, but it is on the front line of vulnerability. Why should Mauritius bear the burden of losses caused by the actions and enrichment of others? Why should Mauritius not be able to invoke its rights under all of the Convention, all of Part XII, including article 235? Mauritius, and every other Party, is entitled to hold others to account under article 235 – any Party that has breached its obligations under the Convention to protect and preserve the marine environment. This, we hope, the Tribunal will state clearly and without ambiguity.

If you pass in silence on this point, you will in effect create an incentive for States to do nothing.

Mr President, I turn to our sixth point: Mauritius invites the Tribunal to confirm in this advisory opinion that sea-level rise, a consequence of pollution that is not permitted by reference to the requirements of Part XII, will not affect existing maritime claims or entitlements. This should be so where a State has claimed maritime entitlements on the basis of maritime features prior to sea-level rise, or where claims or boundaries have been agreed by States, or where they have been determined by an international court or tribunal.

There is, in other words, no obligation under the convention or Part XII as a consequence of rising sea levels caused by pollution for a coastal State to revisit its maritime

²⁰ See article 8 of the Paris Agreement and the COP27 Fund.

²¹ Article 8(1) of the Paris Agreement.

²² SROCC.

²³ IPCC, AR6, SYN, SPM, A.3.2. See also: Human Rights Committee General Comment No. 36 on the Right to Life, at para. 62.

²⁴ Article 194(1).

boundaries. This is intimately connected to issues of obligations in relation to Part XII. And this is a matter of particular importance for a country like Mauritius and so many other coastal States.

Mauritius and the Maldives recently appeared before a Special Chamber of this Tribunal to resolve a long-standing dispute over their maritime boundary. The boundary delimited by the Tribunal was based on maritime features – Peros Banhos Atoll, Salomon Islands Atoll and Blenheim Reef in the case of Mauritius, and Addu Atoll in the case of Maldives. All are gravely threatened by sea-level rise. We trust that the Tribunal will confirm that the maritime boundary it determined in this case, as it has in other cases, and all other maritime boundaries it has confirmed, will not be affected by sea-level rise. If you don't say something about this aspect, there's another international court that is waiting to do so, and we hope you will address this point.

Sea-level rise is affecting maritime features, and Ambassador Koonjul has told you how, in terms of measurable increases in sea-level rise. The location of basepoints, the drawing of baselines, the delimitation of maritime boundaries and entitlements up to and beyond 200 nautical miles are all affected, apparently, by pollution of greenhouse gases.

The Tribunal can do a lot therefore to promote stability in international relations and certitude that is at the heart of any legal order by addressing this issue. It's a golden thread that runs through international practice and decisions relating to maritime spaces and boundaries.

And three particular situations come to mind. The first is when a maritime boundary has been determined by an international court or tribunal, as in the case before which Mauritius recently appeared here in Hamburg. The arbitral tribunal in *The Bay of Bengal Maritime Boundary Arbitration* resisted the suggestion that its preferred equidistance line could later be affected by consequences of climate change.²⁵

A second situation is where a State has deposited with the Secretary-General of the United Nations material to describe the outer limits of its continental shelf up to 200 nautical miles. We say it would be enormously helpful, in terms of stability and certitude, if the Tribunal could confirm that such descriptions apply “permanently” in accordance with article 76(9) of the Convention and will not be affected by sea-level rise, which is caused by the pollution caused by others. Why should Mauritius have to suffer uncertainty in relation to its maritime boundaries because of pollution inconsistent with the requirements of the Convention that have been caused by other States? That is not right and it would not be in accordance with the law.

A third situation is where a State has submitted material in support of a continental shelf entitlement beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf, pursuant to article 76(8). That provision is clear in providing that the limits of the shelf established pursuant to that process shall be final and binding, but it doesn't address the possible effects of sea-level rise, which may intervene in the regrettably lengthy period which now exists between material being submitted and a Commission recommendation being made. Again, this Tribunal can do much for stability and certitude by confirming that sea-level rise will not affect such determinations.

The key issues here are stability and certitude in the legal order, and we say they would be undermined if you indirectly or by silence say nothing on this, which effectively would be used by those who wish to say that pollution can cause boundaries to shift. Small and low-lying States have stated a clear and common view that their baselines and maritime entitlements must not be affected by rising sea-levels.²⁶ An overwhelming majority of all States support that

²⁵ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award, 7 July 2014, paras. 217 & 213-220.

²⁶ The Taputapuātea Declaration on Climate Change signed by the leaders of French Polynesia, Niue, Cook Islands, Samoa, Tokelau, Tonga and Tuvalu, 16 July 2015 (<https://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf>); The Delap Commitment on Securing Our Common

position of principle. The International Law Association rejected the notion of ambulatory baselines in the context of sea-level rise²⁷ and the International Law Commission has followed suit, noting that there was no language in text of the Convention to support a different approach.²⁸ We do invite the Tribunal to speak, with its customary authority, on this absolutely essential issue.

Mr President, members of the Tribunal, I conclude on behalf of Mauritius. Climate change is real and present as a danger to the global community, to every State Party of the Convention, to all States and other statal entities, indeed, to every single human being.

The challenges ahead are daunting by any standard. We cannot be starry-eyed and imagine that the law alone – or the Law of the Sea Convention alone – will offer some sort of a magic remedy. But the law is important, just as our oceans are important, and the Tribunal for the Law of the Sea is the guardian of that most important law. If you don't speak on these issues, the International Court of Justice or others will.

There may be a temptation, as I alerted earlier, to say it is all too complicated, or that the matter is being addressed in other fora. To be clear, the Tribunal will want to be sure that what it says in its advisory opinion does not disrupt the work being done in other fora, in particular under the UNFCCC and the Paris Agreement, even if they do not fully meet the obligations under this Convention. But just as those instruments inform the interpretation of this Convention, so does this Convention inform the engagement of those instruments in relation to the protection of the marine environment. This Convention is distinct from Paris.

Wealth of Oceans, signed by the heads of State or their representatives of The Federated States of Micronesia, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, Republic of Palau, Independent State of Papua New Guinea, Solomon Islands and Tuvalu, 2 March 2018

(https://www.pnatuna.com/sites/default/files/Delapper_cent20Commitment_2ndper_cent20PNAPER_cent20Leadersper_cent20Summit.pdf);

Act No. 13 of 2016

(https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mhl_mzn120_2016_1.pdf);

Baselines around the Archipelagos of Kiribati Regulations 2014

(https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_2014_archipel_baselines_regulations.pdf).

Also Kiribati Exclusive Economic Zone Outer Limit Regulations 2014, available at:

(https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KIR_2014_eez_outer_limits_regulations.pdf).

Declaration of Archipelagic Baselines 2012, LN No. 7 of 2012 (Tuvalu)

(https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/tuv_declaration_archipelagic_baselines2012_1.pdf);

Pacific Oceanscape Vision: A Secure Future for Pacific Island Countries and Territories Based on Sustainable Development, Management and Conservation of our Ocean

(<https://www.sprep.org/attachments/Publications/BEM/oceanscape-brochure.pdf>);

'Observations by the Federal States of Micronesia in Connection with the Official Deposit of its Lists of Geographical Points of Coordinates, Accompanied by Illustrative maps, for Maritime Baselines and Maritime Zones in Accordance with the 1982 United Nations Convention on the Law of the Sea', available at:

https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsreposit/FSM_Observations.pdf; Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (<https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>); Launch Of The Alliance Of Small Island States Leaders' Declaration (<https://www.aosis.org/launch-of-the-alliance-of-small-island-states-leaders-declaration/>).

²⁷ Report of the International Law Association, Committee on International Law and Sea-level rise, Sydney Conference (2018) (https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018cteversion), pp. 16-19; ILA Resolution 5/2018 (https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english-2).

²⁸ International Law Commission, 'Sea-level rise in Relation to International Law: First Issues Paper', UN Doc A/CN.4/740 (28 February 2020), paras. 78 & 82-104.

We live with an integrated legal order, and the relationship goes in two ways, which is why this advisory opinion is so potentially very important.

It can lead the way. It can encourage other international courts and tribunals – and equally importantly, national courts and tribunals who are now facing these kinds of issues – on how the law of the sea and the applicable law under the Convention can be harnessed to protect our oceans and our planet.

This Tribunal has never shirked its responsibilities. It has, in so many of its cases, not least the Advisory Opinions of 2011 and 2015, spoken in a clear voice, one that has avoided platitudes; one that is not passed in silence on the most difficult issues. And so, by way of conclusion, Mauritius invites the Tribunal to so speak again in this truly most important of matters.

Mauritius expresses the hope that the Tribunal will offer clear guidance in the following ways:

first, the science is established;

second, all relevant obligations under the Convention are informed by the science;

third, those obligations under the Convention are distinct but necessarily informed by and consistent with other rules of international law, in particular, but not limited to, the UNFCCC and the Paris Agreement;

fourth, that the internationally agreed 1.5°C temperature goal informs specific obligations under the Convention, but does not limit those obligations;

fifth, to protect the marine environment from greenhouse gas emissions, particularly from fossil fuel emissions, States Parties must act in accordance with a standard of due diligence, including in relation to prior environmental assessment;

sixth, the duty of cooperation in relation to the protection of the marine environment is paramount in closing gaps in the regulation of greenhouse gases, including emissions gaps and production gaps;

seventh, the obligation of due diligence covers mitigation and adaptation, including the requirement to provide technical and financial assistance;

eighth, article 235 of the Convention is applicable to the consequences of climate change to the marine environment;

and *ninth*, baselines, maritime entitlements and boundaries shall not be affected by sea-level rise in the context in which I have addressed.

Mr President, members of the Tribunal, this concludes the oral statement of Mauritius. We thank you truly for your kind attention.

THE PRESIDENT: Thank you, Mr Sands.

I now give the floor to the representative of the Federated States of Micronesia, Mr Mulalap. You have the floor, Sir.

STATEMENT OF MR MULALAP
MICRONESIA

[ITLOS/PV.23/C31/9/Rev.1, p. 35–42]

Mr President, distinguished members of the Tribunal, good day. It is a tremendous honour for me to deliver an oral statement on behalf of the Federated States of Micronesia in the present case.

This statement will supplement the written statement that was submitted by the Federated States of Micronesia to the Tribunal earlier this year. For the sake of brevity, I will not repeat the factual recitations and the arguments advanced by the Federated States of Micronesia in our written statement unless necessary. Those recitations and arguments, of course, remain endorsed by the Federated States of Micronesia. Additionally, I wish to inform the Tribunal that for the rest of this oral statement, I will refer to the Federated States of Micronesia as simply “Micronesia.”

For this oral statement, I will address four main points that build on Micronesia’s written statement, respond to certain points raised in other statements in the present case and introduce a number of additional elements. The four main points are:

first, the jurisdiction and discretion of the Tribunal to issue the advisory opinion requested by the Commission of Small Island States on Climate Change and International Law, or COSIS;

second, the deficiencies in focusing narrowly on the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, when determining the relevant sources of rules, standards, practices and procedures that inform the implementation of obligations in the United Nations Convention on the Law of the Sea, UNCLOS, particularly its Part XII;

third, the applicability of international human rights, the rights and knowledge of Indigenous People and the rights of nature; and

fourth, the relevance of rules on the responsibility of States for internationally wrongful acts.

On the jurisdiction of the Tribunal to issue the advisory opinion requested in the present case, Micronesia acknowledges that a number of statements in the present case either do not take a definitive position on the question of advisory jurisdiction or raise notes of caution regarding the Tribunal’s exercise of such jurisdiction – with some statements calling on the Tribunal to provide a careful articulation, if not a reconsideration, of the bases for its advisory jurisdiction as a full body.

Micronesia recalls that the Tribunal has already articulated in Case No. 21, with authority and conviction, that the Tribunal has jurisdiction to issue advisory opinions as a full Tribunal if certain prerequisites are first met. As articulated in our written statement, and as demonstrated by most other statements in the present case, it is Micronesia’s view that the request from COSIS meets all of those prerequisites. We will not recap those statements today.

We do want to add, however, that in the years since Case No. 21, the international community has signalled strong support for the Tribunal’s exercise of advisory jurisdiction as a full Tribunal. We point to the adoption in June of this year of the final text of the so-called BBNJ Agreement, whose article 47(7) authorizes the Conference of the Parties to the BBNJ Agreement to request an advisory opinion from the Tribunal on a particular legal question. This article was negotiated and finalized with a view to meeting the prerequisites for seizing the Tribunal’s advisory jurisdiction as a full Tribunal that the Tribunal identified in Case No. 21.

The BBNJ Agreement was negotiated as an international legally binding instrument under UNCLOS by all States Parties to UNCLOS. Indeed, the President of the Tribunal referenced this development in his remarks to the 33rd Meeting of States Parties to UNCLOS

in New York earlier this year, where he said, among other things, that “[t]he inclusion of such a provision in the new agreement reflects the potential usefulness of advisory opinions when dealing with complex ocean governance issues.” Therefore, depending on when the BBNJ Agreement enters into force, it is poised to represent either subsequent State practice or subsequent agreement of UNCLOS States Parties that is relevant to the interpretation of UNCLOS, including the provisions of UNCLOS and integral subsidiary documents pertaining to the advisory jurisdiction of the Tribunal.

This issue of advisory jurisdiction should no longer be doubted, let alone be the subject of outright dispute. The strong positive engagement by the international community in the present case underscores this point. We encourage the Tribunal to reaffirm its advisory jurisdiction, as established in Case No. 21, rather than weaken that jurisdiction in any manner.

With respect to the Tribunal’s discretion to issue an advisory opinion requested in the present case, Micronesia reiterates that the general rule regarding discretion is whether there are “compelling reasons” for the Tribunal to choose not to exercise its advisory jurisdiction. Not only does Micronesia not know of any such compelling reasons, it is our view that the inverse is true, namely, that there are numerous compelling reasons for the Tribunal to exercise such advisory jurisdiction.

We point to the groundswell of support in the international community for the issuance of advisory opinions relating to anthropogenic greenhouse gas emissions, such as the current advisory proceedings before the Inter-American Court of Human Rights and the International Court of Justice. Synergies between this Tribunal and those other advisory proceedings will be key.

We point as well to the clear and alarming evidence, as reported by the Intergovernmental Panel on Climate Change as well as captured in the Synthesis Report for the technical dialogue for the first Global Stocktake under the Paris Agreement, that anthropogenic greenhouse gas emissions are the predominant cause of what the United Nations Secretary-General calls the “global boiling” and “climate breakdown” now afflicting the Earth, including the marine environment. There is no more time for delay, caution and deferral, including by States Parties to UNCLOS.

I will now address several substantive elements pertaining to the questions presented by COSIS in the present case, with a reminder that, in our written statement, Micronesia has joined the overwhelming majority of submissions in asserting that anthropogenic greenhouse gas emissions constitute pollution of the marine environment under UNCLOS. I begin with the role of the UNFCCC and the Paris Agreement (which I will at times collectively call the “UNFCCC regime”) in the identification of other rules of international law not incompatible with UNCLOS, including internationally agreed rules, standards and recommended practices and procedures that pertain to the pollution, protection and preservation of the marine environment, including as reflected in Section 5 of Part XII of UNCLOS.

We acknowledge that a number of written statements in the present case emphasize the centrality of the UNFCCC and the Paris Agreement to the international legal infrastructure applicable to addressing climate change. However, we stress that while the UNFCCC and the Paris Agreement are key international instruments for tackling the climate crisis, particularly with respect to establishing the long-term temperature goal in article 2 of the Paris Agreement, they are not the sole sources of applicable international law, and this Tribunal must avoid the trap of being narrowly focused on the UNFCCC regime.

For example, the International Maritime Organization and the International Civil Aviation Organization address gaps in the UNFCCC regime pertaining to emissions from shipping and aviation, respectively. The Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer as well as the Kigali Amendment address short-lived but highly impactful climate pollutants that are not

directly regulated by the UNFCCC regime. The Parties to the Convention on Biological Diversity recently adopted the Kunming-Montreal Global Biodiversity Framework which, among other things, contains Targets 8 and 11 addressing the relationship between anthropogenic greenhouse gas emissions and biological diversity, including in the marine environment.

Therefore, in terms of treaty law, it is clear that the UNFCCC regime is neither the sole nor the final authority for climate action under international law. The UNFCCC and the Paris Agreement establish a long-term temperature goal for addressing the climate change crisis, but other sources of international law play important roles in achieving and complementing that goal, including through measures that have greater degrees of legal bindingness than much of the Paris Agreement, such as in the Montreal Protocol and Kigali Amendment. This, in turn, helps States Parties satisfy their obligations in UNCLOS pertaining to the pollution, protection and preservation of the marine environment.

Put another way, if the UNFCCC regime is currently insufficient for preventing, reducing and controlling pollution of the marine environment as well as protecting and preserving the marine environment, then States Parties to UNCLOS that are also Parties to the UNFCCC and the Paris Agreement must push the UNFCCC regime to be more effective in addressing harms to the marine environment, while also pursuing complementary efforts with greater binding effect under other relevant intergovernmental processes and multilateral instruments, including the assumption of legally binding emission reduction obligations.

Additionally, while we acknowledge that a prominent element of Part XII is the duty to cooperate, we agree with COSIS that adherence to the UNFCCC regime is not sufficient to satisfy the duty to cooperate. There is a need to cooperate beyond those instruments if current cooperation through those instruments is insufficient to achieve the objectives envisioned by UNCLOS for such cooperation.

We also agree with COSIS that the duty to cooperate does not displace individualized State obligations under UNCLOS to take national action regarding the pollution, protection and preservation of the marine environment. In sum, the UNFCCC regime cannot represent the lowest common denominator preventing more robust global and domestic action by members of the international community because of a misplaced (or bad faith) reverence by States of the UNFCCC regime, to the exclusion of other valid processes and approaches. That sort of thinking, we submit, is not supported by the law, and it is part of the reason we are in a climate crisis today.

As a necessary corollary, States Parties to UNCLOS can act within UNCLOS itself to regulate anthropogenic greenhouse gas emissions in order to address the pollution, protection and preservation of the marine environment, taking into account the work done under the UNFCCC regime and other international legally binding instruments but not necessarily being limited by such work.

If the UNFCCC regime and other such instruments did not exist, States Parties to UNCLOS would still be obligated under UNCLOS to prevent, reduce and control pollution of the marine environment as well as to protect and preserve the marine environment from the harms caused from anthropogenic greenhouse gas emissions. The relevant obligations in UNCLOS have inherent and independent force.

Because of painful political compromises, the UNFCCC regime is unable at the moment to impose legally binding emission reduction targets on its Parties that are necessary to achieve the long-term temperature goal of the Paris Agreement, but that does not prevent States Parties to UNCLOS from adopting such targets for ourselves domestically or in other intergovernmental processes – or from being compelled by a competent tribunal to adopt such targets for ourselves – in order to discharge our obligations under UNCLOS with respect to the pollution, protection and preservation of the marine environment.

I turn now to the applicability of international human rights and related matters to the present case. A number of statements in the present case – including Micronesia’s own written statement as well as the statements from Chile and Nauru that we heard the other day and from Mauritius today – highlight the relevance of international human rights to the consideration of the harms to the marine environment caused by anthropogenic greenhouse gas emissions.

Indeed, just because human rights feature prominently in other advisory proceedings pertaining to climate change under other bodies, that is not a sufficient reason for this Tribunal to refrain from addressing human rights. Human rights apply to all peoples at all times and in all spaces, including with respect to the marine environment. This Tribunal has an opportunity to provide an important contribution to international law in a manner that will substantively inform future advisory proceedings that touch on the nexus between human rights and anthropogenic greenhouse gas emissions. The Tribunal should not shy away from this opportunity.

How, exactly, should the Tribunal characterize the interplay between international human rights and UNCLOS? One way to think about this is that international human rights are part of the corpus of internationally agreed rules, standards, practices and procedures that must be taken into account – if not actively pursued and implemented – when determining what steps must be taken by UNCLOS States Parties to address the pollution, protection and preservation of the marine environment from harms caused by anthropogenic greenhouse gas emissions.

Additionally, as indicated by the representative of Chile the other day, article 293 of UNCLOS, as interpreted by the Tribunal in Case No. 21, allows for the Tribunal to apply “other rules of international law not incompatible with [UNCLOS]” in advisory proceedings, and international human rights can be deemed to form part of such “other rules”.

To put this interplay into action, States Parties to UNCLOS must work through all intergovernmental processes and multilateral instruments pertaining to the climate crisis, including, but not limited to, the UNFCCC regime, as well as in domestic contexts in order to prevent, reduce and control anthropogenic greenhouse gas emissions to such an extent as to ensure that all peoples are able to enjoy the full sweep of human rights associated with a healthy marine environment, including the right to life, the right to sustenance – which we heard today – the right to productive economic activity, the right to self-determination – which we heard today as well – and the right to cultural practice, not to mention the standalone right to a clean, healthy and sustainable environment, as recognized in the United Nations General Assembly resolution 76/300.

If such peoples are not able to enjoy those human rights to that full extent because of harms to the marine environment from anthropogenic greenhouse gas emissions, then that is strong evidence that the measures taken by UNCLOS States Parties to address the pollution, protection and preservation of the marine environment are legally insufficient. This is a failure of States as States Parties to UNCLOS, as well as a failure of these States as duty bearers under international human rights law. Put simply, the marine environment is not truly protected and preserved under UNCLOS, including from pollution, if those who have human rights that are dependent on a healthy marine environment cannot fully enjoy those rights.

At this point, a special mention must be made of the rights of Indigenous Peoples, whether they are considered a subset of international human rights or a separate body of rights under international law.

International law – including as reflected in the United Nations Declaration on the Rights of Indigenous Peoples – recognizes that Indigenous Peoples have collective rights pertaining to the safeguarding, conservation, development and sustainable use of their traditional territories, including coastal and maritime spaces. And harms to such traditional territories from anthropogenic greenhouse gas emissions also represent, in our view, harms to the enjoyment by Indigenous Peoples of their relevant rights. These rights must be viewed as

being part of international rules, standards, practices and procedures pertaining to the pollution, protection and preservation of the marine environment from harms caused by anthropogenic greenhouse gas emissions.

UNCLOS States Parties must work through various intergovernmental processes pertaining to the climate crisis, as well as in domestic contexts, to prevent, reduce, and control anthropogenic greenhouse gas emissions to the extent necessary to enable Indigenous Peoples to fully enjoy their rights that are dependent on a healthy marine environment. If such enjoyment is not possible due to emissions harming the marine environment, then this again is evidence of a failure of States Parties to satisfy their relevant obligations under UNCLOS.

While on the issue of Indigenous Peoples, Micronesia submits that any consideration of the impacts of anthropogenic greenhouse gas emissions on the marine environment – as well as any decisions on what measures are necessary in order to address those impacts – must take fully into account not just the best available science which we support, but also the relevant knowledge of Indigenous Peoples and local communities pertaining to the marine environment.

We point to references to such knowledge in international legally binding instruments dealing with the marine environment and climate change, such as, for example, the Central Arctic Ocean Fisheries Agreement and the recently adopted BBNJ Agreement, where such knowledge is treated as being on par with and complementary to the best available science and scientific information, including in connection with the conduct of environmental impact assessments under Part XII of UNCLOS.

We also point to references to such knowledge in the Kunming-Montreal Global Biodiversity Framework, including in its Target 3 on the so-called 30x30 initiative as well as in connection with its Targets 8 and 11. The Intergovernmental Panel on Climate Change has accepted Indigenous knowledge as complements to science in its major reports, including for its Special Report on the Ocean and Cryosphere in a Changing Climate as well as in its recent Sixth Assessment Report Cycle.

In the Pacific Islands region, such knowledge remains strong, vibrant and key to understanding the marine environment, including tracking the rapid changes in the marine environment in this era of a climate crisis. We urge the Tribunal to afford appropriate consideration to such knowledge as a complement to its discussion of the importance of the best available science, including in the context of Part XII of UNCLOS.

In addition to international human rights and the rights and knowledge of Indigenous Peoples, Micronesia acknowledges growing interest in the issue of rights of Nature, namely, that Nature itself, or at least certain ecosystems and components therein, enjoy certain rights that are separate from the rights enjoyed by peoples, and which States must safeguard on behalf of Nature or the components therein. At least one State Party to UNCLOS has enshrined the rights of Nature as a whole, including the marine environment, in its national constitution, while localities in other States Parties to UNCLOS have recognized the rights of certain environmental components in their jurisdictions, drawing in part on Indigenous views of Nature.

To the extent that UNCLOS imposes obligations pertaining to the protection and preservation of the marine environment for its own sake, this raises the intriguing notion that the marine environment, or at least certain components therein, should be deemed to have certain rights under international law, which States Parties to UNCLOS must safeguard, including by preventing dangerous anthropogenic greenhouse gas emission interference with the atmosphere and, by extension, the marine environment.

Indeed, Part XII of UNCLOS, including the key articles 192 and 194, contemplate harm to the marine environment in and of itself, in addition to harm to the enjoyment of the marine environment by humankind. In Micronesia's view, UNCLOS is worded expansively enough to

allow for the potential designation of components of the marine environment as being rights holders.

Finally, I turn to the relevance, to the present case, of rules on the responsibility of States for internationally wrongful acts. Micronesia reiterates, as in our written statement in the present case, that such rules refer to and represent international legal obligations in and of themselves, including obligations pertaining to reparations in the form of restitution, compensation and satisfaction. Additionally, article 235 of UNCLOS – which is in Part XII, as Mauritius emphasized earlier – addresses the responsibility and liability of States Parties to UNCLOS in the context of the protection and preservation of the marine environment, including the obligation to cooperate to assure prompt and adequate compensation in respect of all damage caused by pollution of the marine environment.

Micronesia acknowledges that a number of statements in the present case assert that the scope of the present case should not include questions of the responsibility of States for internationally wrongful acts, given that they are considered “secondary rules” under international law. However, we submit that the wording of the questions in the present case, as submitted by COSIS, does not preclude an expansive view of what is meant by “obligations”, given that secondary rules of State responsibility themselves contain obligations, including obligations whose discharge could lead to the prevention, reduction and control of pollution of the marine environment, as well as the protection and preservation of the marine environment in general.

Such secondary rules include, among other things, the obligation to make reparations that could include the restoration of the marine environment that is harmed; satisfaction of existing treaty requirements regarding the pollution, protection and preservation of the marine environment; and compensation that could be used to finance efforts to protect and preserve other parts of the marine environment not currently harmed, including from pollution.

The request from COSIS refers to obligations without distinguishing between primary and secondary roles, and the Tribunal can very well take a holistic view in this regard.

Micronesia submits that adherence to such rules of State responsibility is essential to addressing the pollution, protection and preservation of the marine environment, including through various forms of reparations, and we are very pleased to come after the delegation of Mauritius, which made many of the same points.

To conclude, please allow me to quote select passages from the Preamble of the Constitution of the Federated States of Micronesia, with some light editing to make them more gender neutral:

The seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger Micronesia began in the days when [humankind] explored seas in rafts and canoes. The Micronesian nation is born in an age when [humans] voyage among the stars; our world itself is an island.

With those images of common purpose, boldness and humanity’s deep connection to a marine environment that is the defining environmental feature of this planet, we stress that a robust, expansive, inclusive advisory opinion from the Tribunal will represent a landmark contribution by the Tribunal to international law on an issue of fundamental importance and profound implications for Small Island Developing States like Micronesia, as well as for the international community as a whole.

We strongly urge the Tribunal to seize this opportunity to provide authoritative guidance and clarity on what States Parties to UNCLOS are obligated to do under the full sweep of international law to curb the dangerous anthropogenic introduction of greenhouse gas

REQUEST FOR ADVISORY OPINION – COSIS

emissions into the atmosphere and the marine environment, and by extension, satisfactorily address the pollution, protection and preservation of the marine environment for the benefit of present and future generations of humankind, and for the sake of the marine environment itself on this tiny, fragile, but hopefully enduring “island” we call home as it sails through the cosmos.

Mr President, distinguished members of the Tribunal, this concludes Micronesia’s oral presentation in these advisory proceedings. I thank you very much for your kind attention and patience.

THE PRESIDENT: Thank you, Mr Yow Mulalap.

This brings us to the end of this morning’s sitting. The hearing will be resumed at 3:00 p.m. The sitting is now closed.

(Lunch break)

PUBLIC SITTING HELD ON 15 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

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New Zealand

Ms Victoria Hallum, Deputy Secretary Multilateral and Legal Affairs Group, Ministry of Foreign Affairs and Trade

Ms Charlotte Skerten, Lead Adviser, Legal Division, Ministry of Foreign Affairs and Trade

Ms Megan Addis, First Secretary, New Zealand Embassy to Belgium

Republic of Korea

Mr Hwang Jun-shik, Director-General for International Legal Affairs, Ministry of Foreign Affairs

Mr Lee Jung-woo, Director for Territory and Oceans Division, International Legal Affairs Bureau, Ministry of Foreign Affairs

Ms Back Kyung Wha, First Secretary, Territory and Oceans Division, Ministry of Foreign Affairs

Mr Oh Yuchan, First Secretary, Permanent Mission of the Republic of Korea to the United Nations

Ms Kim Jin Heui, Second Secretary, Territory and Oceans Division, Ministry of Foreign Affairs

Ms Kang Keun Hwa, Second Secretary, Territory and Oceans Division, Ministry of Foreign Affairs

China

Mr Ma Xinmin, Director-General, Department of Treaty and Law, Ministry of Foreign Affairs

Ms Huang Yingni, Deputy Director, Division of the Law of the Sea and Polar Affairs, Department of Treaty and Law, Ministry of Foreign Affairs

Ms Ju Lei, Third Secretary, Division of the Law of the Sea and Polar Affairs, Department of Treaty and Law, Ministry of Foreign Affairs

Mr Tang Yuhao, Attaché, Division of the Law of the Sea and Polar Affairs, Department of Treaty and Law, Ministry of Foreign Affairs

Mr Liu Jiecheng, Second Secretary, Chinese Embassy in Germany

Mr Zhang Xinjun, Professor, Tsinghua University

Mr Shi Yubing, Professor, Xiamen University

Mr Liu Heng, Associate Professor, Chinese Academy of Social Sciences

Ms Zhou Chen, Associate Professor, Xiamen University

AUDIENCE PUBLIQUE TENUE LE 15 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ÉTATS PARTIES

Nouvelle-Zélande

Mme Victoria Hallum, secrétaire adjointe du groupe des affaires multilatérales et juridiques au Ministère des affaires étrangères et du commerce

Mme Charlotte Skerten, conseillère principale à la division juridique du Ministère des affaires étrangères et du commerce extérieur

Mme Megan Addis, première secrétaire à l'ambassade de la Nouvelle-Zélande en Belgique

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Mme Back Kyung Wha, première secrétaire à la division du territoire et des océans du Ministère des affaires étrangères

M. Oh Yuchan, premier secrétaire à la Mission permanente de la République de Corée auprès de l'Organisation des Nations Unies

Mme Kim Jin Heui, deuxième secrétaire à la division du territoire et des océans du Ministère des affaires étrangères

Mme Kang Keun Hwa, deuxième secrétaire à la division du territoire et des océans du Ministère des affaires étrangères

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M. Ma Xinmin, directeur général du département des traités et du droit du Ministère des affaires étrangères

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Mme Ju Lei, troisième secrétaire de la division du droit de la mer et des questions polaires du département des traités et du droit du Ministère des affaires étrangères

M. Tang Yuhao, attaché à la division du droit de la mer et des questions polaires du département des traités et du droit du Ministère des affaires étrangères

M. Liu Jiecheng, deuxième secrétaire à l'ambassade de Chine en Allemagne

M. Zhang Xinjun, professeur à l'Université Tsinghua

M. Shi Yubing, professeur à l'Université Xiamen

M. Liu Heng, professeur associé à l'Académie chinoise des sciences sociales

Mme Zhou Chen, professeure associée à l'Université Xiamen

THE PRESIDENT: Good afternoon. The Tribunal will continue its hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States and International Law*. This afternoon we will hear statements from New Zealand, the Republic of Korea and the People’s Republic of China.

I now give the floor to the representative of New Zealand, Ms Hallum, to make her statement. You have the floor, Madam.

STATEMENT OF MS HALLUM
NEW ZEALAND
[ITLOS/PV.23/C31/10/Rev.1, p. 1–9]

Mr President, honourable members of the Tribunal, it is a privilege to appear before you in these proceedings on behalf of Aotearoa New Zealand.

Mr President, the questions before you address climate change, “the defining issue of our time”.¹ The Commission on Small Island States (COSIS) has grasped the initiative and framed questions in way that enables the Tribunal to clarify how the obligations under Part XII of the UN Convention on the Law of the Sea apply to the impacts of climate change, and how those obligations fit together with the UN Framework Convention on Climate Change and the Paris Agreement, as well as general international law.

COSIS has placed its faith in the Tribunal to rationalize and make sense of the interplay between these rules, thereby contributing to coherence in the law of the sea and international law more generally. And we thank them for this.

These questions are of great significance to all Parties to the Convention and, indeed, all members of the international community. The ocean covers 71 per cent of the Earth’s surface and, as the world’s largest carbon sink, absorbs 90 per cent of greenhouse gas emissions. Any attempt to address the climate crisis must consider the impact of climate change on the ocean and the marine environment.

Mr President, you have received a range of submissions concerning the catastrophic impacts climate change is having around the world on the marine environment, including sea-level rise, biodiversity loss and ocean acidification. In our region, Tokelau, which is of special significance to New Zealand because of our constitutional and historical ties, and whose people are New Zealand citizens, is one of those countries particularly impacted. Tokelau is halfway between Hawaii and New Zealand, and is comprised of three small coral atolls generally less than three metres above high tide.

The Pacific Islands Forum,² of which New Zealand is a member, has recognized climate change as the single greatest threat to the livelihoods, security and well-being of the peoples of the Pacific.³ It is not surprising, therefore, that four members of COSIS come from our Pacific region.

For New Zealand, the call to action to address these impacts comes not just from the experiences of our Pacific island neighbours to the north but also from the frozen continent to the south of us.

¹ United Nations Secretary-General, António Guterres, 10 September 2019 available at <https://www.unmultimedia.org/avlibrary/asset/2231/2231575/> accessed 5 September 2023.

² The Pacific Islands Forum is an intergovernmental organization comprising 18 members: Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu; as well as one associate member: Tokelau.

³ *Boe Declaration on Regional Security* Pacific Islands Forum (2018).

New Zealand’s climate is strongly influenced by the heat and moisture carried by the ocean, especially the Southern Ocean. A recently published study analyses the profound impact of greenhouse gas emissions on Antarctica’s atmospheric and weather events, sea ice, ocean, ice shelves, glaciers and marine biodiversity.⁴ It is virtually certain that continued greenhouse gas emissions will lead to larger and more frequent events, leading to an increasing lack of winter ice and ice shelf collapse.⁵ This will have global consequences, as well as consequences for New Zealand. As one of our prominent scientists has said, “New Zealand is ... in the firing line of a more energetic ocean/atmosphere system, capable of delivering more intense storm and rain events, with increasing frequency”.⁶ Not only do these events cause mounting damage, but the warming seas around New Zealand are adversely impacting our marine life.⁷

Mr President, I will first make some brief remarks on jurisdiction and admissibility. The issue of whether the Tribunal has a general advisory jurisdiction has already been addressed by the Tribunal. In the *Request by the Sub-Regional Fisheries Commission*, the Tribunal concluded that article 21 of its Statute, together with another agreement that confers jurisdiction on the Tribunal, constitute the substantive legal basis of the Tribunal’s advisory jurisdiction.⁸ Article 138 of the Rules of the Tribunal provides the prerequisites for the Tribunal to exercise its jurisdiction.⁹ As the submissions before the Tribunal have confirmed, the COSIS request meets all these prerequisites.

Nevertheless, even if these prerequisites are met, the Tribunal has a discretion as to whether to give an advisory opinion or not.¹⁰ But, consistent with the view of the International Court of Justice, the Tribunal has determined that, in principle, it should not refuse a request except for “compelling reasons”.¹¹

On that, Mr President, I would like to offer four short observations. First, this is an opinion that is requested on a question which is clearly “of particularly acute concern” to the international community.¹² As the submissions to the Tribunal have emphasized, the issue of the deleterious effects of climate change on the marine environment is of critical importance, not only to COSIS but to all parties to the Convention, and indeed to the international community as a whole.

Second, an advisory opinion on the question posed in the request has a clear purpose of furnishing to COSIS the elements of law that will be necessary to the organization to fulfil its functions.¹³ An opinion from the Tribunal would also be useful for a range of actors. It will

⁴ Siegert et al, ‘Antarctic extreme events’ *Frontiers in Environmental Science*, 8 August 2023, at <https://www.frontiersin.org/articles/10.3389/fenvs.2023.1229283/full> accessed 5 September 2023.

⁵ *Ibid*, at [11].

⁶ Dr Natalie Robinson, Antarctic Oceanographer, NIWA at <https://www.sciencemediacentre.co.nz/2023/08/09/climate-change-is-taking-a-toll-on-every-aspect-of-antarctica-expert-reaction/>, accessed 5 September 2023.

⁷ Cornwall et al, ‘Predicting the impacts of climate change on New Zealand’s seaweed-based ecosystems’ *New Zealand Journal of Botany*, 17 May 2023, at <https://www.tandfonline.com/doi/full/10.1080/0028825X.2023.2245786>, accessed 8 September 2023.

⁸ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* [2015] ITLOS Rep 4 [SRFC Advisory Opinion] at [58].

⁹ *Ibid* at [59].

¹⁰ *Ibid* at [71]. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Reports 156 [Construction of a Wall Advisory Opinion] at [44].

¹¹ *SRFC Advisory Opinion* at [71]. See also *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, [1956] ICJ Reports 86; *Construction of a Wall Advisory Opinion* at [44].

¹² See *Construction of a Wall Advisory Opinion* at [50].

¹³ These functions include “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”, see Agreement for the Establishment of the Commission for Small Island Developing States on Climate Change and International Law of 31 October 2021, article 2(1).

assist States in implementing their law of the sea obligations under the Convention. It can assist a range of intergovernmental and non-governmental organizations in fulfilling their mandates relevant to the implementation of the Convention and its implementing agreements, both now and in the future. And it can provide assistance to other international and domestic courts and tribunals on the interpretation and application of the Convention. Further, as we heard this week from the distinguished Prime Minister of Tuvalu, the advisory opinion will also facilitate international cooperation amongst Parties to the Convention.¹⁴

Third, it has been suggested that a relevant consideration for the Tribunal is the small number of States that have created an international organization with the power to request advisory opinions that focus on obligations of States not party to the Request.¹⁵ However, in New Zealand’s view, it does not seem relevant whether the agreement conferring jurisdiction has 9 or 90 parties. As the Tribunal has previously stated, the consent of third States that are not party to the requesting organization is not relevant in advisory proceedings.¹⁶

Finally, the Tribunal will of course wish to consider the propriety of the exercise of its judicial function.¹⁷ That is, whether in order to remain true to its judicial function, the Tribunal should not proceed because of the circumstances of the particular case. New Zealand acknowledges there may be some cases that directly implicate the judicial propriety of the exercise of the Tribunal’s functions that may be of sufficient concern to justify refusing a request for an advisory opinion. But this is evidently not the case here.

Accordingly, in New Zealand’s view, the Tribunal should exercise its discretion and render an advisory opinion.

Mr President, I now turn to some preliminary observations: first, on how the Tribunal should approach the interpretation of the applicable law; and, second, on factual matters.

New Zealand notes that the Convention provides the legal framework within which all activities in the oceans and seas must be carried out.¹⁸ It is known not only as the Constitution for the Oceans, but as a “living treaty”, able to adapt to new realities.¹⁹ As written submissions have highlighted, there are a number of guardrails that support this. I will briefly outline five.

First, article 237 establishes what has been described as a “double relationship of compatibility” between the Convention and other treaties relating to the protection and preservation of the marine environment.²⁰ Article 237 makes clear that the provisions of Part XII are without prejudice to other past or future treaties; and also that these other treaties are to be applied in a manner consistent with the Convention.²¹

Second, a number of obligations in Part XII adopt a “rules of reference” approach. That is, they require rules and standards contained in instruments external to the Convention to be taken into account.

Third, article 31(3)(c) of the Vienna Convention on the Law of Treaties supports an integrated approach to international law, as it requires “any relevant rules of international law

¹⁴ Commission of Small Island States on Climate Change and International Law, oral statement, 11 September 2023, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_1_Corr.1_E.pdf at [14].

¹⁵ United Kingdom Written Statement, 16 June 2023, para. 18; Guatemala Written Statement, 16 June 2023, para. 22.

¹⁶ *SRFC Advisory Opinion* at [76].

¹⁷ *Construction of a Wall Advisory Opinion* at [45].

¹⁸ *Virginia Commentary on the United Nations Convention on the Law of the Sea* (1982) Volume IV, at 36-37.

¹⁹ Barnes, Richard and Barrett, Jill (2016) *Law of the Sea - UNCLOS as a Living Treaty*, (The British Institute of International and Comparative Law); *Virginia Commentary on the United Nations Convention on the Law of the Sea* (1982) Volume VII, at xviii-xix.

²⁰ Italy Written Statement, 15 June 2023, para. 13.

²¹ *Ibid.*

applicable in the relations between the parties” to be taken into account in the interpretation of the Convention.

Fourth, the International Law Commission’s Study Group on Fragmentation has recognized that, consistent with the principle of harmonization, “when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.²²

And, fifth and finally, as the Study Group on Fragmentation has also identified, the principle of systemic integration also calls for attention to be given to the rules of customary international law and general principles of law applicable in relations between the parties.²³

All this demonstrates the Convention’s continuing openness to being informed by other agreements, rules and principles dealing with overlapping issues and to addressing them in an integrated manner. As Portugal’s written submission puts it, the inherent openness and flexibility of the Convention “means that the interpretation of its provisions must never be taken in isolation”.²⁴

In summary, the obligations in Part XII interconnect and interlock to produce a coherent system of obligations on States Parties for the protection and preservation of the marine environment. To give an analogy, we can imagine the Convention, and Part XII in particular, as a river. The particular obligations in Part XII are fed by other international rules and standards, like tributaries feeding into the river as it flows towards the sea. And the river and its tributaries sit upon, and draw from, a bed of customary international law and general principles of law. Together, these obligations create a coherent and integrated whole.

In New Zealand’s view, this suggests that focusing on the extent to which aspects of climate law are or are not *lex specialis* is not helpful. As noted by the International Law Commission’s Fragmentation Study Group, “there are two possible ways in which law may take account of the relationship of a particular rule to a general one”.²⁵ Either a more specific rule can be understood as an elaboration of a more general rule;²⁶ or the more specific rule may be considered to overrule a more general rule.²⁷ Neither situation seems particularly apt here. In this advisory opinion, there is no need to determine the prevalence of one set of rules over another. The Convention, on the one hand, and the treaties that address climate change on the other, are complementary and capable of harmonious application.

New Zealand therefore submits that although the question posed in this request may require the Tribunal to consider regime interaction, the Tribunal should view this legal landscape as a coherent and integrated whole, rather than different regimes in conflict or having nothing to do with each other.

Mr President, turning to the question of factual matters, in New Zealand’s view this is straightforward. To the extent the Tribunal needs a factual base on which to issue its opinion, for example on the deleterious impacts of the accumulation of anthropogenic greenhouse gas emissions on the marine environment, the science is clear. COSIS has helpfully provided a dossier of documents that shed light on the question it has posed. These documents include several recent reports of the Intergovernmental Panel on Climate Change, the United Nations body responsible for assessing the science relating to climate change. New Zealand is not aware of any submissions that have disputed the factual basis of the request. The IPCC reports reflect

²² *Conclusions of the Study Group on Fragmentation*, International Law Commission, Annual Report 2006, Chapter XI, p. 178 at [251(4)].

²³ International Law Commission, Annual Report 2005, Chapter XI, p. 87 at [470].

²⁴ Portugal Written Statement, 16 June 2023, at para. 19.

²⁵ [Report of the Study Group of the International Law Commission, finalized by Mr Martti Koskenniemi \(un.org\)](#) at [88].

²⁶ *Ibid.*, at [98].

²⁷ *Ibid.*, at [103].

unequivocally the best available science on the impacts of climate change. They provide sufficient facts on which the Tribunal can render the opinion on the question before it.

Mr President, turning to the specific question posed by the request, I wish to briefly explain New Zealand’s understanding of how the two parts of the question relate to each other.

Mr President, we visualize the relationships between the obligations in Part XII of the Convention as a series of concentric circles. Article 192, which is the first provision in Part XII, is the most expansive obligation. The other, more specific obligations in Part XII sit within this circle including, in particular, the obligation in article 194 to prevent, reduce and control pollution, one of the most obvious and concerning harms to the marine environment. And article 194, in turn, has other, more specific obligations nested within it, such as articles 207 and 212 which deal with pollution from particular sources.

These relationships between the obligations in Part XII mean that it is not possible to address part (a) of the question, which reflects the language of 194 of the Convention, separately from part (b) of the question, which reflects the language of article 192 of the Convention. The Tribunal’s consideration of the standard of conduct necessary to meet States Parties’ obligations under article 194 will, in New Zealand’s view, also be relevant to the standard of conduct required to meet the obligations under article 192. Further, while compliance with article 194 is a necessary prerequisite for compliance with article 192, compliance with article 194 alone would not be sufficient to constitute compliance with article 192.

With that said, Mr President, I will now focus on part (a) of the question. This addresses States Parties’ obligation to take measures to prevent, reduce and control pollution of the marine environment, as specifically required by article 194 of the Convention.

An important threshold question for the application of article 194 is whether anthropogenic greenhouse gas emissions fall within the definition of “pollution of the marine environment” as set out in Article 1, paragraph (4) of the Convention. Many written submissions, including New Zealand’s, analyse this question in detail, drawing in particular on recent reports by the IPCC.²⁸ They identify the deleterious effects that result, or are likely to result, from the accumulation of anthropogenic greenhouse gas emissions.

The written submission of COSIS, in particular, clearly explains how the absorption of heat by the ocean and sea ice, and the absorption of carbon by the ocean, can change the physics and chemistry of the marine environment, leading to severe harm.²⁹ The resulting deleterious effects range from: harm to living resources and marine life, including loss of biodiversity; to hazards to human health, such as population displacement; to hindrances to marine activities, including fishing and other legitimate uses of the sea; and to impairment of the quality of sea water.³⁰

I note that the term “marine environment” is not specifically defined in the Convention, but the written submission of COSIS suggests that the marine environment should be interpreted as encompassing the entire marine ecosystem under and beyond national jurisdiction, including the ocean, the marine cryosphere, coastlines, the air-sea interface, and the habitats and ecosystems of marine life.³¹ New Zealand is comfortable with this interpretation, which is consistent with the ordinary meaning of the term in its context.

²⁸ See, for example, Commission of Small Island States on Climate Change and International Law Written Statement, 16 June 2023, para. 126–169; African Union Written Statement, 16 June 2023, para. 152–242; Chile Written Statement, 16 June 2023.

²⁹ Commission of Small Island States on Climate Change and International Law Written Statement, 16 June 2023, para. 82–125.

³⁰ Commission of Small Island States on Climate Change and International Law Written Statement, 16 June 2023, para. 165, 167.

³¹ Commission of Small Island States on Climate Change and International Law Written Statement, 16 June 2023, para. 132–142.

In New Zealand’s view, Mr President, the evidence shows that anthropogenic greenhouse gas emissions constitute an introduction by humans directly *and* indirectly of substances *and* energy into the marine environment. The global accumulation of these emissions is resulting in, and is likely to continue to result in, the kinds of deleterious effects set out in the Convention’s definition of “pollution”. This is particularly the case in circumstances where the global accumulation of greenhouse gas emissions is at current and projected future levels.

Mr President, I wish to highlight another important consideration. These deleterious effects result from the global accumulation of greenhouse gas emissions from *multiple* sources from many actors over time. When assessing the harm that is caused by greenhouse gas emissions, it is therefore necessary and appropriate to consider the global concentration of emissions that accumulate from all anthropogenic sources.

The inherently aggregate and cumulative nature of the problem means that the emissions originating from the territory of one State in isolation may not meet the threshold of “deleterious effects” set out in the definition of “pollution of the marine environment”. The “deleterious effects” required by that definition, which are in fact taking place, result from the accumulation of emissions that originate from all sources over time.

As the pollution in question is a result of multiple actions, accumulating over time, it follows that the obligation to prevent, reduce and control that pollution is most effectively met through cooperative action. The preamble to the UN Framework Agreement on Climate Change recognizes that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response”.³²

The potential need for a collective response is also anticipated in the Convention. This includes article 194 itself, which specifically reflects that it may be appropriate for States Parties to “jointly” take the necessary measures to prevent, reduce and control pollution of the marine environment.

In addition, the thread of cooperation that runs through the Convention can be seen in Section 2 of Part XII on “Global and Regional Cooperation”. This section sets out a number of obligations relating to cooperation. These include the general obligation in article 197 to cooperate on a global or regional basis on the protection and preservation of the marine environment.³³ They also include a range of more specific obligations, such as the obligation in article 201 relating to cooperation on scientific criteria for regulations.

As well as being reflected across the Convention, the duty to cooperate is a basic tenet of international customary law.³⁴ The Tribunal has recognized on several occasions, beginning with the *MOX Plant* case, that the duty to cooperate is fundamental in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.³⁵ It has been well established by international courts, including the International Court of Justice, that it is through complying with the duty of cooperation, both its substantive and its procedural aspects, that the risks of damage to the environment can be jointly managed.³⁶ The

³² United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC], preambular paragraph 6.

³³ See, in particular, articles 200 and 201 of the Convention.

³⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, ITLOS Case No. 17, 1 February 2011 at [148].

³⁵ *The MOX Plant Case (Ireland v United Kingdom): Provisional Measures* [2001] ITLOS Rep 95 at [82]; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures Order)* [2003] ITLOS Rep 10 at [92]; *SRFC Advisory Opinion*, at [140].

³⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, (2010) ICJ Reports 49 (*Pulp Mills*) at [77]; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia) (Judgment)* 1 December 2022 at [100].

duty is of an ongoing nature,³⁷ and cooperation in accordance with the duty must be meaningful.³⁸ The duty to cooperate permeates international environmental law, and the Convention should be interpreted in the context of this obligation, along with other relevant customary international law rules and principles, as outlined in our written submission.³⁹

Mr President, compliance with article 194 also requires reference to other frameworks, rules and principles. Article 194 is closely linked to the obligations in Section 5 of Part XII, on international rules and national legislation. These obligations require States to cooperate to formulate international rules and standards to address pollution of the marine environment from particular sources.⁴⁰ They also mandate that when formulating domestic measures, States take into account these international rules and standards.⁴¹

I will outline three such obligations in Section 5 relevant to the context of the request before the Tribunal.

Article 211 requires States to establish international rules and standards with respect to pollution from vessels “acting through the competent international organization”, which is the International Maritime Organization. It is noteworthy that in July this year, the Marine Environment Protection Committee of the IMO adopted a revised strategy on the reduction of greenhouse gas emissions from ships.⁴²

International efforts will now continue to develop measures to operationalize this strategy. In New Zealand’s view, this represents an important example of the process by which international cooperation can take place to establish rules and standards to prevent, reduce and control pollution of the marine environment from vessels, consistent with article 211 of the Convention.

In addition, articles 207 and 212 of the Convention address pollution from land-based sources and pollution from and through the atmosphere, respectively. They require States Parties to adopt laws and regulations to prevent, reduce and control such pollution “taking into account internationally agreed rules, standards and recommended practices and procedures”. These provisions also require States Parties to endeavour to develop global rules to prevent, reduce and control pollution of the marine environment from the relevant sources, through competent international organizations and diplomatic conferences.

The UNFCCC and the Paris Agreement are highly relevant in this regard. These treaties reflect the current multilateral legal framework and principles for international climate change cooperation. They are aimed at stabilizing atmospheric concentrations of greenhouse gases to avoid dangerous anthropogenic interference with the climate system.⁴³ As such, the UNFCCC and the Paris Agreement represent “internationally agreed rules” that States Parties are required to take into account when adopting laws and regulations to prevent, reduce and control pollution of the marine environment from the accumulation of greenhouse gas emissions.

The UNFCCC and the Paris Agreement are also important tools that will help to define the “necessary measures” and standard of conduct required of States to meet these obligations. My colleague will provide more detail as to what this means in practical terms.

³⁷ *The “Enrica Lexie” Incident (Italian Republic v Republic of India) (Award)* PCA 2015-28, 21 May 2020 at [723]; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia) (Judgment)* ICJ 1 December 2022 at [129].

³⁸ See Separate Opinion of Judge Sebutinde, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, (2014) *ICJ Reports* 226, at 435, [15].

³⁹ See, for further context, New Zealand Written Statement, 15 June 2023, para. 51–59.

⁴⁰ For example, articles 207(4), 210(4), 211(1), 212(3) of the Convention.

⁴¹ For example, article 207(1), 210(6), 211(2), 212(1) of the Convention.

⁴² 2023 IMO Strategy on Reduction of GHG Emissions from Ships, Resolution MEPC.377(80), Annex 1, adopted 7 July 2023.

⁴³ UNFCCC Art 2.

REQUEST FOR ADVISORY OPINION – COSIS

Mr President, members of the Tribunal, I thank you for your attention and invite you to call my colleague, Ms Charlotte Skerten, to address part (b) of the question.

THE PRESIDENT: Thank you, Ms Hallum.

I now give the floor to Ms Skerten to make her statement. You have the floor, Madam.

STATEMENT OF MS SKERTEN
NEW ZEALAND
[ITLOS/PV.23/C31/10/Rev.1, p. 9–14]

Mr President, honourable members of the Tribunal, it is an honour to appear before you today in these proceedings and to do so on behalf of Aotearoa, New Zealand.

In our view, the need for international cooperation and collective efforts is even more pronounced in the context of article 192 of the Convention, given this is an overarching obligation to protect and preserve the marine environment.

In New Zealand’s view, article 192 of the Convention requires a holistic approach to be taken to the protection and preservation of the marine environment.

New Zealand notes that the arbitral tribunal in the *South China Sea Arbitration* interpreted the general obligation in article 192 as extending “both to ‘protection’ of the marine environment from future damage, as well as ‘preservation’ in the sense of maintaining or improving its present condition”.¹ It seems appropriate to adopt the view of that tribunal that article 192 “entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment”.²

Accordingly, in addition to measures to prevent, reduce and control pollution, which my colleague has already covered, article 192 also requires States to take active measures to protect biodiversity and the integrity of ecosystems from the harm caused by the accumulation of anthropogenic greenhouse gas emissions.

Mr President, as noted earlier, article 197 of the Convention reflects States Parties’ duty to cooperate on a global basis in formulating and elaborating international rules, standards and recommended practices and procedures consistent with the Convention, for the protection of the marine environment.

This obligation is particularly relevant in the context of issues such as climate change that can only be effectively addressed through collective action. In the context of article 192, this obligation requires States to cooperate on an ongoing basis to protect and preserve the marine environment from the impacts of climate change.

The UNFCCC and the Paris Agreement reflect the results of cooperation to date among States on the establishment of a multilateral legal framework to address climate change. As such, the obligations under the UNFCCC and the Paris Agreement help to define the minimum standard of conduct for States Parties under article 192 of the Convention, just as they do in relation to article 194.

In New Zealand’s view, Mr President, States Parties’ duty to cooperate for the protection and preservation of the marine environment includes the following six specific elements from the UNFCCC and the Paris Agreement:

First, States must actively engage in international collaborative efforts to reduce greenhouse gas emissions at the global level.

Second, as suggested in Singapore’s written submission, States’ obligation to cooperate in the context of climate change extends to participating in good faith in international efforts at rule-making and standard-setting, such as under the UNFCCC and Paris Agreement.³

Third, States must adopt ambitious nationally determined contributions, consistent with the Paris Agreement. This third element is linked to a number of more specific obligations under the Paris Agreement. In particular:

¹ *South China Sea Arbitration (Republic of the Philippines v the People’s Republic of China (Award))* PCA 2013-19, 12 July 2016 [*South China Sea Arbitration (Award)*] at [941].

⁴⁵ *Ibid.*

³ Singapore Written Statement, 16 June 2023, para 41.

Parties shall prepare, communicate and maintain successive nationally determined contributions that they intend to achieve and pursue domestic measures aimed at achieving them;⁴

Parties shall also communicate NDCs every five years,⁵ which will represent a progression beyond their current NDCs and reflect their highest possible ambition;⁶

Further, Parties shall account for progress against these NDCs in a manner that promotes, among other things, transparency, completeness and environmental integrity;⁷

In addition, these obligations and commitments are to be carried out with a view to achieving the purpose of the Paris Agreement,⁸ that is, to “strengthen the global response to the threat of climate change, including by ... pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.⁹

Returning now to my list of six elements, my fourth point is that States must take action to mitigate emissions through their NDCs and should cooperate to enhance adaptation to the impacts of climate change within their capabilities and in light of their circumstances.¹⁰ Adaptation actions may include building resilience in marine ecosystems to enhance the capacity of the ocean to act as a carbon sink.¹¹

Fifth, States must take action to provide financial resources to assist developing country Parties with respect to both mitigation and adaptation, as required by article 9 of the Paris Agreement.¹²

And sixth and finally, capacity-building under the Paris Agreement should enhance the capacity and ability of developing country Parties to take effective climate change action, including, in particular, least developed countries and those that are particularly vulnerable to the adverse effects of climate change, such as Small Island Developing States.¹³ This is reflected in article 11 of the Paris Agreement and specifically includes, among other measures, capacity-building to implement both adaptation and mitigation measures, as well as technology facilitation and access to climate finance.

Mr President, it is important to note that the obligations under the UNFCCC and the Paris Agreement reflect the international climate change architecture at the present time. Cooperation on these matters is of a continuing nature, it is ongoing, including within the Conference of the Parties and its subsidiary bodies. States’ obligations relating to climate change are likely to continue to evolve and may become more specific and ambitious in the future. In New Zealand’s view, the duty to cooperate requires States to participate meaningfully in international collaborative efforts to address and respond to climate change on an ongoing basis, and to do so in good faith.

Mr President, while compliance with the UNFCCC and the Paris Agreement and ongoing cooperation in that context is a crucial aspect of States Parties’ obligation to protect and preserve the marine environment under article 192, it will not necessarily be *sufficient* to fulfil this obligation.

⁴ Paris Agreement, article 4(2).

⁵ Paris Agreement, article 4(9).

⁶ Paris Agreement, article 4(3).

⁷ Paris Agreement, article 4(13).

⁸ Paris Agreement, article 3.

⁹ Paris Agreement, article 2(1)(a).

¹⁰ Paris Agreement, article 2(1)(b) and article 7.

¹¹ See COSIS Written Submission, 16 June 2023 at [421].

¹² Paris Agreement, article 9(1).

¹³ Paris Agreement, article 11(1).

Article 192, like article 194 of the Convention, reflects States' obligation under customary international law to act with due diligence.¹⁴ The Tribunal has previously described this kind of due diligence obligation as an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost".¹⁵ In the context of article 192, New Zealand's view is that the obligation to act with due diligence requires action to be taken through appropriate measures such as policies, legislation and administrative controls, to protect and preserve the marine environment.¹⁶ As the Republic of Korea's written submission notes, "the concept of due diligence is to be understood in light of the continuing development of international law and the relevant circumstances that rules of international law intend to address."¹⁷

In this context, States Parties may be required to take additional steps that go beyond the provisions of the UNFCCC and the Paris Agreement to respond to the accumulation of greenhouse gas emissions in order to protect and preserve the marine environment.

To give just one example, biodiversity is of fundamental importance to the marine environment, and must be protected and preserved, consistent with article 192 of the Convention.

As summarized in the written submission of the Federated States of Micronesia, the Conference of the Parties to the Convention on Biological Diversity has undertaken important work in connection to anthropogenic greenhouse gas emissions, including on minimizing the impacts of climate change and ocean acidification on biological diversity.¹⁸

Likewise, the recent adoption of the Agreement under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, or the "BBNJ Agreement", provides a valuable example of cooperation among States on the formulation of international rules for the protection and preservation of the marine environment, consistent with article 197 of the Convention.

Negotiations for the BBNJ Agreement were initiated as a result of a recognition by States that further elaboration of international rules for areas beyond national jurisdiction was needed. States have an obligation under article 192 of the Convention to protect and preserve the marine environment of areas beyond national jurisdiction from the impacts of climate change, and a duty to cooperate to that end. By becoming parties to the BBNJ Agreement and by participating in the mechanisms for cooperation that it establishes, States will be in the best position to meet their obligation to protect and preserve the marine environment in areas beyond national jurisdiction.

Mr President, New Zealand agrees with other submitters that a range of other customary international law rules and general principles of law are also relevant and should help guide States in taking action, in addition to the duty to cooperate and due diligence. I will now touch briefly on three pertinent examples.

First, articles 192 and 194 engage the customary international law principle of prevention, in that they require States to ensure that activities within their jurisdiction and control respect the environment beyond that geographical area.¹⁹ Seeking to prevent harm before it is caused is one way to protect and preserve the marine environment.

¹⁴ Report of the International Law Commission on the work of its fifty-second session, ILC Report (2000) GAOR A/55/10 (available at: https://legal.un.org/ilc/documentation/english/reports/a_55_10.pdf accessed 4 May 2023), at [718].

¹⁵ *SRFC Advisory Opinion* at [129]; *Activities in the Area (Advisory Opinion)*, above n 36, at [110].

¹⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & The Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 147.

¹⁷ Republic of Korea Written Statement, 16 June 2023, para 10.

¹⁸ Micronesia Written Statement, 16 June 2023, para 47.

¹⁹ The International Court of Justice (ICJ) has affirmed on multiple occasions that "The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the *corpus* of international law relating to the

Second, the use of the best available science is also relevant to the minimum standard of conduct under article 192.²⁰ As explained by the United Kingdom, best available science provides part of the context in which States make decisions – including on information-sharing, consulting on necessary preventative measures, and on the specific assistance to be provided to developing States.²¹ As my colleague has indicated, Mr President, the best available science is before the Tribunal.

And third and finally, the precautionary approach is relevant to the interpretation and application of a treaty relating to a common concern, such as the marine environment.²² This essentially requires States to act with “prudence and caution”²³ to “prevent the degradation of the marine environment”.²⁴ Where the interaction between States’ activities and the marine environment are not fully understood, the precautionary approach is particularly relevant to the planning and management of those activities. We acknowledge, however, that this is becoming less applicable given the level of certainty of the scientific evidence.

Mr President, to conclude, the present case provides the Tribunal, as guardian of the Convention, with an important opportunity to clarify States’ law of the sea obligations in relation to climate change, the defining issue of our time. The Tribunal, as the specialist and permanent court for the law of the sea, has an authoritative role in clarifying obligations and textual ambiguities in the Convention. Recourse to the Tribunal, including through advisory proceedings, can provide greater stability, security, certainty and predictability in the law of the sea.

In New Zealand’s view, it is clear that the global accumulation of anthropogenic greenhouse gas emissions constitutes pollution of the marine environment, as defined in the Convention. Consequently, States Parties are obliged to take measures to prevent, reduce and control this pollution. The overarching requirements of article 192 are also engaged.

In our view, just as the nature of the problem is a global one, to be effective, our solutions must also be global. The need for collective action to address some problems was recognized by the negotiators of the Convention, and this is underpinned by the duty to cooperate under customary international law. The protection and preservation of the marine environment requires collaborative and active measures to protect biodiversity and marine ecosystems, including from the cumulative impacts of climate change and ocean acidification.

In New Zealand’s view, cooperation between States – through the UNFCCC Conference of the Parties and other frameworks – is the most effective way of discharging our collective responsibility for the protection of the marine environment, given the cumulative and aggregated nature of the problem of climate change. The rules, standards and international best practices and procedures that exist today are important in helping to define the current minimum standard of conduct required of States Parties to meet their obligations under the Convention.

But it is also important to acknowledge that what exists today is not the end of the story. The duty of cooperation, as reflected in the Convention, requires States to continue to collaborate, meaningfully and in good faith, to protect and preserve the marine environment.

environment.” See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 3, at [29]. This has also been confirmed in *Gahéikovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, at [53] and *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 [*Pulp Mills*] at [101].

²⁰ See United Kingdom Written Statement, 16 June 2023, para. 89(c).

²¹ *Ibid.*

²² See *Pulp Mills* at [164].

²³ See *Southern Bluefin Tuna Cases (PMO)* at [77].

²⁴ *Agenda 21: Programme of Action for Sustainable Development* UN GAOR 46th Sess, Agenda Item 21, A/Conf 151/26 (1992) [Agenda 21] ch 17, at [21].

Mr President, I would like to close by recalling the words of the distinguished Attorney-General of Vanuatu: “We know from ancient wisdom that if we respect the Earth, then the Earth will respect us.”²⁵ For us, this brings to mind a Māori proverb: “Toitū te whenua, Toitū te moana, Toiora te tangata.” This means simply: if the land is well and the sea is well, the people will thrive. This proverb seems particularly apt in the context of the request the Tribunal is considering today, as the question posed is about the connection between people and the marine environment and States’ obligation under the Convention to protect and preserve it.

Mr President, distinguished members of the Tribunal, this concludes New Zealand’s observations. Thank you for your kind attention.

THE PRESIDENT: Thank you, Ms Skerten.

I now give the floor to the representative of the Republic of Korea, Mr Hwang Jun-shik, to make his statement. You have the floor, Sir.

²⁵ Commission of Small Island States on Climate Change and International Law, oral statement, 11 September 2023, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_1_Corr.1_E.pdf at [18].

STATEMENT OF MR HWANG
 REPUBLIC OF KOREA
 [ITLOS/PV.23/C31/10/Rev.1, p. 15–21]

Mr President, distinguished Members of the Tribunal, it is an honour to appear before you today on behalf of the Republic of Korea to speak about the request for an advisory opinion made to the Tribunal by the Commission of Small Island States on Climate Change and International Law.

In our written statement, we expressed our appreciation for the Commission’s request. We also expressed our hope that the Tribunal will be able to contribute to the endeavours of the international community to respond to the grave challenge of climate change and its adverse effects on the marine environment. As we indicated, our own purpose in the present proceedings is to assist the Tribunal in examining the matter brought before it, by presenting some of the main elements that should be addressed.

Today, I will expand on some of the views presented in our written statement and share our thoughts on certain additional matters. My remarks will be organized as follows. I will begin by discussing jurisdiction and admissibility as well as the applicable law. Next, I will make some general observations on the relationship between UN Convention on the Law of the Sea (“the Convention”) and climate change. I will then highlight some specific obligations under the Convention in relation to climate change, before concluding by commenting on the role of the Tribunal in addressing climate change within its mandate. All this supplements the position expressed in our written statement.

Mr President, I turn first to jurisdiction and admissibility. The Republic of Korea shares the view that the advisory jurisdiction may contribute to the legitimate expansion of the Tribunal’s judicial activity. At the same time, it is important that the Tribunal clarifies the legal basis of its jurisdiction in each advisory proceeding, including the present one.

As a number of States Parties have recalled, there is no express provision in the Convention for the advisory jurisdiction of the full Tribunal. In its advisory opinion of 2015, the Tribunal founded its advisory jurisdiction upon article 21 of its Statute.¹ The Tribunal also clarified that article 21 of the Statute and any “other agreement conferring jurisdiction on the Tribunal” are “interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.”²

The Republic of Korea agrees with the 2015 Advisory Opinion in this respect, and it further considers that in the present case the prerequisites specified in article 138 of the Rules of the Tribunal are satisfied. Accordingly, the Republic of Korea considers that the Tribunal has jurisdiction to entertain the request submitted to it by the Commission. We do not believe there is any compelling reason for the Tribunal to decline to exercise this jurisdiction.

Mr President, the Republic of Korea nevertheless shares the view that the present case affords the Tribunal an opportunity to clarify further the circumstances in which it would be appropriate for the Tribunal to respond to a request for an advisory opinion under article 21 of its Statute. We hope that the Tribunal will seize this opportunity and provide valuable guidance for the future by elaborating on this matter.

Turning now to applicable law, I note that the Tribunal has already had occasion to recognize that in exercising its advisory jurisdiction, it “contribute[s] to the implementation of the Convention.”³ The terms employed in the Agreement for the Establishment of the

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

² *Id.*, at p. 22, para. 58.

³ *Id.*, at p. 26, para. 77 (citing also *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, *ITLOS Reports 2011*, p. 24, para. 30).

Commission,⁴ and also in the questions put to the Tribunal by the Commission, likewise suggest that the present case concerns specific obligations under the Convention, in particular its Part XII.

This does not mean that the Tribunal is not able to refer to or take into account other rules of international law not incompatible with the Convention, including those in agreements concluded in furtherance of the general principles set forth in the Convention. In our written statement we drew attention to articles 237 and 311 of the Convention, which may well come into play in assessing the scope of relevant obligations under the Convention that pertain to climate change.

As some States Parties rightly pointed out, however, the Tribunal should not seek to determine obligations that do not fall within the scope of the Convention or to read into the Convention obligations that are not properly anchored in it.

Mr President, let me now make some general observations on the relationship between the Convention and climate change.

The Convention does not expressly refer to climate change. This is hardly surprising, bearing in mind that the first treaty to address climate change, the UN Framework Convention on Climate Change, was adopted a decade after the Convention was concluded. However, we agree with the Commission, and with other States Parties, that the UN Convention on the Law of the Sea is very relevant to climate change. This is easily justified by the scientifically proven fact that climate change has a significant and far-reaching impact on the marine environment, causing, among others, ocean warming, ocean acidification and sea-level rise. It is important therefore to recognize, and to give effect to, the way in which the law of the sea as set out in the Convention bears upon the issue of climate change.

Above all, we share the view that the definition of “pollution of the marine environment” in article 1, paragraph (1)(4) of the Convention is to be interpreted as encompassing deleterious effects resulting from anthropogenic greenhouse gas emissions. The definition in article 1 does not specify sources of deleterious effects, and the expression “introduction by man, directly or indirectly, of substances or energy” may not have been adopted at the time of its drafting in reference to the absorption by the oceans of greenhouse gases emitted into the atmosphere. But anthropogenic greenhouse gas emissions at least indirectly introduce a substance, that is carbon, and energy, that is heat, into the marine environment.

There is moreover nothing that prevents an interpretation covering such sources of marine pollution, whether in the text of the Convention or *travaux préparatoires*, or indeed in any other element of the rules on treaty interpretation reflected in the Vienna Convention on the Law of Treaties. Indeed, an interpretation by which anthropogenic greenhouse gas emissions are found to fall under the definition of “pollution of the marine environment” would ensure an application of the Convention that would be effective in terms of its object and purpose. Mention may be made in this regard of the significance of the Convention as, and here I quote from the Preamble, “an important contribution to the maintenance of peace, justice and progress for all peoples of the world”. One other stated goal is the conservation of the living resources of the seas and oceans.⁵

As a framework agreement, the Convention can very much accommodate development of the law of the sea. It allows, and indeed calls for, the development of the law through further international agreements. Such agreements, of which the UNFCCC and Paris Agreement form a very welcome and very important part, constitute *lex specialis* and *lex posterior* for the parties thereto. I am saying this not to support prevalence of one agreement over another, but to

⁴ See article 2(2).

⁵ Preamble, paras. 2, 4.

emphasize that they can play an important and appropriate role in interpreting the obligations laid down in the Convention.

Part XII of the Convention, which is dedicated to the protection and preservation of the marine environment, contains several provisions stipulating general obligations that are pertinent to the matter under consideration. Central to these are article 192 and article 194 of the Convention. Both provisions are located in Section 1 of Part XII, which is entitled “General Provisions”. The two questions contained in the request for an advisory opinion made by the Commission closely follow the language of these provisions.

Article 192 lays down, as its title suggests, a “general obligation” to protect and preserve the marine environment. Considering the wide range of harmful impacts caused to the marine environment by climate change, this provision can be understood as stipulating a general obligation to protect and preserve the marine environment from deleterious effects that result or are likely to result from climate change. It entails a positive obligation to protect the marine environment from future damage and to preserve it by maintaining or improving its condition; it also entails a negative obligation not to degrade the marine environment.⁶

Article 194 of the Convention provides in paragraph 1 that States Parties must “take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source.” Paragraph 3 of the article refers to “all sources of pollution”. Since pollution of the marine environment encompasses deleterious effects resulting from anthropogenic greenhouse gas emissions, it may be said that article 194 imposes upon States Parties an obligation to take measures to prevent, reduce and control pollution of the marine environment from impacts of climate change.

Significantly, articles 192 and 194 give rise to an obligation of due diligence. As clarified by this Tribunal, and in the case law of the International Court of Justice and arbitral tribunals, this is an obligation of conduct to exercise best possible efforts and deploy adequate measures, not an obligation to ensure a certain result. As we explained in our written statement by reference to previous case law, this due diligence obligation requires a State to use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment. It requires, as the ICJ clarified and this Tribunal accepted, “not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement.”⁷

Overall, it may be said that articles 192 and 194 provide for general due diligence obligations to exercise best possible efforts to protect and preserve the marine environment, particularly by taking all measures necessary to prevent, reduce and control pollution of the marine environment caused by climate change. The most crucial measures in this context would be those aimed at mitigating greenhouse gas emissions. In this regard a primary standard for assessing due diligence is found in the UN climate change regime, including the Paris Agreement, which is a critical international instrument in the fight against the climate crisis.

It is difficult to say that articles 192 and 194 of the Convention create in themselves a specific legal obligation to implement obligations undertaken under other specialized agreements. As some States have pointed out, the Convention does not create more stringent obligations or commitments than those agreed or laid down in such other agreements. Article 193, which is located between these two general provisions, needs to be borne in mind as well.

⁶ See also the *South China Sea Arbitration*, PCA Case N° 2013-19, Award of 12 July 2016, para. 941.

⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 79, para. 197; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, supra note 1, at p. 41, para. 131.

Mr President, Section 1 of Part XII of the Convention provides limited specificity in terms of the obligations of States Parties in addressing climate change and its impact on the marine environment. However, Sections 2 to 6 of Part XII contain more specific obligations that can be applied to the protection and preservation of the marine environment from deleterious effects that result or are likely to result from climate change. To some of these specific obligations I now turn.

Sections 5 and 6 of Part XII are particularly significant, in that they impose upon States Parties the specific obligations to adopt and to enforce laws and regulations to prevent, reduce and control pollution of the marine environment. Such laws and regulations are to be adopted, *inter alia*, taking into account “internationally agreed rules, standards and recommended practices and procedures”. There is no doubt that the UN climate change regime, including the Paris Agreement, constitutes the most important rules and standards in terms of the impact of climate change on the marine environment.

In our written statement, we provided examples of possible requirements of such domestic laws and regulations. We observed that the relevant provisions of Sections 5 and 6 may give rise to a specific obligation on the part of States Parties to manage, implement and monitor their overall efforts to protect and preserve the marine environment in relation to climate change as part of a comprehensive strategy or plan to address climate change.

On the part of the Republic of Korea, we adopted the first Basic Plan for Carbon Neutrality and Green Growth in April this year. This Basic Plan includes reduction road maps by year as well as by sector, in line with our National Strategy for Carbon Neutrality and Green Growth of October 2022, which is based on our “Basic Law on Carbon Neutrality”. Both the Plan and Strategy include measures to protect and preserve the marine environment in terms of mitigation as well as adaptation.

Other specific obligations under the Convention that merit particular emphasis in the present context are found in Sections 2 to 4 of Part XII. We lay particular stress in this regard on the obligations of cooperation under Section 2, and of technical assistance under Section 3.

Section 2 sets out an obligation to cooperate on a global or regional basis in formulating and elaborating international rules, standards and recommended practices and procedures consistent with the Convention. It is true that there is no specific international legal instrument directly addressing the relationship between climate change and the marine environment. It is noteworthy that the newly adopted agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, the BBNJ Treaty, contains express references to climate change, although the general objective of the agreement is not to regulate impacts of climate change on the marine environment.

The obligation under article 197 of the Convention requires States Parties to the Convention to continue to cooperate in the present context in exploring the need for formulating and elaborating additional rules, standards, and recommended practices and procedures. This underscores the importance of negotiations among States to address normative gaps in the protection of the marine environment from deleterious effects that result or are likely to result from climate change.

The obligation of cooperation is of course anchored in Part XII more generally, as the Tribunal has confirmed on several occasions. This obligation requires States Parties to engage in consultations as may be necessary to the protection and preservation of the marine environment. The Republic of Korea agrees with the Tribunal that, and I quote, “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment

under Part XII of the Convention and general international law.”⁸ We believe it is applicable to the present matter.

Mr President, the Republic of Korea agrees with the Commission and other States Parties that Section 3 of Part XII, concerning scientific and technical assistance to developing States, applies to the issue of climate change as well. In accordance with article 202, States are required to promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.

This provision is related to capacity-building programmes for developing States, including small island States specially affected by sea-level rise and other serious impacts of climate change. Enabling developing States, including small island States, to have the necessary infrastructure and to engage in more effective mitigation and adaptation efforts, is in our view one of the most significant aspects of addressing climate change under the Convention.

Consistent with this provision as well as other bilateral and multilateral commitments, the Republic of Korea has been engaging in various programmes for scientific and technical assistance. I mention, by way of example, the establishment of a liaison office of the Climate Technology Centre and Network (“CTCN”), which carries out capacity-building activities with developing countries; our contribution to the UN’s “Rising Nations Initiative” programme in support of the Pacific Atoll countries; and our recent commitment to additional contribution to the Green Climate Fund to assist developing countries with their reduction and adaptation efforts.

Mr President, I wish to conclude my statement with a few words about the implications of these advisory proceedings and the contribution that may be made by the Tribunal.

There can be no doubt that climate change is one of the most critical challenges ever faced by humanity. It raises a host of questions of international law that are of great importance to all States, and particularly small island States. That is why the Republic of Korea supports the 2021 Declaration, of the Pacific Islands Forum, on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise.

In the same vein, we consider the request for an advisory opinion brought before you by the Commission as providing an important opportunity for this Tribunal, and for States Parties to the Convention, to engage in a discussion on the critically important matter of the application of the Convention to climate change. We already mentioned that the obligation of cooperation set out by the Convention indicates that States Parties should continue to negotiate in order to meet the challenges and to fill normative gaps as circumstances change over time.

For this to succeed, States Parties, and the international community more broadly, need to be informed of the scope and limits of the *lex lata*. In this respect, the Tribunal may render a great service by identifying in the present case the current state of law under the Convention in regard to the protection and preservation of the marine environment from climate change. This will not only clarify for States Parties what their respective obligations are in this context, but also point to where we should focus international efforts for any new international law-making and agreement.

Mr President, distinguished members of the Tribunal, that concludes my remarks today. I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Hwang.

⁸ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 110, para. 82; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 25, para. 92; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *supra* note 1, at p. 43, para. 140.

We have now reached 4:15 pm. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 4:45, a quarter to five.

(Pause)

THE PRESIDENT: I now give the floor to the representative of the People's Republic of China, Mr Ma. You have the floor, Sir.

STATEMENT OF MR MA
CHINA

[ITLOS/PV.23/C31/10/Rev.1, p. 21–31]

Mr President, distinguished members of the Tribunal, it is a great honour and privilege for me to appear before you on behalf of China. China attaches great importance to the role of the Tribunal in the interpretation and application of UNCLOS, and recognizes the important contribution made by the Tribunal to the peaceful settlement of maritime disputes. China is a staunch defender of the international rule of law and supports the Tribunal in performing its functions in accordance with UNCLOS.

Climate change is a common concern for all humankind. Addressing climate change and its adverse impacts bears on human survival and sustainable development. It concerns equitable access to the climate system by all countries, and it has profound implications for advancing global governance and the practice of multilateralism. We live in a global village. As a member of developing countries, China fully empathizes with the practical difficulties faced by many developing countries, including small island States, in coping with climate change.

China submitted its written statement to the Tribunal on 15 June 2023, setting out its position on the matter of jurisdiction. My oral statement has two parts: first, I will address the question of jurisdiction; then, I will address several legal issues relating to the request for an advisory opinion.

Mr President, I will now move to address the matter of jurisdiction. I will start with reiterating the view of China that the full Tribunal does not have advisory competence. The competence of the Tribunal derives from the consent of States as reflected in the authorization given by the Tribunal’s constituent documents. As a matter of fact, UNCLOS and its Annexes, including the Statute of ITLOS (“Statute”), do not confer advisory jurisdiction on the full Tribunal. There are four main reasons:

first, neither article 288 of UNCLOS nor article 21 of the Statute provides the legal basis for the advisory competence of the full Tribunal;

second, articles 159 and 191 of UNCLOS, as well as article 40 of the Statute, relate to the advisory competence of the Seabed Disputes Chamber of the Tribunal only, which are unrelated to the advisory competence of the full Tribunal;

third, article 138 of the Rules of the Tribunal goes beyond the authorization of UNCLOS, including the Statute;

fourth, the Tribunal cannot establish advisory jurisdiction on the basis of “implied powers”.

China notes that some States in their written statements mention that, as UNCLOS States Parties approved the report with which the Tribunal notified the adoption of its Rules of Procedure (“Rules”) without objection and did not provide sufficient response to the exercise of the advisory jurisdiction by the Tribunal in Case No. 21, it implied that the States Parties have “implicitly consented” to the advisory jurisdiction of the full Tribunal and claimed that such has been reaffirmed by the BBNJ Agreement. China is of the view that these arguments are open to question. I will offer three short observations.

As the starting point, the Meeting of States Parties to UNCLOS did not “approve” nor tacitly agree to the Rules. The report of the Meeting of States Parties in 1998 only records the fact that the President of the Tribunal informed the Meeting of the adoption of the Rules by the Tribunal.¹ The fact that the Meeting did not take a position on the issue cannot be seen as an implicit manifestation of consent of the States Parties to the Rules.

¹ SPLOS/31, para. 9-14.

Second, States Parties have never reached a subsequent agreement on the advisory competence of the full Tribunal.² There is a clear, specific and repeated practice in this regard. Case No. 21 is the first case in which the full Tribunal dealt with a request for an advisory opinion. In that case, nine States expressly objected to advisory jurisdiction of the full Tribunal. Following the issuance of the advisory opinion by the Tribunal, there were still objections from States. Among the written statements submitted in the present case, some States have expressly disagreed with the Tribunal's interpretation of article 21 of the Statute and objected to the advisory competence of the full Tribunal, and some others maintain their previous objections.

Third, the newly adopted BBNJ Agreement states that its Conference of the Parties may request the full Tribunal to give an advisory opinion on particular legal questions. This Agreement is the first universal legal instrument that provides for the advisory competence of the full Tribunal. Its negotiations were open to all Member States of the United Nations and all States Parties to UNCLOS. The Agreement was adopted by consensus in line with the principle of State consent; this can be seen as a development of the competence of the Tribunal. At the same time, I would like to emphasize that the relevant Parties to the BBNJ Agreement only confer on the full Tribunal the competence to give advisory opinions on particular legal issues for a request made by the Conference of the Parties to the BBNJ Agreement, and nothing else.

China also notes that the rules and practices of the global judicial institutions, such as the ICJ and Seabed Disputes Chamber of the Tribunal, provide that the advisory competence is authorized by their respective constituent instruments. There are clear procedures for requesting advisory opinions, and the eligible subjects of the request are limited to the decision-making organs of the particular international organizations and other specific bodies being duly authorized.³

The scope of the jurisdiction *ratione materiae* is limited to the scope of the functions or activities of the relevant international bodies. The legal effect of these advisory opinions does not affect the rights and obligations of a third State. Advisory procedures are not dispute-settlement procedures. Advisory opinions should not, I quote, "*have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*".⁴

China would like to stress that having jurisdiction is a prerequisite to deciding on the merits. Without advisory competence, there is no way to address substantive questions.

Mr President, I will now move to address the legal issues relating to the request for an advisory opinion and declare that the following statements are without prejudice to China's

² Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Yearbook of the International Law Commission, 2018, vol. II, Part Two. Conclusion 4(2) : "A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty."

³ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, 1973 ICJ Rep. 166, p. 175, para. 23: "In the light of the foregoing considerations, the Court concludes that the Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request".

⁴ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33: "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would *have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*. If such a situation should arise, the powers of the Court under the discretion given to it by article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction."

position that the full Tribunal does not have advisory competence. Before going into the details of legal issues, I will elaborate on the legal nature of the present request for an advisory opinion.

China submits that the questions raised in the request centre around the deleterious effects of anthropogenic greenhouse gas emissions on the marine environment, which, in essence, is a legal issue concerning the regulation of such emissions. It mainly concerns international climate change law and also involves the law of the sea. In this regard, international climate change law is the foundation and has primacy in dealing with climate change and its adverse effects, while UNCLOS may play a subsidiary role in protecting and preserving the marine environment from the adverse effects of climate change. I will make some observations on these two legal issues respectively.

Now, I turn to the first legal issue: international climate change law is the foundation and has primacy in dealing with climate change and its adverse effects. Numerous resolutions of the UN General Assembly confirm the UNFCCC, its Kyoto Protocol and the Paris Agreement as the primary channel in combating climate change and its adverse effects.⁵

International climate change law is the specialized law that regulates the rights and obligations of States in controlling GHG emissions and combating climate change and its adverse effects. International climate change law is based on the UNFCCC, its Kyoto Protocol and the Paris Agreement. It is guided by the principles of sustainable development, equity, common but differentiated responsibilities and respective capabilities, State sovereignty and international cooperation. The law focuses on mitigation, adaptation, financial and technical assistance and capacity-building through both national and collective actions. It is supported by a facilitative, non-confrontational and non-punitive compliance mechanism. These aspects collectively form a comprehensive and a unique legal regime characterized by the following five key features.

First, sustainable development for all humankind is the fundamental objective of addressing climate change and its adverse effects. Climate change is closely related to States' economic and social development, ecology and environment, as well as people's well-being. It is not only an environmental issue but also a developmental one. However, at the fundamental level, it is a developmental issue, which must be solved by sustainable development. The UNFCCC regime confirms the principle of sustainable development. Under this principle, economic and social development is crucial in addressing climate change.⁶

Parties should actively deal with climate change and promote sustainable development.⁷ They should advance social and economic development and climate change in an integrated and coordinated manner, and avoid taking climate actions that adversely affect economic and social development. Moreover, they should give full consideration to the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.⁸

Put simply, the principle of sustainable development requires States to strike a reasonable balance between economic and social development and protecting the climate system. States should promote development while addressing climate change and should actively respond to climate change while developing.

Second, equity is a fundamental value pursued in global climate governance. The climate system is a global resource that involves the common interests of all humanity as well as the interests of the present and future generations. The system should be protected and utilized in an equitable and reasonable manner. According to the UNFCCC regime, Parties should protect the climate system on the basis of equity and for the benefit of the present and

⁵ See, for instance, UNGA Resolutions A/RES/74/21 and A/RES/76/205.

⁶ UNFCCC, article 3(4),(5).

⁷ UNFCCC, article 3(3),(4).

⁸ UNFCCC, Preamble.

the future generations of humankind. The present generation of developing countries has the right of equitable access to sustainable development. The share of developing countries in global emissions will increase in order to meet their social and developmental needs, and it is consistent with the principles of equity to allow developing countries a longer time to achieve carbon peaking.

Third, the principles of CBDR and respective capabilities are the cornerstone of global climate governance. These principles are the manifestation of the principle of equity in global climate governance. The UNFCCC regime sets up a unique system of responsibilities and obligations. These principles were first established by the UNFCCC and later confirmed by both Kyoto Protocol and Paris Agreement.

Traditional international treaties normally set out obligations that apply equally to all the States. In contrast, the UNFCCC regime focuses on equity and sets out CBDR for developed and developing States in addressing climate change and its adverse effects, in accordance with their differences in respective share of historical emissions, development stages, national conditions and capabilities.

States should contribute to the protection of the climate system in accordance with the principle of CBDR. All Parties bear the common obligation to address climate change. The UNFCCC sets up the overall objective of stabilizing GHG concentrations in the atmosphere. The Paris Agreement further sets up the dual temperature goals and obliges its Parties to submit Nationally Determined Contributions, and to formulate and implement measures to reduce emissions, enhance sinks and reservoirs of GHGs, and adapt to the adverse effects of climate change.

At the same time, the UNFCCC regime confirms that developed and developing countries bear different obligations and responsibilities in addressing climate change and its adverse effects. Climate change is mainly caused by the uncontrolled emission of GHGs by developed countries since the Industrial Revolution. Thus, developed countries should bear their historical responsibilities in addressing climate change and take the lead by undertaking economy-wide absolute emission reduction targets. Developed countries should be obligated to assist developing countries and support them in finance, technology and capacity-building to enhance the latter's capacity in addressing climate change.⁹

To this end, developed countries should at first fulfil the commitment to provide US\$ 100 billion per year to developing countries by 2020.¹⁰

GHG emissions are closely related to human production and life. The right to development of developing countries and their entitlement to GHG emissions for development purposes should be guaranteed. Developing countries should be encouraged to, I quote, "*continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances*",¹¹ end of quote. Meanwhile, international support shall be provided to developing countries in implementing adaptation actions.¹² Parties other than developed countries may provide financial support on a voluntary basis.

Fourth, global climate governance is based on a combination of nationally determined actions and international cooperation, with mitigation and adaptation as its main measures.

⁹ As required by the Preamble, articles 9-11 of the Paris Agreement, the international community should take full account of the specific needs and special circumstances of developing countries, and developed countries shall provide financial and technical support and capacity building to developing countries.

¹⁰ "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention", Doc.FCCC/CP/2010/7/ADD.1, paras. 95, 98.

¹¹ Paris Agreement, article 4(4).

¹² See, for instance, UNFCCC, article 4(7); Kyoto Protocol, article 12(8); Paris Agreement, article 7(13).

Responding to climate change and its adverse effects relies on a combination of national and a collective action.

On one hand, all States shall prepare NDCs. The UNFCCC regime recognizes the principle of sovereignty of States, respecting domestic policies. It makes it clear that international cooperation to address climate change should be implemented in a manner respecting State sovereignty and avoiding undue burdens on the Parties. States should set progressive targets for NDCs in accordance with their national circumstances and take concrete actions to address climate change domestically.

On the other hand, the principle of international cooperation should be followed. The UNFCCC regime recognizes climate change as a global concern, calling for the widest possible cooperation by all countries by strengthening collective cooperation internationally.¹³ States should cooperate in mitigation, adaptation, scientific and technological research, information exchange, education and training.¹⁴

The major measures to address climate change and its adverse effects in international climate governance are mitigation and adaptation. States concerned should not only take measures to limit and reduce anthropogenic GHG emissions, but should also enhance their capacity to adapt and minimize the adverse effects of climate change. International cooperation is required, and financial, technological and capacity-building support to developing States are needed.

Fifth, assistive measures are used as unique means of relief for loss and the damage associated with climate change effects. According to existing international law, the emission of anthropogenic GHGs does not constitute an internationally wrongful act, and it is difficult to attribute adverse effects of anthropogenic GHGs to specific States.

The system of State responsibility under international law cannot be invoked to address loss and damage so caused. It is also difficult to establish any causal link between loss and damage caused by climate change and any emission by any specific State, such that States have no recourse to international liability for injurious consequences arising out of acts not prohibited by international law.

Article 8 of the Paris Agreement articulates the loss and damage issues related to the adverse effects of climate change for the first time. A profound system – consisting of the Warsaw International Mechanism for Loss and Damage (WIM) as the coordination mechanism, the Santiago Network (SNLD) as the technical assistance mechanism, and a loss and damage fund and funding arrangement as the support mechanism – has been gradually established. Resolution 1 of the UN Climate Change Conference Paris 2015, I quote, “*agrees article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation,*”¹⁵ end of quote. The above-mentioned mechanism is a unique form of relief which is not based on States’ liability arising from loss and damage, nor involves any compensation.

In conclusion, the principles, rules and spirit of international climate change law should be fully respected by all Parties.

Mr President, I will now turn to address the second legal issue relating to the subsidiary role of UNCLOS in protecting and preserving the marine environment against the adverse effects of climate change.

UNCLOS does not explicitly lay down the specific obligations of States in dealing with climate change issues. However, there is a growing international consensus that climate change might lead to adverse effects on the marine environment. Accordingly, UNCLOS might play a

¹³ UNFCCC, Preamble Para. 6.

¹⁴ UNFCCC, Art.4.1.

¹⁵ Resolution 1 paragraph 52: “agrees that article 8 of the Agreement does not involve or provide a basis for any liability or compensation”.

subsidiary role in protecting the marine environment from the adverse effects of climate change. In this regard, I will make some brief remarks on four points.

I will start with the first point concerning the relationship between the UNFCCC regime and UNCLOS. The oceans are part of the “hydrosphere” of the climate system and serve as a sink and reservoir of GHGs. The UNFCCC regime underscores the relationship between climate change and the oceans, and its Conferences of the Parties have integrated climate-ocean issues into the agenda of its formal work.

The interpretation and application of UNCLOS shall be in harmony with the UNFCCC regime. The International Law Commission took note of the Report on the Study Group on the fragmentation of international law concerning “the principle of harmonization”. The report’s conclusions stated, I quote, “[i]t is a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations,”¹⁶ end of quote.

As mentioned above, international climate change law is the foundation and has primacy in dealing with climate change and its adverse effects, while UNCLOS may play a subsidiary role in protecting and preserving the marine environment from the adverse effects of climate change. Therefore, with respect to addressing climate change and its adverse effects on the marine environment, UNCLOS can apply to the extent that its provisions are compatible with those of the UNFCCC regime, and shall not impose any obligations relating to the reduction of GHG emissions, which are incompatible with the UNFCCC regime on States Parties to UNCLOS. The interpretation and application of UNCLOS shall fully respect the UNFCCC regime and shall not affect the rights and obligations of the Parties under the said regime.

The second specific point is the identification of GHG emissions. On the question of whether GHG emissions constitute the “pollution of the marine environment” under UNCLOS, there are different views. China takes the view that identifying GHG emissions as the “pollution of the marine environment” is groundless, both in fact and in law, and lacks support from universal international practice. The main reasons are as follows:

First, UNCLOS does not explicitly stipulate GHG emissions. There is no authorization or intention to treat them as pollution. The full text of UNCLOS, including 320 provisions and nine annexes, does not touch upon wording such as “climate change”, “ocean acidification” or “greenhouse gases”.

UNCLOS was adopted in 1982 after nearly 10 years of negotiations. Climate change had not yet become a prominent concern of the international community then, and the connection between the oceans and climate change was not a topic of discussion during the negotiations. As a matter of fact, climate change and its effects had not been assessed specifically until 1988 when the IPCC was established.

Also, the relationship between climate change and oceans was only initially established in 1992 when the UNFCCC was adopted. Obviously, the drafters of UNCLOS did not have the intention to address climate change through UNCLOS. Even when using an evolutionary interpretation approach, this interpretation should not go beyond the original intention of the States Parties.

Second, GHG emissions are different from pollution in nature, and cannot simply be identified as harmful activities. The scientific findings indicate that some of the main types of GHG, such as carbon dioxide, are harmless in themselves, and are indispensable for life and the ecosystem on the Earth. It is the historical accumulation of excessive GHG emissions since the Industrial Revolution in the 18th century that has enhanced the greenhouse effect, which resulted in climate change and the potential indirect adverse effect on the marine environment.

¹⁶ A/CN.4/SER.A/2006/Add.1 (Part 2), p. 178, para. 251(4).

The assertion that “*climate change resulting from GHG emissions has deleterious effects on the marine environment*” ignores the indispensability of GHGs and their emissions to the survival and development of humankind.

Third, the identification of GHG emissions as “*pollution of the marine environment*” is inconsistent with the UNFCCC regime. This regime has never treated GHG emissions as pollution. According to article 4(1)(d) of the UNFCCC, the oceans, coastal and marine ecosystems are the “*sinks and reservoirs of ... greenhouse gases*”, and States are required to conserve and enhance them. Therefore, the identification of GHG emissions as the “*pollution of the marine environment*” is obviously incompatible with the functions of oceans as provided in this article.

Last but not least, treating GHG emissions as pollution lacks universal international practice. In July 2011, the IMO adopted, by a majority vote, the revised Annex VI to MARPOL, which regulates GHG emissions reduction from ships. However, this revised Annex VI does not identify GHGs as air pollution. Instead, the negotiating history of this revised Annex VI indicates that no consensus was reached by States regarding the identification of GHGs. A thorough examination of State practice also reveals that, currently only very few States have regulated GHGs as pollution in their domestic law.

China holds that GHG emissions are different from pollution, and their adverse effects on the marine environment are *sui generis*. Therefore, these emissions cannot be simply characterized as “*pollution of the marine environment*”. The relevant provisions on pollution of the marine environment under UNCLOS, including article 194, do not apply to these emissions, which should be dealt with by means of sustainable development under the framework of international climate change law.

I now turn to the third point: the subsidiary role of UNCLOS in protecting and preserving the marine environment from the adverse effects of climate change. While GHG emissions should not be considered as “*pollution of the marine environment*”, from an objective point of view, excessive GHG emissions may have adverse effects on the marine environment. Therefore, article 192, which provides that States have the obligation to protect and preserve the marine environment, as well as other relevant provisions of Part XII of UNCLOS, may be applicable in addressing the relevant adverse effects on the marine environment.

Under article 192 of UNCLOS, States have the general obligation to protect and preserve the marine environment, which includes not only the obligation to “protect” the marine environment from future damage, but also the obligation to “preserve” the current status of the marine environment. From another perspective, it includes both the positive obligation to take actions and the negative obligation to refrain from certain actions. It is an obligation of conduct, rather than an obligation of result. In principle, article 192 applies to the protection and preservation of the marine environment from the adverse effects of climate change.

When interpreting and applying the general obligation under article 192, it is important to consider the context provided by other relevant provisions in Part XII of UNCLOS. Additionally, it is crucial to take into account the UNFCCC regime as part of “any relevant rules of international law applicable in the relations between the parties”. Article 192 serves as the foundation for Part XII of UNCLOS and, based on this article and related provisions, the specific obligations for safeguarding the marine environment from the adverse effects of climate change primarily encompass the following four elements. Now, I turn briefly to address them individually.

The first refers to the obligation to take mitigation and adaptation measures for protecting and preserving the marine environment. Pursuant to the UNFCCC regime and article 192 of UNCLOS, States shall, based on the principle of CBDR, take all necessary mitigation and adaptation measures, including preventing, controlling and reducing the adverse effects of climate change on the marine environment.

The second concerns the obligation of international cooperation to protect and preserve the marine environment from the adverse effects of climate change. States have broad obligations to cooperate in protecting and preserving the marine environment. Under article 197 of UNCLOS, States shall cooperate on a global or regional basis, directly or through competent international organizations, in formulating international rules and standards for the protection and preservation of the marine environment. In light of this provision, in addressing marine environmental issues caused by climate change, States shall cooperate mainly through the UNFCCC regime.

The third is the obligation to provide scientific and technical assistance to developing States. Under article 202 of UNCLOS, States shall, directly or through competent international organizations, promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment. In addressing the adverse effects of climate change on the marine environment, States shall provide financial, technical and capacity-building support to developing States in light of this article and the relevant provisions of the UNFCCC regime.

The fourth refers to the obligation to assess the potential effects of planned activities which may cause sufficient and harmful changes to the marine environment, and to communicate reports of results of such assessment. Article 206 of UNCLOS stipulates this environmental impact assessment obligation under specific circumstances and, at the same time, stipulates that such assessment shall be carried out “as far as practicable”. How to assess, scientifically, the adverse effects of activities related to GHG emissions on the marine environment, and how to implement relevant obligations are in need of further study.

China is of the view that the UNFCCC regime reflects internationally accepted norms for regulating GHG emissions. The objectives, principles and the rules of the UNFCCC regime should be respected, followed and promoted. The process of global climate governance should not be disturbed. If States meet their obligations and commitments under the UNFCCC regime, they also satisfy their obligations to protect and preserve the marine environment under Part XII of UNCLOS.

Now, I turn to the final point: the question of State responsibility regarding climate change. Several countries referred to State responsibility in their written statements, which is inappropriate. As I mentioned earlier, China wishes to reiterate that, according to the existing international law, the regime of responsibility of States for internationally wrongful acts as well as the international liability for injurious consequences arising out of acts not prohibited by international law cannot be resorted to in addressing GHG emissions. Therefore, the relevant responsibility and liability system under UNCLOS cannot be applied to these issues. There should be a consensus that the UNFCCC regime is fundamental and primary in addressing climate change and its adverse effects, and should be followed in this regard.¹⁷

Mr President, China notices that some States mentioned the so-called *South China Sea* arbitration awards in their written and oral statements. The position of China on this issue is clear and consistent. The arbitral tribunal in the *South China Sea* arbitration acted *ultra vires*, erred in fact finding, misinterpreted and perverted the law in adjudication. The so-called “awards” are null and void and should not be invoked as a legal basis.

Mr President, addressing climate change and its adverse impacts is a common endeavour for all humankind. It is a task of great importance with a long way to go, and the key lies in action. It requires all parties to keep their promises. Under the guidance of Xi Jinping Thought on Ecological Civilization, China is ready to work with the international community

¹⁷ ILC, Responsibility of States for Internationally Wrongful Acts, article 55 “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by the special rules of international law.”

to tackle climate change, protect the marine environment and collaborate in seeking harmonious co-existence between humanity and nature.

Mr President, before concluding my statement, I would like to emphasize that China respectfully requests the Tribunal to faithfully perform its duties in accordance with UNCLOS, uphold the primacy of the UNFCCC regime in addressing climate change issues, interpret and apply UNCLOS and the UNFCCC regime in good faith, avoid the fragmentation of international law in relevant fields, and safeguard the healthy development of global oceans and climate governance.

Mr President, distinguished members of the Tribunal, this concludes China's statement. Thank you for your kind attention and thank you for the support provided by the Registry and all the staff. I thank you all.

THE PRESIDENT: Thank you, Mr Ma.

This brings us to the end of this afternoon's sitting. The Tribunal will sit again on Monday, 18 September, at 10:00 a.m., when it will hear oral statements made on behalf of Mozambique, Norway and Belize. I wish you all a very good weekend. The sitting is now closed.

(The sitting closed)

PUBLIC SITTING HELD ON 18 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: *President* HOFFMANN; *Vice-President* HEIDAR; *Judges* JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; *Registrar* HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Mozambique

Ms Paula da Conceição Machatine Honwana, Representative

Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson, International Law Commission

Ms Phoebe Okowa, Professor, Queen Mary University, London; Member, International Law Commission

Mr Dire D. Tladi, Professor, University of Pretoria; former Member, Special Rapporteur and Chair, International Law Commission

Mr Andrew Loewenstein, Partner, Foley Hoag LLP

Ms Christina Hioureas, Partner, Foley Hoag LLP

Norway

Mr Andreas Motzfeldt Kravik, State Secretary, Ministry of Foreign Affairs

Ms Dagny Ås Hovind, Adviser, Ministry of Foreign Affairs

Belize

Mr Lennox Gladden, Chief Climate Change Officer, National Climate Change Office, Ministry of Sustainable Development, Climate Change and Disaster Risk Management

Mr Sam Wordsworth KC

Mr Sean Aughey

AUDIENCE PUBLIQUE TENUE LE 18 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILOLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ÉTATS PARTIES

Mozambique

Mme Paula da Conceição Machatine Honwana, Représentante
M. Charles C. Jalloh, professeur à l'Université Florida-International ; membre, rapporteur spécial et deuxième Vice-Président de la Commission du droit international
Mme Phoebe Okowa, professeure à l'Université Queen-Mary de Londres ; membre de la Commission du droit international
M. Dire D. Tladi, professeur à l'Université de Prétoria ; ancien membre, rapporteur spécial et président de la Commission du droit international
M. Andrew Loewenstein, associé au cabinet Foley Hoag LLP
Mme Christina Hioureas, associée au cabinet Foley Hoag LLP

Norvège

M. Andreas Motzfeldt Kravik, Secrétaire d'État au Ministère des affaires étrangères
Mme Dagny Ås Hovind, conseillère au Ministère des affaires étrangères

Belize

M. Lennox Gladden, responsable du Service changement climatique, Bureau national du changement climatique, Ministère du développement durable, du changement climatique et de la gestion des risques de catastrophe
M. Sam Wordsworth KC
M. Sean Aughey

THE PRESIDENT: Good morning. Today, the Tribunal will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States and International Law*.

At the outset, I wish to note that we have been informed by Mexico that they will not be participating in the hearing. The schedule of this morning's sitting has been revised to take this into account. Belize, which was initially scheduled to speak this afternoon, will deliver an oral statement during the present sitting. Accordingly, this morning we will hear oral statements from three delegations in the following order: Mozambique, Norway and Belize. There will be no sitting this afternoon.

I now give the floor to the representative of Mozambique, Ms Machatine Honwana, to make her statement. You have the floor, Madam.

STATEMENT OF MS MACHATINE HONWANA
MOZAMBIQUE
[ITLOS/PV.23/C31/11/Rev.1, p. 1–5]

Good morning. Mr President, members of the Tribunal, I have the honour to appear before you today on behalf of the Republic of Mozambique in connection with the request for an advisory opinion submitted by the Commission of Small Island States. With your permission, I would like to introduce the intervention of the Republic of Mozambique.

The responsibility of rendering an advisory opinion is an important function of this Tribunal as custodian of UNCLOS. This is especially the case given the weighty and consequential matter before you: the effect of greenhouse gas emissions on the States Parties' obligations to prevent and reduce pollution of the marine environment, as well as to protect and preserve it under articles 194 and 192 of the Convention. This advisory opinion will significantly influence the operation of Part XII of the Convention going forward, which is what prompted Mozambique, as a strong supporter of UNCLOS and its institutions, to intervene.

The devastating effects of climate change have rightly become the defining issue for this generation. It is a particularly pressing issue for Mozambique which, like other African States, is paying the ultimate price for an emergency not of its making. African States are among the most affected by the climate change's damage to the marine environment, including ocean warming, acidification, stratification and deoxygenation.¹ This serious harm, if left unchecked, will gravely threaten the livelihoods and sustenance of Mozambique's population.

In fact, it is already causing damage now. We have, in the last decade alone, been at the forefront of devastating cyclones, storms and droughts in equal measure.² Each disaster has been worse than the last and the gap between them grows only shorter. The impacts being faced by our communities are disproportionate to our contribution to the climate crisis. Nevertheless, we remain convinced that the way forward for the international community must involve solutions that are robust and firmly rooted in the values of solidarity, sustainability and equity.

At the outset, Mozambique reiterates its commitment to UNCLOS and the authority conferred on this Tribunal in matters of its interpretation. It believes very strongly that the advisory opinion will play an important role in aligning UNCLOS obligations with those under

¹ IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) ("IPCC 2022, Summary for Policymakers"), p. 9.

² Written Submissions of the Republic of Mozambique dated 16 June 2023 ("Mozambique's Written Submissions"), paras. 1.6, 3.36.

international law's broader climate change regime. It is this desire for a robust equitable solution, firmly grounded in law, and considering the differentiated impacts of climate change, that bring us here today. It is sincerely hoped that the Tribunal's opinion will carefully outline States Parties' obligations under articles 194 and 192. In doing so, the Tribunal's opinion can act as a guideline for the much needed development of local, national and regional programmes in line with commitments in UNCLOS.

Mozambique would further add, as put forward in its written submissions, that the Tribunal's opinion must take into account States Parties' common but differentiated responsibilities.³ Where measures taken pursuant to articles 194 and 192 involve determining individual contributions necessary for limiting global temperatures to 1.5°C above pre-industrial levels, developed States must assume a greater share of the burden. This must include economy-wide absolute emission reduction targets and providing support to developing States Parties for the implementation of their obligations under UNCLOS. Solutions reached by this Tribunal must be equitable and in light of developed States' historical responsibility for the climate emergency.

In essence, Mr President and members of the Tribunal, we come before you seeking urgent guidance on the scope of the States Parties' obligations under UNCLOS. We seek guidance on the nature of the mitigation and adaptation measures mandated by the Convention that would enable us, in cooperation with the rest of the States Parties, to jointly address this crisis.

No fewer than 53 States and organizations have joined us in providing written submissions to the Tribunal. These States and organizations all seek guidance on the proper interpretation and application of Part XII of UNCLOS. Mozambique notes with strong approval that several African States as well as the African Union are taking active part in these proceedings. This is in many ways an exceptional development given the historically low level of our participation in advisory proceedings. But this only further demonstrates the pressing importance of the issues that fall to be decided by the Tribunal, not just for African States, but for the international community.

Moving now to UNCLOS itself: Mozambique's core contention is that the Convention's drafters wisely anticipated that any interpretation of the obligations therein would not be fixed at a particular point in time; rather, the drafters deliberately left the Convention's text flexible to allow it to incorporate advancements in scientific knowledge and respond to new and evolving challenges to ocean governance. The emission of greenhouse gases and the climate change they cause is the most significant challenge presented to the Convention thus far.

The Tribunal therefore has the responsibility to ensure that its interpretation accords not just with the present scientific consensus on climate change but also with the lived experience of States since UNCLOS was adopted in 1982. This includes the subsequent practice of States Parties, such as the ratification of the Paris Agreement. UNCLOS was negotiated and entered into force before climate change was part of public discourse. It would be myopic to ignore the profound relevance that the accepted climate change science has on an interpretation of UNCLOS conducted in the present day.

UNCLOS must therefore be interpreted in light of the overwhelming scientific evidence that greenhouse gas emissions, which are absorbed by the world's oceans, have profound deleterious effects on the marine environment and its living resources. Excessive greenhouse gas emissions into the atmosphere very clearly qualify as pollution of the marine environment within the meaning of article 1(1)(4) of UNCLOS. Mozambique's recent experience bears graphic witness to the devastating impacts that climate change has on the marine environment.

³ Mozambique's Written Submissions, para. 3.67.

Mr President, as a State Party to the UNCLOS, Mozambique sees as its solemn responsibility to shed light on matters before the Tribunal by placing before it all relevant information that may assist in reaching a decision.

Mozambique and its marine environment are particularly vulnerable to impacts of climate change. As a low-lying coastal State, located downstream of nine major rivers, Mozambique's geography has inherent problems which have been exacerbated by climate change. In the past 35 years, we have encountered 75 natural disasters, including 13 droughts, 25 floods, 14 cyclones and 23 epidemics. As stated, these disasters only grow more common. In 2016, for example, we faced one of the most catastrophic droughts in our history due to the influence of El Niño. In 2017, Cyclone Dineo affected nearly 55 million people. In 2019, Mozambique was struck by Cyclone Idai, resulting in loss of life and infrastructure damage estimated at US\$ 800 million.

On your screen is the picture of flooded homes in Mozambique in the aftermath of Cyclone Idai. The cyclone created an inland ocean of 80 miles in length and 15 miles in width. Only six weeks later, Cyclone Kenneth hit Mozambique, marking the first time in history that a country was hit by two tropical storms in one season. This map shows you the amount of cyclones that have recently threatened East Africa. In the last 12 months alone, Mozambique has endured five tropical storms and cyclones. Cyclone Gombe, which occurred in 2022, affected the lives of over one million people.

The broader adverse effects of these disasters brought on by climate change are too many to enumerate here but include loss of ecosystems, reduced food security and mass displacement of populations. These would be catastrophic for any nation, but Mozambique, in particular, relies heavily on fishing and marine resources to sustain its economy and feed its people. The introduction of greenhouse gases into the marine environment continues to threaten Mozambique's way of life and the livelihood of its people – fish stocks continue to decline due to ocean warming and ocean acidification; coastal communities, already experiencing significant hardship, are being pushed to the breaking point.

Limiting global warming to a maximum increase of 1.5°C above pre-industrial levels, as outlined in the Paris Agreement, is not only compelling but represents the irreducible minimum that can be expected of States Parties to UNCLOS if climate change is to be contained. This was the conclusion reached too by the IPCC in its February 2022 report when it observed that temperature increases and extreme weather events resulting from human activities are causing irreversible impacts more rapidly than our capacity to adapt to the changes.⁴

Alone, Mozambique's own efforts to reduce the impact of natural disasters is limited. Our capacity to deploy meaningful adaptation measures is impeded by high levels of poverty, as well as limited technological and infrastructure development. In many cases, we are forced to prioritize sanitation, food security and health needs over and above the benefits that may accrue from long-term adaptation measures. We know that we are not alone in facing such a situation. The experience of Mozambique and other developing States in combating climate change provides further reason for the Tribunal to recognize common but differentiated responsibilities and the concomitant obligations on developed States to provide assistance to States who need it most.

However, within the limits of our national capacity and resources, we have nevertheless made great strides in containing some of the climate change's negative effects in all aspects, including agriculture and fisheries, water resources, health, biodiversity and infrastructure. Mozambique is not asking other States Parties to do what it does not do itself. In line with our commitments under the Paris Agreement, Mozambique has devised and implemented a long-

⁴ IPCC 2022, Summary for Policymakers, p. 20.

term development strategy for lowering greenhouse gas emissions. For example, Mozambique adopted the National Strategy for Climate Change in 2013, identifying adaption and reduction of climate risk as a national priority. The strategy includes not only preparation for and responses to climate change impacts but also low-carbon mitigation and development.⁵

In its updated first National Determination Report under the Paris Agreement, Mozambique proposed to carry out a series of mitigation actions aimed at significantly reducing greenhouse gas emissions by 2025, particularly when viewed against Mozambique's actual emissions per capita.⁶ These actions include promoting the use of renewable energy sources and low-carbon urbanization, increasing energy efficiency, encouraging development of low-carbon agricultural practices, reducing the rate of deforestation and rehabilitating degraded ecosystems. Indeed, Mozambique is one of the first countries to successfully implement the Forest Carbon initiative of the World Bank, evidencing its commitment and effort in developing national systems for cutting emissions.⁷

To conclude, it is sincerely hoped that the Tribunal will seize this opportunity in interpreting UNCLOS to clarify the differentiated measures that must be taken to protect the marine environment of vulnerable States such as ours. We look earnestly for guidance, too, on the principles of mitigation and adaptations that must be taken to avert irreversible harm to the marine environment. We ask, therefore, that the Tribunal's interpretation of articles 194 and 192 be carried out with the aforementioned in mind.

I would like to now introduce the legal team appearing for Mozambique. Our advocates include Professor Phoebe Okowa of Queen Mary, University of London, Professor Charles Jalloh of Florida International University and Mr Andrew Loewenstein of Foley Hoag. The remaining members of the legal team are Professor Dire Tladi of the University of Pretoria and Ms Christina Hioureas of Foley Hoag.

I now request that you invite Professor Jalloh to the podium to present on questions of jurisdiction. I thank you.

THE PRESIDENT: Thank you, Ms Machatine Honwana.

I now give the floor to Mr Jalloh to make his statement. You have the floor, Sir.

⁵ See Republic of Mozambique, National Strategy for Adaptation and Mitigation of Climate Change, 2013-2025, available at <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC185538/>

⁶ Republic of Mozambique, *Update of the First Nationally Determined Contribution to the United Nations Framework Convention on Climate Change: Period 2020-2025*, available at https://unfccc.int/sites/default/files/NDC/2022-06/NDC_EN_Final.pdf, pp. 19, 21.

⁷ *Ibid.*, p. 19.

STATEMENT OF MR JALLOH
MOZAMBIQUE
[ITLOS/PV.23/C31/11/Rev.1, p. 5–8]

Mr President, distinguished members of the Tribunal, good morning. It is an honour for me to appear before this Tribunal today. It is also equally an honour for me to be representing the Republic of Mozambique in such an historic matter.

Honourable members of this Tribunal, Mozambique's written statement comprehensively contains our submissions on the core issues before the Tribunal. Today, our presentations will only highlight key issues, and also respond to some of the written comments of other States.

Mr President, my presentation will proceed as follows. First, I will quickly address the Tribunal's jurisdiction. Second, I will then pass the podium to Professor Phoebe Okowa, who will explain Mozambique's arguments on the proper interpretation of the Convention. She will also deal with the due diligence obligation and the precautionary principle, before handing over to Mr Andrew Loewenstein for the final part of Mozambique's submission today.

Mr President, turning immediately to the threshold question of jurisdiction. In this regard, while jurisdiction was for the most part not contested by most participants in these proceedings, Mozambique submits two principal arguments for your consideration. We consider these important because there are still States that have expressed doubts about this Tribunal's advisory competence.

First, COSIS' request for an advisory opinion falls within the Tribunal's well-established jurisdiction to render advisory opinions.

Second, on the facts of this case, Mozambique considers that there are no compelling reasons why this Tribunal should decline its exercise of jurisdiction to provide an advisory opinion. We are pleased that our argument basically aligns with that of most States and international organizations that have so far participated in these historic proceedings.

Allow me to elaborate our arguments on jurisdiction and admissibility by making three points. First, article 21 of the Tribunal's Statute provides that its jurisdiction includes "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." In the *SRFC* Advisory Opinion, the Tribunal confirmed that the term "all matters" in article 21 means something more than just "disputes" and includes advisory opinions where provided for in any other agreement which confers jurisdiction on the Tribunal.¹ Therefore, it is article 21 read together with article 138 of the Rules, which "constitute the substantive legal basis" for the Tribunal to provide advisory opinions.

Last week, COSIS cogently demonstrated that their request falls within the Tribunal's advisory competence. We are in full agreement. So are most States in both their written and oral statements. In fact, only three States, namely, China, Brazil and India, have submitted that the Tribunal does *not* possess advisory jurisdiction. They argue, essentially, that the reference to all matters in article 21 does not encompass non-contentious matters.² Mozambique believes that this proposition cannot stand in light of the Tribunal's historic decision in the *SRFC* Advisory Opinion.³

¹ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) ("*SRFC* Advisory Opinion"), para. 58.

² Written statement of the Federative Republic of Brazil, (16 June 2023), paras. 7-9; Written statement of the People's Republic of China, (15 June 2023), paras. 11-12.

³ Written statement of the African Union (16 June 2023), para. 70; Written statement of the Republic of Mozambique (16 June 2023), para. 2.2.

We acknowledge at least one State requested further clarification regarding the basis of the advisory jurisdiction in the present proceedings.⁴ We would welcome such an approach. Not least because it would contribute to legal certainty for the benefit of all States Parties, including those not participating in these proceedings.

Second, accepting that the Tribunal possesses advisory competence, Mozambique further submits that all three preconditions for the exercise of the Tribunal’s jurisdiction are met.⁵

Firstly, there exists an international agreement related to the purposes of the Convention providing for the submission to the Tribunal of the request for an advisory opinion. COSIS is an international organization. Under article 2(a) of the articles on the Responsibility of International Organizations, the International Law Commission defined an “international organization” to mean “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”⁶ COSIS would fall within that definition. Its founding treaty’s object is directly relevant in the sense that it is to promote the rule of international law concerning climate change, including the protection and preservation of the marine environment.⁷

Secondly, the request for an advisory opinion was also transmitted by an authorized body. COSIS is specifically authorized by its founding treaty to submit the request. It did so on 26 August 2022.⁸

Finally, the request clearly concerns a “legal question”. The two questions raised by COSIS are framed in legal terms and directly call for interpretation of articles 192 and 194 of the Convention.

Before moving on, we note the argument of some States that the two COSIS questions are “framed in broad terms”. We would however respond, basically in agreement with several other States,⁹ that the two questions are sufficiently clear and specific. Even if the questions were to be deemed broad, Mozambique would invite this Tribunal to follow the approach of the International Court of Justice in its *Namibia* Advisory Opinion and decide that it is empowered to “give an advisory opinion on any legal question, abstract or otherwise”¹⁰.

Mr President, and this would be my third point today, even where jurisdiction is established, its exercise is technically discretionary. This is because article 138, paragraph 1, of the Rules of the Tribunal provides that it “may” decide not to give an advisory opinion. It is true that there have not been many advisory requests to date, whether to the Seabed Disputes Chamber or the Tribunal as a whole. Nonetheless, it is evident from the Tribunal’s practice not to refuse a request for an advisory opinion, “except for ‘compelling reasons’”.¹¹ In fact, to date, there exists no decision of this Tribunal finding compelling reasons not to give an advisory opinion.

⁴ Written statement of the United Kingdom, (16 June 2023), paras. 15-16.

⁵ See article 138 of the Rules of the Tribunal. See also, *SRFC Advisory Opinion*, para. 38.

⁶ International Law Commission, Draft articles on the Responsibility of International Organizations, *Yearbook of the International Law Commission* (2011), vol. II, Part Two, article 2(1).

⁷ COSIS was established pursuant to the 31 October 2021 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (“COSIS Agreement”) agreed to by Antigua and Barbuda, Tuvalu, Niue, Palau, Vanuatu and Saint Lucia. See COSIS Agreement, article 2(1).

⁸ See articles 3(3) and 3(5) of the COSIS Agreement. The request was transmitted to the Tribunal by COSIS’ Co-Chairs on 12 December 2022 pursuant to article 3(3) of the COSIS Agreement.

⁹ Written statement of the Federal Republic of Germany, (14 June 2023), para. 31.

¹⁰ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, *I.C.J. Rep* 51, 61. See also the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion [1954] *ICJ Rep* 51; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] *ICJ Rep* 27, para. 40.

¹¹ *SRFC Advisory Opinion*, para. 71.

This eminently sensible judicial posture is consistent with the well-settled approach of the International Court of Justice, which since 1945, has never found reason to decline its advisory competence when such advice is properly requested by competent United Nations organs pursuant to article 96 of the United Nations Charter. The ICJ, as the principal judicial organ of the United Nations under article 94 of the Charter, takes a liberal approach that recognizes the value of providing advisory opinions to the relevant UN bodies to the extent that such opinions might assist them in the discharge of their functions.

This Tribunal – as the guardian of UNCLOS which is rightly referred to as the “Constitution of the oceans”, which must adapt to the changing requirements of international life – has compelling reasons to follow the ICJ’s practice. It should therefore not lightly decline to provide a properly requested advisory opinion such as that of COSIS.

Indeed, in the present case, in Mozambique’s view, there are no compelling reasons to not answer the two questions. To the contrary, in our respectful submission, an advisory opinion on this vital matter is crucial for clarifying the rights and obligations of States Parties in light of the existential threat posed by climate change. This is particularly important for developing States like Mozambique and many other countries in Africa and the Global South that continue to bear the brunt of climate change not of their own making. This Tribunal’s guidance is essential for States Parties regarding how to interpret and discharge their obligations in the face of the scientific consensus on the acute threats posed by climate change to the marine environment.

However, the United Kingdom urges caution because COSIS is not truly an “international body” contemplated by UNCLOS, and the advisory opinion may implicate the obligations of States not party to the COSIS Agreement or who are uninvolved in either framing the request or participating in these proceedings.¹²

With respect, these are not compelling reasons for refusing to render this much needed advisory opinion. The fact remains that the preconditions for the exercise of the Tribunal’s jurisdiction have been met. It now falls to the Tribunal to interpret UNCLOS. There is no mandatory rule that international organizations require large or universal membership to act on the international plane or to make requests for advisory opinions. Further, UNCLOS also provides that, like for regional fishing matters under article 118, States Parties must “cooperate on a global basis ... through competent international organizations”.¹³ The nature of COSIS as an international organization does not detract from this point.

Mozambique further notes the written comments of some States calling on the Tribunal to exercise caution so as to not create obligations for non-States Parties to the agreement conferring jurisdiction or to espouse on policy issues.¹⁴ We are confident that the Tribunal, as a specialist international judicial body, will no doubt remain mindful of the wider issues and be sensitive to the impact of the advisory opinion.

Mr President, distinguished members of the Tribunal, I am grateful for your kind attention. Having now briefly dealt with the issue of jurisdiction and admissibility, and as indicated in my opening, I would respectfully request that you give the floor to my learned colleague Professor Okowa. I thank you very much.

THE PRESIDENT: Thank you, Mr Jalloh.

I now give the floor to Ms Okowa to make her statement. You have the floor, Madam.

¹² Written statement of the United Kingdom, (16 June 2023), para. 18.

¹³ UNCLOS article 197.

¹⁴ *See, e.g.*, Written statement of the French Republic, (16 June 2023), para. 16.

STATEMENT OF MS OKOWA
MOZAMBIQUE
[ITLOS/PV.23/C31/11/Rev.1, p. 8–16]

Mr President, distinguished members of the Tribunal, it is indeed an honour to be here this morning and to make this presentation on behalf of the Government and the people of Mozambique.

Mr President, we have the particular advantage of addressing the Tribunal late in this oral hearing. This has given Mozambique the opportunity to review carefully the written and oral submissions presented thus far. I should add that we are very grateful to COSIS for the initiative in bringing the question of climate change, a matter of profound interest to all UNCLOS members, to your attention.

The key points in Mozambique's submissions are, that UNCLOS is a living instrument that must be interpreted in light of the current state of scientific knowledge and other existing rules and principles of international law developed by States Parties. This includes the due diligence obligations contained in articles 194 and 192. The IPCC's scientific consensus on the harm presented by climate change is globally accepted. Furthermore, the Paris Agreement, ratified by almost all UNCLOS States Parties, requires States to limit global average temperature to 1.5°C above pre-industrial levels – that's the "1.5°C standard".

Due diligence standards under UNCLOS, therefore, must incorporate the conclusions of the IPCC and the standards set in the Paris Agreement as a minimum threshold for satisfying States Parties' obligations under articles 194 and 192.

On a holistic interpretation of UNCLOS, States Parties' due diligence obligations require them, in light of the precautionary principle, to drastically reduce their greenhouse gas emissions given that even the 1.5°C standard presents a serious risk of irreversible harm to the marine environment.

Following my submissions, my colleague Mr Andrew Lowenstein will then further develop Mozambique's core contention that due diligence requires a differentiated regime of responsibility.

The central argument in Mozambique's submissions is that UNCLOS must be interpreted as a living instrument that is capable of responding to the constantly evolving challenges of ocean governance. The most significant challenge it has faced since it entered into force almost 30 years ago is the existential threat of climate change and how to respond to it.

There are at least four reasons in support of this interpretation:

first, the text of UNCLOS anticipates a continuous process of alignment and adaptation in light of scientific advancement;

second, the text of UNCLOS is consistent with the history of ocean governance, which has always involved the adjustment of States Parties' obligations in light of new knowledge of the world's oceans;

third, this Tribunal can therefore have recourse to subsequent developments, including relevant subsequent treaty law and custom as expressly anticipated under article 293 of the Convention, as other rules of international law not incompatible with UNCLOS and that can be taken into account in its interpretation;

fourth, the express recognition in article 237 that UNCLOS is not a self-contained regime, but that its obligations may be concretized through the development of more specific rules in other instruments.

Mr President, this is an explicit recognition that UNCLOS may be interpreted by way of *renvoi* to rules external to it and this includes the UNFCCC and the Paris Agreement.

This approach should not be controversial. The story of ocean governance has always been one of continuous adaptation in light of scientific and technological change. For much of the law of the sea's history, the principle of *mare liberum* reigned supreme. It was premised on the assumption that the seas were indivisible and its resources were capable of endlessly replenishing themselves.¹

Technological and scientific advances eventually eroded the basic premises of *mare liberum*. Fish did not endlessly replenish themselves but were being plundered by large fishing fleets that threatened biological reproduction levels. The seas were not boundless as modern technology made them capable of occupation and dominion by States.²

Increased public sensitivity to environmental values in the 1960s and 70s, as well as the science of ecological damage, made environmental protection of the seas a necessity. International law responded with the 1958 Convention and the Third United Nations Conference, leading to UNCLOS. What resulted was a carefully balanced and highly successful alignment of the law on ocean governance with new scientific knowledge.

Now the Tribunal is called upon to interpret UNCLOS in light of new scientific knowledge once more, so as to confront a profound challenge to ocean governance. Accordingly, in formulating the scope of States Parties' obligations under Part XII, this Tribunal must be guided by the accepted science on climate change and the steps that must be taken to avoid its adverse effects.

Mr President, contrary to some States' submissions last week, the Tribunal is not being asked to amend UNCLOS or act inconsistently with its judicial function by creating new law on climate change. While formal amendments to the Convention are possible under article 312, the process was made procedurally and politically cumbersome in the expectation that that would in all likelihood be a very rare occurrence.

You have heard a great deal already – about formal and informal processes for the evolution of obligations in UNCLOS, including through judicial interpretation. This is precisely what you are being asked to do here: to give effect to the living nature of the Convention by taking into account circumstances not foreseen at the time it was adopted.

UNCLOS effectively functions as the constitution of the world's oceans. This was first put forward in the Third Conference of the Law of the Sea,³ whose mandate was to adopt a convention dealing with “all matters relating to the law of the sea ... bearing in mind that the problems of ocean space are closely interrelated and need to be considered a whole”.⁴

Not only is the ambit of UNCLOS incredibly broad, but a large portion of its substantive provisions were explicitly designed to respond to changing circumstances. In the *Activities in the Area* Opinion, the Seabed Disputes Chamber held that UNCLOS' due diligence obligation, with respect to environmental protection, is a “variable concept” that may “change over time ... in light, for instance, of new scientific or technological knowledge”.⁵

¹ Hugo Grotius, *Mare Liberum* at (Ralph Van Deman Magoffin trans., 1916), p. 43 “For every one admits that if a great many persons hunt on the land or fish in a river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea.”

² See Oscar Schachter, *The New Law of the Sea*, 178 *Recueil des Cours*, 266 (1982).

³ See Tommy Koh, *A Constitution for the Oceans* (6 December 1982); see, e.g., Tulio Treves, UN Audiovisual Library of International Law, UNCLOS (10 December 1982); Yoshifumi Tanaka, *THE INTERNATIONAL LAW OF THE SEA* (4th ed. 2023), p. 40.

⁴ UN General Assembly, Resolution 3067(XXVIII), *Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and Use of Their Resources in the Interests of Mankind, and Convening of the 3rd United Nations Conference on the Law of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction* (1973).

⁵ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 ITLOS REP. 10 (1 February) (“Activities in the Area”) 117.

The same was said by Judge Lucky in the *Sub-Regional Fisheries Commission* opinion: UNCLOS is “dynamic and ... through interpretation ... a court or tribunal can adhere to and give positive effect to this dynamism”.⁶ This is precisely what Mozambique calls on the Tribunal to do in answering the questions put to it.

Mozambique submits that to give effect to UNCLOS as a living instrument in issuing its advisory opinion, the Tribunal must arrive at an interpretation that incorporates the present scientific consensus on climate change and the harm greenhouse gas emissions cause to the marine environment.

This is contemplated by the ordinary meaning of UNCLOS’ text, including articles 194 and 192. Part XII, in particular, allows for the determination of States Parties’ obligations with direct reference to the current state of scientific understanding.

Article 194, for example, is premised on objective scientific assessments of, among other things, whether measures are “necessary to prevent, reduce or control” marine pollution and the extent of “best practicable means at a State’s disposal”.⁷

Article 192 can be understood in the same way, as States Parties have an obligation to reduce greenhouse gas emissions in accordance with the best available science to prevent climate change’s harm to the marine environment.⁸

The core provisions of Part XII – articles 192 to 207 – impose a general obligation on States Parties to prevent, reduce and control pollution. And pollution is broadly defined and, pursuant to articles 194, 207 and 212, covers all airborne and land-based sources of marine pollution, which would include greenhouse gas emissions.⁹

Article 194(3) also reiterates that measures adopted must deal with “all sources” of marine pollution, which ought also to be wide enough to include greenhouse gas emissions.¹⁰

This due diligence standard contained in articles 194 and 192 is, however, not devoid of content. Part XII of UNCLOS anticipates the means by which the obligations therein take normative shape.

In that regard, articles 200 to 206 create a scientific infrastructure envisaging a process of collaborative study and research by States Parties. The results of this research on the marine environment then determines the “appropriate scientific criteria” for the development of rules and standards on the prevention, reduction and control of marine pollution. This is complemented by obligations to conduct active “surveillance of any activities which they permit” and a further consideration of whether these activities are likely to cause pollution necessitating environmental impact assessments.¹¹

In the present case, Mozambique submits that the relevant scientific knowledge must include the current accepted consensus on the harm caused by climate change to the marine environment. This is also borne out by an application of the general rules of treaty interpretation.

The rules of treaty interpretation are not in dispute. It is accepted by all written submissions to the Tribunal that addressed the matter that, pursuant to the Vienna Convention on the Law of Treaties, articles 194 and 192 of UNCLOS must be interpreted in good faith according to the ordinary meaning of their words, in light of UNCLOS’ object and purpose.¹²

⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case No. 21, Advisory Opinion, 2015 ITLOS REP. 4 (2 April) Separate Opinion of Judge Lucky, 18.

⁷ Mozambique’s Written Submissions, para. 3.47.

⁸ Mozambique’s Written Submissions, paras. 4.3-4.8.

⁹ Mozambique’s Written Submissions, paras. 3.7-3.19.

¹⁰ Mozambique’s Written Submissions, para. 3.14.

¹¹ Mozambique’s Written Submissions, paras. 4.25-4.29.

¹² Mozambique’s Written Submissions, para. 3.3; *Activities in the Area*, paras. 57-58.

Such an interpretation can include reference to other relevant parts of a treaty or its drafting history.¹³ This approach accords perfectly with the arguments Mozambique has just advanced.

Additional support can be found in other rules and principles of international law, including treaties and relevant norms of customary international law, which this Tribunal is entitled to rely on in interpreting UNCLOS.¹⁴ Accordingly, the Tribunal's interpretation of UNCLOS as a living instrument must take into account the accepted science on climate change and the obligations contained in the Paris Agreement.

Dealing first with subsequent practice of the parties: Mozambique submits that the Tribunal's advisory opinion must incorporate, at the very minimum, the 1.5°C standard. This can be rationalized either as a necessary measure, based on scientific consensus that is necessary to control marine pollution under article 194; or that is necessary to protect and preserve the marine environment under article 192; or as a relevant subsequent practice within the meaning of article 31(3)(c) of the Vienna Convention.

With respect to custom, article 194 imports an obligation of due diligence and sets a very high threshold as States Parties are required to take "all measures ... necessary" to prevent, reduce and control pollution of the marine environment.

Article 192 also imports a due diligence obligation.¹⁵ But the due diligence obligation also enjoys standalone status as a customary norm, the contents of which can be relevant to an interpretation of UNCLOS. Both articles 194 and 192 cannot be read in isolation. They have to be considered with – and, as part of due diligence – other principles of environmental law such as the precautionary principle.¹⁶

Mr President, members of the Tribunal, in characterizing these obligations as ones of due diligence, Mozambique has deliberately avoided the binary characterization of obligations of "conduct" and of "result". In fact, in the context of UNCLOS, and international law generally, these labels are largely unhelpful as many obligations will straddle both categories. As the late Professor James Crawford pointed out, the specific measures required by an obligation are determined by that obligation's primary rule; whether or not the obligation has been performed thus turns on the interpretation of the instrument in question.¹⁷

With respect to UNCLOS, in some cases, such as articles 207 and 212, the obligations in Part XII require States to undertake specific measures such as enacting and implementing legislation to prevent marine pollution. In other cases, such as article 194, States are required to adopt all necessary measures – a threshold substantially higher than best efforts, which has traditionally characterized pure conduct obligations.¹⁸

Here Mozambique aligns itself with the analysis provided by Professor Rüdiger Wolfrum that these are "goal-oriented obligations" – obligations that neither specify the conduct or result necessary to achieve the goal.¹⁹

¹³ Vienna Convention on the Law of Treaties, article 32. Mozambique's Written Submissions, para. 3.3.

¹⁴ Mozambique's Written Submissions, para. 3.85. *See* Vienna Convention on the Law of Treaties, article 31(3)(c) ("There shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the Parties").

¹⁵ Mozambique's Written Submissions, para. 4.16.

¹⁶ *South China Sea (Philippines v. China)*, PCA Case No. 2013-19, Award on the Merits (12 July 2016), para. 942; *Activities in the Area*, paras. 111-120.

¹⁷ James Crawford, *The International Law Commission's articles on State Responsibility* (Cambridge University Press 2002) at p. 13, 22.

¹⁸ Moreover, there has been considerable terminological confusion in the logical consequences of characterizing obligations as either conduct or result, as evidenced by the critical academic commentary on the jurisprudence of international courts and the work of the International Law Commission. Mozambique submits that the categories of obligations of "conduct or result" are neither sufficient nor exhaustive of the infinite variety of contexts in which international responsibility falls to be considered.

¹⁹ Above p. 367-368.

Mozambique would therefore urge the Tribunal, in interpreting the States Parties' obligations under Part XII, to do so unimpeded by the unhelpful restrictions implicit in categorizing those obligations as ones of conduct or of result.

Drawing together the strands of argument thus far: once the Tribunal has concluded that UNCLOS imposes due diligence obligations on States Parties regarding harm to the marine environment caused by greenhouse gas emissions and climate change, the question then becomes what the scope of the due diligence obligation is. As has been established, the normative content of articles 194 and 192 is directly informed by both scientific knowledge and subsequent practice. Mozambique's submissions will now turn to what this requires of States Parties.

Mr President, members of the Tribunal, at this point in the proceedings, we are all no doubt fully apprised of the severe damage that climate change is causing not just to the world's oceans but also to livelihoods around the globe. Mozambique is no exception. The havoc that is right now being wrought by climate change has been outlined in detail in its written submissions and by the representative of Mozambique earlier.

To further assist the Tribunal, Mozambique notes in summary that: as a coastal state, Mozambique is particularly vulnerable to the effects of climate change on its coastal environment and infrastructure;²⁰ that increased ocean temperatures also contribute to more frequent and violent cyclones. In the past 12 months, Mozambique has suffered no less than five tropical storms or cyclones.

Mozambique is also at particular risk of coral bleaching caused by increased ocean temperatures. If the significant increase in greenhouse gas emissions is not curtailed, then coral bleaching events will threaten a significant portion of Mozambique's reefs with extinction.²¹

The above have knock-on effects on the health of Mozambique's fisheries, on which its people depend for their sustenance and livelihoods. Fisheries are responsible for at least 3 per cent of Mozambique's GDP and 4 per cent of its national exports.²² Marine foods are also responsible for 18-23 per cent of its population's nutrition.²³

Finally, over 60 per cent of Mozambique's population lives in locations that are at risk of flooding and damage caused by sea-level rise.²⁴ This is not including the population that is dependent on agriculture, also primarily in areas threatened by sea-level rise.

The dire effects on Mozambique constitute local manifestations of the global phenomena described in the IPCC's research, which has also been cited several times in the proceedings thus far.²⁵ It is this reality, supported by the clearest scientific evidence, that the Tribunal must incorporate into its interpretation of States Parties' due diligence obligations under UNCLOS.

Applying the scientific consensus on climate change to articles 194 and 192, then, in Mozambique's submission, results in the following conclusions: it is accepted that all necessary measures under UNCLOS require a high threshold of due diligence in order for States Parties to discharge their obligations; the best available science confirms that failure to adhere to the 1.5°C standard in the Paris Agreement will result in marine pollution;²⁶ the 1.5°C standard must therefore function as the absolute minimum of what is required of States Parties under articles 194 and 192 of UNCLOS.

²⁰ Mozambique's Written Submissions, para. 3.30.

²¹ Mozambique's Written Submissions, para. 3.37.

²² Mozambique's Written Submissions, para. 3.39.

²³ Mozambique's Written Submissions, para. 3.39.

²⁴ Mozambique's Written Submissions, para. 3.40.

²⁵ See, generally, IPCC, "Summary for Policymakers" in Hans-Otto Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022).

²⁶ Mozambique's Written Submissions, para. 3.65.

Mozambique further submits that the 1.5°C standard is the start, but not the end point, of the scope of States Parties' obligations under UNCLOS. Mozambique argues that this Tribunal should find that all necessary measures pursuant to UNCLOS' due diligence standard requires States to reduce their greenhouse gas emissions such as to bring global average temperatures below the 1.5°C standard. In this regard, Mozambique expresses its support for, and is in full agreement with, the submissions of the African Union in these proceedings.

Mozambique adds that reducing greenhouse gas emissions below the 1.5°C standard is also in line with the precautionary principle, which is a relevant customary norm in the interpretation of UNCLOS. This was accepted by the Seabed Disputes Chamber in the *Activities in the Area* Advisory Opinion. The Chamber held that the principle is an “integral part” of States' due diligence obligations, and that it mandates that due diligence be taken even “where scientific evidence concerning the scope and potential negative impact of [the conduct in question is] insufficient”.²⁷

The precautionary principle does not permit States to wait for serious or irreversible damage to the environment to occur before mandating that necessary measures be taken. Mr President, members of the Tribunal, the picture provided by the scientific evidence is stark and the outlook is grim. Three examples will suffice.

Concerning ocean acidification – the IPCC has concluded that, even following the 1.5°C standard – will result in impacts to “a wide range of marine organisms and ecosystems, as well as sectors such as aquaculture and fisheries”.²⁸

As regards ocean warming, the rate of ocean warming across the world is actually increasing, with higher temperatures threatening to cause knock-on effects across the food chain.²⁹ This will still occur with global temperatures kept at the 1.5°C standard.

Warmer temperatures also lead to ocean deoxygenation, which causes severe impacts to aquatic species who need to absorb oxygen to survive. The IPCC concluded that it is “virtually certain” that ocean deoxygenation will increase as warming continues, even at the 1.5°C standard.³⁰

The scientific evidence establishes that even at the 1.5°C standard, climate change presents serious and potentially irreversible harm to the marine environment. It follows from the legal principles consistent across the submissions of all States Parties that the level of marine pollution and harm to the marine environment at the 1.5°C standard would still trigger States Parties' due diligence obligations under articles 192 and 194.

It then becomes incumbent on States Parties to reduce greenhouse gas emissions below the 1.5°C standard until the harm they pose is no longer serious or irreversible. The assessment of when harm is no longer serious or irreversible should be carried out on a case-by-case basis.

Mr President, members of the Tribunal, this concludes my presentation on the interpretation of UNCLOS and the due diligence requirement. I thank you for your kind attention, and I now request that you invite Mr Andrew Loewenstein to the podium to present the final part of Mozambique's oral submission. Thank you for your attention.

²⁷ *Activities in the Area*, para. 117.

²⁸ IPCC, “Technical Summary” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018), p. 37.

²⁹ IPCC 2014, “The Ocean” in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) Table 30-1, p. 1667.

³⁰ IPCC, “Impacts of 1.5°C Global Warming on Natural and Human Systems” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018) p. 224.

MR PRESIDENT: Thank you, Ms Okowa. I note that it would appear that your delegation have taken up the time allotted for you to speak, so I don't know whether Mr Loewenstein will be able to complete his presentation within the next five minutes. Can I have an indication from your delegation, please?

MS OKOWA: Mr President, may we request that you indulge our delegation by giving us 10 minutes?

THE PRESIDENT: Yes, okay. We will give you 10 minutes, but please, I would urge you to keep within that time limit. We have to be fair to all parties and we have granted them all the same amount of time, so please.

MS OKOWA: Much appreciated.

THE PRESIDENT: Thank you very much. I now give the floor to Mr Loewenstein to make his statement. You have the floor, Sir.

STATEMENT OF MR LOEWENSTEIN
MOZAMBIQUE
[ITLOS/PV.23/C31/11/Rev.1, p. 16–20]

Mr President, members of the Tribunal, good morning. It is an honour to appear before you on behalf of the Republic of Mozambique and to do so in a case of such fundamental importance. I will continue Mozambique’s submissions on the obligation of due diligence and will address three aspects of that obligation.

But before proceeding, Mr President, on my discussion over those aspects of due diligence, I hope you will permit me to pay tribute to Professor Alan Boyle, with whom I had the privilege of working, including on cases where due diligence lay at the core, and had the even greater privilege of learning from him.

Mr President, I begin by pausing to explain why Mozambique considers these facets of due diligence that I will address to have particular importance in the context of protecting and preserving the marine environment. The questions that are directed to the Tribunal ask it to describe the “specific obligations” of States Parties to UNCLOS regarding the two questions that are the subject of these proceedings.

As indicated by the specificity called for by the request, it does not seek abstract or theoretical answers; it calls upon the Tribunal to provide *concrete guidance*. Mozambique welcomes this approach and respectfully submits that it is essential that the Tribunal provide answers that will inform States as to what concrete measures they must undertake, especially in view of the liability regime established in article 235.

Professor Okowa addressed one aspect of that concreteness when she showed that, for the specific context of greenhouse gas emissions, the due diligence obligations codified in Part XII required States to undertake effective action to ensure that the global temperature rise does not exceed 1.5°C. I will address Mozambique’s views as to *how* States must concretely fulfill that obligation.

In doing so, I begin by noting that while every State Party to UNCLOS must discharge its due diligence obligations, bearing in mind the paramount objective of limiting temperature rise to 1.5°C, that does not suggest that the *means* by which the obligation is discharged is the same for all States. It is not.

To the contrary, developing States like Mozambique, which bear little responsibility for having created the present environmental crisis and which are not themselves significant emitters of greenhouse gases, are not required to assume the same burden as the developed States that contributed the most to the situation in which we now find ourselves.

In that regard, the drafters of the Convention chose to weave the common but differentiated responsibilities principle into the fabric of the environmental obligations set out in Part XII. Indeed, the principle animates the Convention as a whole. This is reflected in the Preamble, which immediately, after recognizing the desirability of establishing through the Convention a legal order that promotes, among other things, the protection and preservation of the marine environment, notes the “special interests and needs of developing States.”¹

And it can be seen in article 194(1), which not only establishes the general obligation that States must take “all measures consistent with” the Convention that are “necessary to prevent, reduce and control pollution,” it qualifies the directive by stipulating that States are to use “for this purpose the best practicable means at their disposal” and are to act “in accordance with their capabilities.”²

¹ United Nations Convention on the Law of the Sea (“UNCLOS”) (entered into force 16 November 1994), Preamble, paras. 4-5.

² UNCLOS, art. 194(1).

The fact that the due diligence obligation is informed by the common but differentiated responsibilities principle is confirmed by other provisions of Part XII. Article 207 concerns the regulation of pollution from *land-based sources*, which are, of course, among the most significant contributors to greenhouse gas emissions.³ It establishes that States Parties, in adopting laws and regulations to prevent, reduce and control pollution from such land-based sources, must “tak[e] into account internationally agreed rules, standards and recommended practice.”⁴ And the same is true with respect to the obligation to prevent, reduce and control pollution from the *atmosphere* in article 212.

The common but differentiated responsibilities principle plainly qualifies as an internationally agreed upon rule, standard or recommended practice. Indeed, it is an important one, especially in the climate change context. More than three decades ago, Principle 7 of the Rio Declaration referred to the fact that “States have common but differentiated responsibilities”.⁵

Moreover, the relevant instruments concerning climate change – which, as Professor Okowa explained, must be taken into account when interpreting Part XII of the Vienna Convention – likewise reflects the common but differentiated responsibilities principle. And the same is true with respect to article 2(2) of the Paris Agreement.

Similarly, article 3(1) of the UNFCCC – another instrument to which all UNCLOS States Parties are also parties – records, as the first of its guiding principles, that “[t]he Parties should protect the climate system ... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”⁶

The upshot is clear: while all States must take effective action to ensure that global temperature rise is limited to no more than 1.5°C, the provisions of the Convention which establish that obligation do not mandate uniformity into how it is to be accomplished.

So what are the differentiated responsibilities? The answer can be found in the Paris Agreement, which for the reasons we have seen, must be taken into account.

Specifically, the Paris Agreement, while acknowledging that what due diligence requires may depend on a State’s particular “national circumstances”,⁷ sets out a tripartite scheme of differentiated responsibilities.

Developed States bear the greatest responsibility. Why? Because they have greater capabilities, as that term is used in the Paris Agreement in article 194(1) of UNCLOS itself. Put simply, they have the scientific, technical and financial means to do more, and they continue to host industrial facilities that remain significant contributors to greenhouse gas emissions. Due diligence therefore requires that they do more.

Mr President, the fact that developed States must do more is deeply rooted in international environmental law. Principle 7 of the Rio Declaration records the acknowledgement by developed countries of the “responsibility” they “bear ... in view of the pressures their societies place on the global environment.”⁸

And developed and developing States alike accept this. And the Paris Agreement sets it out in concrete terms. You can see this in article 3(1) in the UNFCCC⁹ and in article 4(4) of the Paris Agreement, which specify that in undertaking a leadership role, developed States

³ UNCLOS, art. 207.

⁴ UNCLOS, art. 207(1).

⁵ UN General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I) (Rio de Janeiro, 3-14 June 1992), Annex I (“Rio Declaration”), Principle 7.

⁶ United Nations Framework Convention on Climate Change (“UNFCCC”) (entered into force 21 March 1994), art. 3(1).

⁷ Paris Agreement, art. 2(2).

⁸ Rio Declaration on Environment and Development (1992), Principle 7.

⁹ United Nations Framework Convention on Climate Change (“UNFCCC”) (entered into force 21 March 1994), art. 3(1).

should undertake economy-wide absolute emission reduction targets in a manner designed to limit the increase in temperature to no more than 1.5°C.¹⁰

With respect to developing countries, the same provision of the Paris Agreement imposes a lesser but equally important responsibility. In recognition of their vulnerability, developing countries are directed to “continue enhancing their mitigation efforts” and “encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.”¹¹

Mr President, as these provisions of the Paris Agreement make clear, mitigation of and adaptation to threats posed to the marine environment are of central importance, particularly for vulnerable developing States like Mozambique. Indeed, as the ICJ recognized in the *Certain Activities* case, mitigation is fundamental to the discharge of a due diligence obligation.¹²

Mozambique, like many African States, such as Sierra Leone, is doing its utmost to develop and implement such strategies, including by adopting a National Strategy for Climate Change Adaptation and Mitigation. But the stark reality is that the impact of such efforts is likely to remain limited unless developed States engage in robust efforts to assist. There is thus an urgent need for the Tribunal to clarify that the duty to cooperate obligates States to provide such assistance.¹³

The Tribunal emphasized in *MOX Plant* case that the “duty to cooperate is a fundamental principle in the prevention of pollution under both Part XII of the Convention and general international law.”¹⁴ International law ascribes the same importance to cooperation in connection with mitigation and adaptation. This is codified in numerous provisions of the Convention, including article 197, articles 200 and 201, 202, 203 and in Part XIV.

Mr President, this concludes my presentation. I thank you for your kind attention.

THE PRESIDENT: Thank you very much, Mr Loewenstein.

I now give the floor to the representative of Norway, Mr Kravik, to make his statement. You have the floor, Sir.

¹⁰ Paris Agreement, art. 4(4).

¹¹ *Ibid.*

¹² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 724, para. 168.

¹³ UNCLOS, arts. 123, 197, 266, 275-277.

¹⁴ *MOX Plant (Ireland v. United Kingdom) Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, p. 95, para. 82).

STATEMENT OF MR KRAVIK
 NORWAY
 [ITLOS/PV.23/C31/11/Rev.1, p. 20–27]

Mr President, honourable members of the Tribunal, it is an honour to appear before you on behalf of the Kingdom of Norway.

Imagine for a moment, that you are floating in space. You turn your gaze to see a distant pale blue dot. You look closer and realize that this object is in fact our own planet. Seen from this vantage point, it seems obvious that we live on a blue planet. As Norwegian author Morten Strøksnes writes: “It has been said that our planet’s name shouldn’t be Earth. It would be more appropriate to call it Ocean.”¹

Mr President, members of the Tribunal, the climate crisis is grave, acute and unfolding as we speak. It represents an existential threat to both present and future generations. To counter, mitigate and adapt to climate change – in short, to protect the atmosphere and prevent environmental disasters – a strong and robust global response is required, comprising our combined and coordinated efforts.

As a coastal State and a seafaring nation with strong maritime ties, Norway fully recognizes that our oceans and seas, the blue of our planet, are both at risk and represent potential solutions in the face of climate change.

First, the marine environment is at severe risk from the effects of climate change, through ocean warming, ocean acidification and sea-level rise.² Although impacting on all of us and transcending all borders, there is no doubt that coastal States and communities, and in particular, Small Island Developing States, are especially vulnerable.

Second, changes in the marine environment due to climate change – resulting in loss of biodiversity amongst other things – impact on and must be taken into full account in future management of living resources.

Third, and at the same time, it has been clearly demonstrated by many, and in particular by the High-Level Panel for a Sustainable Ocean Economy, that ocean-based climate action represents a fundamental part of a sustainable and effective global response to climate change.³

We consider marine resources, rights, freedoms and obligations of the UNCLOS system to be key to enable the critical provisions of food, energy, critical raw materials and value chains necessary to accomplish the green and blue transitions. As an example, in order to provide for electrification of ferries, which is a process well underway in Norway, you need access to electricity and critical minerals. Thus, the sovereign rights of coastal States and the high seas freedoms enshrined in UNCLOS are necessary components of combating climate change and responding to key needs of humanity. The sea and UNCLOS are our allies in this struggle.

Norway considers it imperative to acknowledge, further study and develop all these linkages between climate change and the ocean. This is not a theoretical exercise; it’s an unfolding reality that requires reaction. It is in this context that Norway makes its oral observations before this Tribunal.

Let me briefly present the outline of our statement: first, I will present a few general observations on the questions of jurisdiction and admissibility; second, I will turn to the UN Convention of the Law of the Sea (UNCLOS) and ascertain the Convention’s general character

¹ Strøksnes, Morten (2017), “Shark Drunk. The Art of Catching a Large Shark from a Tiny Rubber Dinghy in a Big Ocean”.

² E.g., IPCC (2021), “Sixth Assessment Report Working Group 1: The Physical Science Basis”.

³ High Level Panel for a Sustainable Ocean Economy (2019), “The Ocean as a Solution to Climate Change: Five Opportunities for Action”.

and whether the provisions Norway consider to be more important in the present case also address climate change and its effects; third I will provide some concluding remarks.

My objective with this intervention is not to replicate Norway's written statement. Instead, I will attempt to make a few overarching remarks that I believe can give guidance to the Tribunal as it deals with the task at hand.

I will first begin with a few short observations on the questions of jurisdiction and admissibility. Before responding to the questions addressed to it, the Tribunal must assess whether it has jurisdiction to provide an advisory opinion on the matter before it. If this is so, the Tribunal must, as a second step, assess whether there are convincing reasons to provide or refrain from giving an advisory opinion. In this regard, Norway recalls the wording of article 138(1) of the Rules of the Tribunal, which provides that “[t]he Tribunal may give an advisory opinion”. Whether to give an advisory opinion is thus a discretionary decision on the part of the Tribunal.

Norway will not address the question of the legal parameters around the Tribunal's advisory jurisdiction. Regardless of its decision, it seems imperative from our vantage point, that the Tribunal seize this opportunity and provide further clarity on this issue. In Norway's view, this should entail elucidating the Tribunal's understanding of its Statute,⁴ in light of the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law,⁵ as well as the Tribunal's own previous conclusions in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, while at the same time recognizing that the circumstances of that case might differ in certain respects from the one at bar.

Additionally, the questions posed by the Commission are broadly formulated and potentially wide-ranging. Therefore, Norway also encourages the Tribunal to use its discretion to frame the questions in a way that will enable the Tribunal to answer them in a manner that can provide practical guidance on the interpretation of the Convention.

I will now, as my second point, turn to the UN Convention on the Law of the Sea.

As is well established, the means of treaty interpretation are based on the relevant provisions of the Vienna Convention on the Law of Treaties, widely considered to reflect existing international customary law.⁶ Consequently, these rules should form the basis for the Tribunal's Interpretation of UNCLOS.

With regard to the legal framework, Norway wishes to make three points, relating to: (1) the character of the Law of the Sea Convention; (2) the nature of its provisions and whether they also address climate change and its effects; and (3) the specific nature of its articles 192 and 194, which Norway considers central to the present case.

To the first point: a key characteristic of UNCLOS is that it establishes a set of maritime zones and allocates rights, obligations and jurisdiction of coastal States, flag States and other States within, across and beyond these different zones.

Thus, UNCLOS constitutes a coherent and unified legal order for the oceans and seas, which in the words of the Convention's Preamble, “will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.” The Tribunal plays an important role in this regard, as a guardian of this legal order.

The Convention has also proven itself as a highly practical instrument. As confirmed numerous times by the United Nations General Assembly, the Convention “sets out the legal

⁴ Statute of the International Tribunal for the Law of the Sea, article 21.

⁵ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, article 2 (2).

⁶ Vienna Convention on the Law of Treaties, articles 31-33.

framework within which all activities in the oceans and seas must be carried out”. In practice, the Convention constitutes the relevant parameters for States when ascertaining what activities can be undertaken and what measures implemented in the different maritime areas.

The Convention is a carefully negotiated package. Its text represents a true balancing act. Each part and provision represent a carefully agreed compromise. The Norwegian UNCLOS chief negotiator, Ambassador and later Judge at the International Court of Justice, Jens Evensen, was keen to recall how the Law of the Sea draft articles were carefully conceived among expert colleagues from all over the world and across geographical groups. Remarkably, consensus on the constitutive instrument of what would become the “Constitution of the Oceans” was, in large part, developed through active exchanges in downtown New York diners, with deliberations over thin coffee and greasy pancakes.

As regards the outcome of these efforts, this was described recently by the International Court of Justice in *Nicaragua v. Colombia* in the following terms:

As recognized in the preamble to the Convention, ‘the problems of ocean space are closely [inter]related and need to be considered as a whole’. The method of negotiation at the Conference was designed against this background and had the aim of achieving consensus through a series of provisional and interdependent texts on the various questions at issue that resulted in a comprehensive and integrated text forming a package deal.⁷

As the Court continued, the outcome was a Convention that amounted to an “integrated” instrument.⁸

Mr President, honourable members of the Tribunal, my previous reference to pancakes in New York, of course, should not be seen as an attempt to dictate what the members of the Tribunal should consume while deliberating – although Hamburg pfannekuchen are no doubt most delicious – but this paints an accurate picture of the communal spirit across delegations that helped produce a balanced and universally applicable text.

The Convention is truly one of the most significant and successful multilateral instruments of the twentieth century. The more than 400 articles of the text and of the nine annexes that are an integral part of it are the most extensive and detailed product of codification activity States have ever attempted and successfully concluded under the auspices of the United Nations. It is therefore vital that the Convention’s integrity, what the International Court calls its “integrated character”,⁹ is preserved.

Norway considers that this is a relevant backdrop for the interpretation of the specific provisions of the Convention.

Turning to my second point regarding UNCLOS and climate change: it has been argued that UNCLOS does not apply to climate change because the term “climate change” does not appear in the text itself.

Norway respectfully submits that this is not decisive. We consider that the relevant exercise for the Tribunal to apply the rules of treaty interpretation in good faith to the relevant terms used in the Convention. UNCLOS is a framework convention. As such, its terms are of a general nature. It regulates rights, obligations and activities. Norway considers that UNCLOS does not, in itself, exclude climate change and its effects from its regulatory scope. To the contrary, the terms used in UNCLOS’ provisions on the protection and preservation of the

⁷ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, para. 48.

⁸ *Ibid.*, para. 49.

⁹ *Ibidem*.

marine environment are broad enough, in their ordinary meaning, to encompass climate change and its effects.

In this regard, Norway wishes to draw the Tribunal's attention to the fact that an important part of UNCLOS' object and purpose is "the protection and preservation of the marine environment", seemingly irrespective of the sources of pollution or impact. To take an example, article 194 requires States to take measures to prevent, reduce and control pollution from "any source". Any source.

Even if the Tribunal should find that climate change impacts do not easily fall within the definition of "pollution" in UNCLOS article 1(4), Norway would remind the Tribunal that the general obligation to protect and preserve the marine environment would remain relevant.

Turning to my third point on articles 192 and 194: Norway considers that the questions posed by the Commission first and foremost invoke articles 192 and 194 of the Convention. In fact, the two questions posed to the Tribunal seem to mirror these two provisions specifically.

Norway submits that both the obligation to protect and preserve the marine environment (article 192) and the obligation to prevent, reduce and control pollution (article 194) are general obligations. In addition to the general nature of their wording, this is confirmed by their immediate context, as they are both situated in Part XII, Section 1, titled "General Provisions". The title of article 192 as "General Obligation" further confirms its role as the overarching obligation pertaining to Part XII.

Norway further submits that articles 192 and 194 contain obligations of a due diligence nature. The Tribunal has itself confirmed this as regards article 192 in the *SRFC* advisory opinion from 2015.¹⁰ With respect to article 194, Norway considers that this can be deduced from its wording, which obliges States to "take all measures necessary" and "using for this purpose the best practicable means at their disposal" "in accordance with their capabilities" and "to the fullest possible extent".

The practical effect of the due diligence nature of these provisions entails that marine activities, including the way exploration and exploitation of living and non-living resources are carried out, and the way maritime transport are conducted, require environmental awareness. This is a fundamental part of Norway's marine policies, including zoning planning, science-based environmental impact assessments, and open, transparent and democratic debate based on active and inclusive stakeholder consultations.

An example is related to the comprehensive debates pertaining to how best to reduce demand for petroleum, promote offshore wind as a source of energy and provide effective incentives to promote protection of the atmosphere and biodiversity. This is exemplified by our emphasis within the WTO on the need to remove subsidies for the use of fossil fuels in fishing activities.

This latter example brings me to a key point: a careful assessment of the relevant provisions of UNCLOS reveals the importance of collective action to be taken within the competent international organizations, whether at the global or regional level. Standard setting and action plans in such fora are key to remove a frequent obstacle invoked for national reforms, namely, the need for a level playing field and common norms to avoid economic and societal disruptions. Norway would thus invite the Tribunal to highlight, in particular, the contributions that are already being made and that can be furthered and advanced in such key regional fora.

Returning to the legal meaning of articles 192 and 194, Norway considers that the precise content of these obligations is informed by other and complementary sources. First, they are immediately informed by the subsequent more detailed provisions of UNCLOS

¹⁰ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Case N° 21, Advisory Opinion of 2 April 2015, para. 219.

part XII.¹¹ As an example, Section 5 develops the general obligation under article 194 in relation to specific sources of pollution.

Second, the general provisions of UNCLOS Part XII have recently been complemented by more detailed rules for the conservation and sustainable use of biodiversity beyond national jurisdiction. Among other elements, the new BBNJ Treaty contains more precise rules and stringent requirements for the use of environmental impact assessments in relation to activities and enables States to enact different area-based management tools, including marine protected areas. As a member of the high-ambition coalition advancing a robust and effective agreement, Norway warmly welcomes the adoption of this vital new part of the law of the sea framework. The treaty will be signed by Norway’s Prime Minister, Jonas Gahr Støre, in New York later this week.

Third, Norway agrees with the argument that has been made that, according to article 293 of UNCLOS, certain fundamental principles of human rights law, such as the principle that “in no case may a people be deprived of its own means of subsistence”, represent applicable law in these proceedings. As such, that principle necessarily informs the provisions of Part XII, such as articles 192 and 194.

The principle is an example of what this Tribunal has called “elementary considerations of humanity”, which “must apply in the law of the sea, as they do in other areas of international law”.¹² The Tribunal has a long tradition of elementary considerations of humanity informing the interpretation of UNCLOS.

As Rolf Einar Fife has explained in general terms, “[t]his pronouncement of the International Tribunal on the Law of the Sea reflects the relevance of elementary considerations of humanity as a general principle of international law, and therefore as a source of law in its own right.”¹³

The principle in question here – that in no case may a people be deprived of its own means of subsistence – has, in various formulations, found application in the law of the sea. One example is the *Fisheries* case, a judgment Norway is always pleased to highlight, where the International Court referred to and placed emphasis on “the vital needs of the population of Norway”.¹⁴

Fourth, UNCLOS Part XII must be understood with due regard for other relevant rules of international law applicable in the relations between the parties. This follows directly from the rules of treaty interpretation contained in VCLT article 31(3)(c). It is also evident from the fact that specific provisions of Part XII explicitly oblige States of “taking into account internationally agreed rules, standards and recommended practices and procedures”. The Convention’s references to other conventions and regimes compatible with the Convention further confirm this.¹⁵

Norway submits that the UN Framework Convention on Climate Change and, in particular, the Paris Agreement, is the most relevant source of law informing the interpretation of relevant UNCLOS provisions. This is because the Paris Agreement, with its almost universal

¹¹ Part XII, *inter alia*, sets out requirements for States to cooperate in formulating international rules to achieve their obligations, to provide technical assistance to developing States, monitor and assess the effects of any activities they permit or control, to enact national legislation to give effect to international rules on these issues, as well as laying out rules on the enforcement by different States with respect to pollution.

¹² *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *ITLOS Reports 1999*, p. 10, 62; *M/V “Virginia G” (Panama/Guinea-Bissau)*, *ITLOS Reports 2014*, p. 101, para. 359; *The “Enrica Lexie” (Italy v. India)*, *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 204, para. 133.

¹³ R.E. Fife, “The Duty to Render Assistance at Sea: Some Reflections after *Tampa*” in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill 2003) 470, 482.

¹⁴ *Fisheries*, *I.C.J. Reports 1951*, p. 142; also *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *I.C.J. Reports 1984*, p. 342, para. 237.

¹⁵ See UNCLOS articles 237 and 311.

participation, constitutes the primary instrument prescribing the current and specific obligations on States in relation to climate change. The Paris Agreement represents the primary forum for increasing global climate ambitions and implementation through its carefully negotiated provisions. Norway would argue that the Paris Agreement as the primary legal vehicle for tackling global climate change must serve as a fundamental precondition for the Tribunal's assessment.

Mr President, honourable members of the Tribunal, it is time for me to conclude these observations on behalf of Norway.

I embarked by emphasizing the grave nature of the climate crisis and the urgent need to collectively tackle it by increased efforts to mitigate emissions and adapt to the changes that we cannot prevent. I then confirmed that Norway recognizes the important links between ocean health and climate change, as well as the vital role of ocean-based solutions in solving the climate crisis.

I proceeded to making the following three points in relation to the Convention.

One, UNCLOS is a “comprehensive and integrated text forming a package deal”; it is a framework convention. It is a truly successful practical instrument for the governing of all ocean space. It is vital that its integrity is preserved. This is an important backdrop to the Tribunal's assessment of the questions posed by the Commission.

Second, seeing as it is a framework convention, the fact that the text itself does not mention climate change does not mean that the Convention excludes *a priori* climate change and its impacts from its scope. Rather, the question requires a good faith legal interpretation based on generally recognized principles of treaty interpretation as enshrined in the VCLT. In Norway's view the terms of the Convention, in their ordinary meaning, are wide enough to cover climate change and its impacts.

Three, the obligations to protect and preserve the marine environment (article 192) and to prevent, reduce and control pollution (article 194) are general obligations of a due diligence nature. Their more precise content must be interpreted in light of other relevant rules that can inform their construction. In relation to climate change, the Paris Agreement is the relevant source of law for this assessment.

I will end these observations by returning to the words of Norwegian author Morten Strøksnes. In his sonnet to the sea, he concludes: “The sea will do just fine without us. We [on the other hand] cannot survive without the sea.”¹⁶

Acknowledging this simple fact, our dependence on the sea and our collective responsibility to ensure its health and resilience is crucial and cannot be ignored. Norway certainly considers it a task of existential importance to protect and preserve the marine environment and take effective measures to prevent, reduce and control pollution of the marine environment, as well as combatting climate change. It is no less than a generational responsibility.

Mr President, honourable members of the Tribunal, that concludes Norway's observations. On behalf of Norway's delegation, myself and my colleague Dagny Hovind, I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Kravik.

We have now reached 11:40 am. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 12:10.

(Pause)

¹⁶ See *supra* note 1.

REQUEST FOR ADVISORY OPINION – COSIS

THE PRESIDENT: I now give the floor to the representative of Belize, Mr Gladden, to make his statement. You have the floor, Sir.

STATEMENT OF MR GLADDEN

BELIZE

[ITLOS/PV.23/C31/11/Rev.1, p. 27–29]

Mr President, honourable members of the Tribunal, Madam Registrar, it is a great privilege to appear before you today on behalf of Belize, especially in proceedings of such profound importance to Belize and to the international community as a whole.

Belize is a State with a marine environment of exceptional and, indeed, international importance. The Belize Barrier Reef Reserve System is the world's second largest system of reefs. It has been recognized as a UNESCO World Heritage Site.

As recorded by UNESCO:

The coastal area of Belize is an outstanding natural system consisting of the largest barrier reef in the northern hemisphere, offshore atolls, several hundred sand cays, mangrove forests, coastal lagoons and estuaries. The system's seven sites illustrates the evolutionary history of reef development and are a significant habitat for threatened species, including marine turtles, manatees and the American marine crocodile.

The Belize Barrier Reef Reserve System (BBRRS), inscribed as a UNESCO World Heritage Site in 1996, is comprised of seven protected areas. ... The largest reef complex in the Atlantic- Caribbean region, it represents the second largest reef system in the world.

The Government of Belize recognizes anthropogenic climate change as the country's most serious threat to sustainable development.

Belize ranks as the third country most at risk for natural hazards among small developing States and fifth most at risk from progressive climate change.

As a result of the adverse impacts of climate change, in particular ocean acidification, ocean warming and sea-level rise, Belize's marine environment, including its systems of coral reefs, mangrove forests, coastal lagoons and estuaries, is confronted by an existential threat.

In November 2021, at COP26, Belize's Prime Minister, the Honourable John Briceño, made a statement underscoring the threats which climate change poses to Belize's marine areas and, in particular, its fragile reef system. He stated:

Belize is the proud custodian of the Belize Barrier Reef Reserve System. ... But here is the sad reality. The reef is under siege. Coral bleaching stress doubled from 1.7 in the period 1985-2014 to severe Level 3 between 2014-2017. The reef is dying and may be beyond the point of full restoration. Its loss will be irreversible. For Belize, the Barrier Reef is more than a global beauty; it also underpins our culture and our tourism industry which contributes approximately 40 percent to our gross domestic product. Without the reefs, Belize's economy could crumble. Our people's lives will be forever changed.¹

Belize also considers that it has an important voice before this Tribunal. This is not just because of its exceptional and exceptionally vulnerable barrier reef system; the country of Belize acts as an important sink of greenhouse gas emissions, including due to the significant carbon storage in Belize's extensive forested areas. Belize has been proactive on the international plane, including as a member of the Alliance of Small Island States, and Belize's

¹ Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, pp. 1–2.

action within the domestic sphere demonstrates its commitment to addressing the threats posed by climate change.

As explained at COP25, Belize has expanded its no-take zones from 4 per cent to 11.6 per cent of its seas and has legislated that its maritime economy will follow a green development pathway, through the banning of offshore oil exploration.²

Belize has also been a pioneer in climate finance: in November 2021, it entered into the largest blue bond transaction ever executed – a debt-for-marine conservation transaction valued at over US\$ 360 million.³ Belize’s actions are consistent with its words.

Belize remains staunchly committed to the cause of combating climate change. Like other low-lying coastal States, Belize is “on the frontline of a climate crisis for which they are not responsible”.⁴ Belize is of the firm view that this Tribunal can play an important role in clarifying the specific obligations of States Parties to UNCLOS in responding to this crisis. Belize is therefore proud to be participating in the present proceedings.

Mr President, two members of Belize’s counsel team will address you today. I will be followed by Mr Sean Aughey, who will address the Tribunal on the role played by the specialized conventions on climate change, under the United Nations Framework Convention on Climate Change and the Paris Agreement, in answering the question on which advisory opinion has been requested. Mr Sam Wordsworth KC will then present Belize’s submissions on the obligation of assessment under article 206 of the Convention, as well as touching on the obligations of due diligence under article 194.

Mr President, honourable members of the Special Chamber, that concludes Belize’s opening statement. I now ask that you give the floor to Mr Aughey.

MR PRESIDENT: Thank you, Mr Gladden.

I now give the floor to Mr Aughey to make his statement. You have the floor, Sir.

² Statement of the Hon. Omar Figueroa, Minister of Agriculture, Fisheries, Forestry, the Environment, Sustainable Development and Immigration of Belize, at COP25, December 2019, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop25cmp15cma2_HLS_EN.pdf, p. 3.

³ Statement of the Hon. John Briceño, Prime Minister of Belize, at COP26, 1 November 2021, available at https://unfccc.int/sites/default/files/resource/BELIZE_cop26cmp16cma3_HLS_EN.pdf, p. 3.

⁴ Statement of the Hon. John Briceño, Prime Minister of Belize, to United Nations General Assembly, 24 September 2021, available at https://estatement.unmeetings.org/estatement/10.0010/20210924/ajen3uMeQSDH/nu5mhB5LlnlY_en.pdf.

STATEMENT OF MR AUGHEY
BELIZE
[ITLOS/PV.23/C31/11/Rev.1, p. 29–34]

Mr President, members of the Tribunal, it is a privilege to appear before you and an honour to present the submissions of Belize on the role played by the specialized conventions on climate change in answering the questions on which an advisory opinion has been requested.

This is an important area of some disagreement in the written and oral submissions before the Tribunal.

The Tribunal’s task, as delimited by the precise terms of the questions asked, is to identify “the specific obligations of States Parties to UNCLOS, including under Part XII”.

The questions are focused on and limited to UNCLOS. The Tribunal is not being asked to exercise its advisory jurisdiction to define the specific obligations of States Parties (or non-States Parties) under any other separate independent international instrument, such as the specialized conventions on climate change – a request that would fall outside of its competence. Rather, the Tribunal is being asked to do no more than to interpret the relevant provisions of UNCLOS, including Part XII, in accordance with the usual rules on treaty interpretation.

There is a large measure of agreement among participants that anthropogenic greenhouse gas emissions fall squarely within the definition of “pollution” in article 1(1)(4) and that, as other participants have shown in detail, it is scientifically established that such emissions are already causing significant harm to the marine environment and that further emissions will cause extreme harm. Thus, Part XII of UNCLOS is engaged.

This inevitable conclusion is consistent with the fact that, in a series of resolutions on “The Ocean and the Law of the Sea”, the United Nations General Assembly has repeatedly noted “with satisfaction” that “States [have] recognized that”

the Convention [that is, UNCLOS] provides the legal framework for the conservation and sustainable use of the oceans and their resources, and stressed the importance of the conservation and sustainable use of the oceans and seas and of their resources for sustainable development, including through their contributions to poverty eradication, sustained economic growth, food security and creation of sustainable livelihoods and decent work, *while at the same time protecting biodiversity and the marine environment and addressing the impacts of climate change*.¹

Most recently, this statement was included in the recitals to United Nations General Assembly resolution 77/248, which was adopted on 30 December 2022 by 159 to 1, with 3 abstentions. Every State that has submitted a written statement in these proceedings voted in favour of that resolution.² In doing so, they endorsed the commonsense understanding that UNCLOS itself, as the legal framework for the conservation and sustainable use of the marine environment, has an important role to play in addressing the impacts of climate change on the environment.

¹ See e.g. United Nations General Assembly 77/248 ‘Oceans and the law of the sea’ (30 December 2022), UN Doc. A/RES/77/248 (9 January 2023), preamble (emphasis added); United Nations General Assembly 76/72 ‘Oceans and the law of the sea’ (9 December 2021), UN Doc. A/RES/76/72 (20 December 2021), preamble (emphasis added); United Nations General Assembly 75/239 ‘Oceans and the law of the sea’ (31 December 2020), UN Doc. A/RES/75/239 (5 January 2021), preamble (emphasis added); United Nations General Assembly 74/19 ‘Oceans and the law of the sea’ (10 December 2019), UN Doc. A/RES/74/19 (20 December 2019), preamble (emphasis added); United Nations General Assembly 73/124 ‘Oceans and the law of the sea’ (11 December 2018), UN Doc. A/RES/73/124 (31 December 2018), preamble (emphasis added).

² A/77/PV.56 (Resumption 1), pp. 6–7.

In the present proceedings, however, an important area of disagreement has emerged as to the scope of the specific obligations of States Parties in this context, particularly the obligations under articles 194 and 212 to take all necessary measures to prevent, reduce and control pollution of the marine environment.

The submissions of some States, skillfully developed through two broad lines of argument, ultimately boil down to the proposition that the specialized conventions on climate change represent the present limits of the specific obligations of States Parties to UNCLOS in this context.

The argument is this: the obligations to preserve and protect the marine environment under article 192, and to take measures that are “necessary” to prevent, reduce and control pollution of the marine environment arising from anthropogenic greenhouse gas emissions under articles 194, 207 and 212, require nothing more than the undertaking and, perhaps, the good faith implementation of whatever commitments States have made under the United Nations Framework Convention and the Paris Agreement. In other words, you are told: “Go no further than Paris.”

Whilst it may suit some States to seek to neutralize UNCLOS so that it adds nothing to the commitments, such as they are, under the UN Framework Convention and the Paris Agreement, that approach does not take account of the ordinary meaning of the plain words of Part XII according to the usual rules of treaty interpretation.

First, certain proponents of the neutralization objective seek to reframe the interpretation question before you as a question of compliance with the specific obligations under UNCLOS, and then reason backwards. Take, for example, Australia’s position that, “[i]n the case of States that are parties to the UNFCCC and the Paris Agreement, compliance with those agreements satisfies the specific obligation under article 194 of UNCLOS”.³

Similarly, the European Union submits that “the open-ended and evolutionary obligations under the Paris Agreement are broad enough to provide for the level of due diligence which is necessary and appropriate to comply with articles 192 and 194 of UNCLOS”.⁴

But the Tribunal’s present task of interpreting the specific obligations of Parties is separate, and logically prior, to any consideration of their compliance with those specific obligations. As a matter of interpretation, it is not possible for the Tribunal to state in the abstract whether the due diligence obligation in article 194, variable as it is between States and across time,⁵ would be satisfied by compliance with any particular commitment made under the Paris Agreement.

Indeed, the International Court of Justice has held that “the notion of ‘due diligence’ ... calls for an assessment *in concreto*”.⁶ The question before you also does not require consideration of the operation of articles 237 or 311 of UNCLOS with respect to specialized conventions on climate change.

Second, proponents of the neutralization objective also attempt to elevate the significance of the specialized climate change conventions so that they become the determinative and limiting factor in interpreting UNCLOS. Take Australia’s submission that “Part XII of UNCLOS should not be interpreted as imposing obligations with respect to

³ ITLOS/PV.23/C31/5, p. 16, lines 24–26 (Parlett). See also p. 9, lines 23–26; p. 10, lines 46–50; p. 11, lines 39–42 (Donaghue). See similarly European Union, Written statement, paras. 28, 65 and n. 65.

⁴ European Union, Written statement, para. 69.

⁵ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 43, para. 117.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 221, para. 430.

greenhouse gas emissions that are inconsistent with, or go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.”⁷

For a more specific variant of this argument, see, for example, the United Kingdom’s submission that “[t]he measures that are ‘necessary’ for the purpose of articles 194 and 212 must be determined by reference to those carefully negotiated treaties that are specific to control of anthropogenic greenhouse gas emissions.”⁸

Invoking article 31(3)(c) of the Vienna Convention, the submission asks the Tribunal to pay “particularly careful regard” to the “primary importance” of the climate change treaties which, we are reminded, are “the product of protracted negotiations and careful compromise”. It is almost as if UNCLOS wasn’t. I will come back to article 31(3)(c), but, first, it is instructive to note the arguments on interpretation not being advanced by the United Kingdom.

First, it is not suggested by the United Kingdom that the ordinary meaning of the word “necessary”, read in context and in light of the object and purpose of UNCLOS, directs the interpreter specifically and only to the specialized conventions on climate change. Plainly, it does not. The obligation is not one to take such measures as individual States Parties consider to be necessary in order to discharge different commitments under a different treaty, and all the more so where that different treaty is (unlike UNCLOS) not specifically concerned with the preservation and protection of the marine environment, and the prevention, reduction and control of pollution of the marine environment.

Rather, in identifying what measures are necessary (that is, according to the ordinary meaning of the term, indispensable), it is obvious that the Tribunal must have regard to the best available science regarding the impacts of greenhouse gas emissions on the marine environment, the threat of further extreme harm and the steps that must be taken to mitigate the risk to acceptable levels. The best available science is not merely, as the United Kingdom appears to suggest, “a relevant factor for States to consider in making their assessment of potential measures”.⁹

The assessment of what measures are objectively necessary is a separate, prior, exercise, and one which is itself driven by the best available science. In this case, the need for urgent measures of prevention, reduction and control could not be better established given the works of the IPCC. As a separate stage of the analysis, having identified what measures are in fact “necessary”, the specific obligation on States Parties under article 194(1) is to take those measures using the best practical means at their disposal and in accordance with their capabilities.

Additionally, the context shows that where States Parties wished to establish a specific obligation to take “measures necessary to implement” internationally agreed rules and standards established through competent international organizations or diplomatic conference, they did so expressly, as in articles 213 and 222. The specific obligations under articles 194, 207 and 212 to take all measures necessary to prevent, reduce and control pollution are framed in much broader terms, independent of the question of the implementation of any internationally agreed rules and standards.

The context also shows that there is no assumption that the measures that are necessary to implement internationally agreed rules and standards will constitute the limit of the measures that are necessary to prevent, reduce and control pollution. The obligation under article 207(4) and 212(3) is to “endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution”.

It is not to endeavour to establish agreement on the limits of the measures that are necessary to prevent, reduce and control pollution, and it should not automatically be assumed

⁷ ITLOS/PV.23/C31/5, p. 3, lines 26–35 (Donoghue).

⁸ United Kingdom, Written statement, para. 68(a).

⁹ United Kingdom, Written Statement, para. 68(b).

that any internationally agreed rules and standards represent the limits of what is necessary. Consistent with this, articles 213 and 222 establish independent specific obligations with respect to the enforcement of these two, potentially different, categories of measures.

Ultimately, the careful formulation of the specific obligations in Part XII appears to reflect the common sense appreciation that, since it would be necessary to achieve consensus for their adoption, internationally agreed rules and standards might reflect compromises and might only contribute to, rather than secure, the ultimate objective of ensuring that States Parties take measures that are, in fact, necessary to prevent, reduce and control pollution of the marine environment from any given source.

Third, because UNCLOS and the specialized climate change conventions establish separate independent obligations, it cannot be suggested by the United Kingdom that the specialized conventions amount to subsequent practice establishing agreement between the States Parties to UNCLOS as to the meaning of the term “necessary” in the context of climate change. While the UNFCCC refers to the importance of marine ecosystems as sinks and reservoirs of greenhouse gases,¹⁰ and the Paris Agreement refers in general terms to the “oceans”,¹¹ neither instrument contain any reference to UNCLOS or to the “marine environment” within the meaning of UNCLOS.

I turn then to article 31(3)(c), which I understand to be the principal basis on which the UK says that “[t]he measures that are ‘necessary’ for the purposes of articles 194 and 212 must be determined by reference to” the specialized conventions.¹² UNCLOS is, of course, not to be interpreted in a vacuum, but article 31(3)(c) requires only that the Tribunal shall “take into account” such external rules, no less but no more.

Importantly, relevant rules applicable in the relations between the Parties constitute just one element that is to be thrown into the crucible together with the ordinary meaning of the text of UNCLOS, the context, the object and purpose and so on.¹³ Such rules do not displace or modify the ordinary meaning of the words of Part XII.¹⁴ It is the interaction between the various elements that produces the legally relevant interpretation.

This is what is required by the usual rules and the careful application of article 31 VCLT will be sufficient to meet the United Kingdom’s concern that the Tribunal performs its role “fully conscious of the broader context of the global climate change regime”.¹⁵ The global regime falls for consideration only in that it has a certain role to play in interpreting the provisions of UNCLOS. Nothing in the Convention operates to incorporate these external rules so that they become part of UNCLOS.

What, then, is the relevance to the interpretation of Part XII of the non-binding commitments under the Paris Agreement that States have assumed in the gradual pursuit of the temperature goal?

It is important to recall not only that the NDCs are not rules of international law applicable in the relations between the Parties for the purpose of article 31(3)(c), but also that these commitments, such as they are, fall far short of what is necessary to prevent, reduce and control pollution of the marine environment, as could not be clearer from the words of the IPCC.

¹⁰ UNFCCC, preamble.

¹¹ Paris Agreement, preamble.

¹² United Kingdom, Written statement, para. 68(a).

¹³ Vienna Convention on the Law of Treaties, Article 31(1)–(3); International Law Commission, Draft articles on the Law of Treaties, with commentaries, *Yearbook of the International Law Commission* (1966), Vol. II, at pp. 219–220 (commentary to draft articles 27–28, para 8).

¹⁴ Vienna Convention on the Law of Treaties, article 31(1).

¹⁵ United Kingdom, Written Statement, para. 7.

For example, the IPCC’s Special Report on the Ocean and Cryosphere, with specific reference to the specialized conventions, including the UNFCCC and the Paris Agreement, stated: “Existing international instruments do not adequately address climate change challenges for the open ocean and coastal seas”.¹⁶ That, of course, includes Belize’s coral reefs and mangrove ecosystems.

The science could not be clearer that a great deal more is needed, and it follows from this that the interpretation of the specific obligations under Part XII to take all the measures that are “necessary” to prevent, reduce and control pollution in this context cannot be limited by reference to the modest measures that States have separately and independently committed to take under the Paris Agreement.

To conclude, the Tribunal’s task is to interpret the provisions of Part XII of UNCLOS in a manner that gives real meaning and effect to, rather than neutralizes, those provisions. The question of what measures are “necessary” to prevent, reduce and control pollution of the marine environment is not to be interpreted solely or primarily by reference to the separate and independent commitments under the specialized conventions on climate change. While any true obligations under those specialized conventions are to be taken into account, this in no way precludes the Tribunal from going beyond Paris. You must go further.

Mr President, members of the Tribunal, I thank you for your kind attention and ask that you call Mr Wordsworth KC to the podium.

THE PRESIDENT: Thank you, Mr Aughey.

I now give the floor to Mr Wordsworth to make his statement. You have the floor, Sir.

¹⁶ IPCC, “The Ocean and Cryosphere in a Changing Climate: Special Report of the Intergovernmental Panel on Climate Change” (2022), Table 5.9 (“Ocean Governance and Climate Change: Major Issues”), p. 541.

STATEMENT OF MR WORDSWORTH
BELIZE
[ITLOS/PV.23/C31/11/Rev.1, p. 34–41]

Mr President, members of the Tribunal, it is a privilege to appear before you for Belize, and I wish to start by taking a moment to look at the dynamic currently unfolding before this Tribunal, including in the presentations that we have just heard this morning, and, in doing so, to recall the myth of Sisyphus.

Sisyphus, of course, was condemned by the Greek gods to roll a large boulder up the side of a mountain for all eternity. Whenever he reached the crest of the mountain, the boulder would escape from his grip and roll back down to the bottom, ready for an endless and dispiriting repeat.

The analogy is tolerably clear. At each COP, all States have an interest in reducing the emission of greenhouse gases and are willing work together to a certain point, to push this boulder of existential importance some distance up the mountain towards a goal of the meaningful and binding obligations that are necessary to reduce emissions.

But the closer the boulder gets to the summit, the more the disparities appear between, on the one hand, the States that are the most adversely affected and impacted by climate change, including those most exposed to sea-level rise and most dependent on a healthy marine environment; and, on the other hand, there are those States with less pressing or even opposing interests, mainly more developed or oil-producing States.

And, so, little if anything is agreed in terms of the hard-edged legal obligations needed to make concrete reductions in emissions. The boulder rolls back down the mountainside, and not too distant from its original starting point, while ever more severe adverse impacts are registered on land and sea, including in severe harm to Belize's precious coral reefs.

And this Tribunal is now confronted by the same conflicting interests but as reflected in the two broad lines of argument being put before it, which Mr Aughey has just summarized. And to emphasize, the "Go no further than Paris" argument is conveyed with great skill and can appear to give real meaning and effect to the provisions of Part XII.

For example, France accepts that the measures adopted pursuant to Part XII must be "effective". But it then says: "In this respect countries should intensify the ambition of their greenhouse gas mitigation policies to place themselves on the trajectory to limit greenhouse gases, as set out in article 2 of the Paris Agreement and in line with the Glasgow Pact".¹

Thus, the hard-edged legal obligations under Part XII are elegantly merged into the language of endeavour and ambition, where the endpoint is not the concrete enforcement of the obligation to prevent, reduce and control of pollution to the marine environment, but some undefined and unenforceable location along a trajectory. And so the boulder comes crashing back down the mountainside.

The counterargument is that the provisions of Part XII say what they say and must be interpreted according to the usual rules, which afford some relevance to the UNFCCC and the Paris Agreement, but do not remove or obscure the independent legal existence and meaning of what States and other parties were able to agree to in the specific context of the law of the sea. Intuitively, and as just follows from the more developed points that Mr Aughey has just made, only this second line of argument can be correct. In short, this is the Tribunal for the Law of the Sea being asked to interpret provisions of the Convention of the Law of the Sea.

And because anthropogenic greenhouse gases unquestionably meet the Convention's definition of pollution, the Tribunal has the jurisdiction and the tools accorded to it by the 168 States and other parties to UNCLOS to make, through its advisory opinion, a hugely

¹ France, Written Statement, para. 112.

important contribution to the protection and preservation of the marine environment. Sisyphus need not, and must not, within this context of UNCLOS, be sent back to the bottom of the mountain with nothing to show for his labours.

Now, against this backdrop, I wish to focus on the obligation of assessment under article 206, including its interplay with articles 192 and 194. Thus far, article 206 has received surprisingly little attention, despite its very real importance to the protection and preservation of the marine environment.

As to articles 192 and 194, I refer the Tribunal to Belize's written statement,² and note the broad consensus that these establish what are primarily obligations of due diligence, but of a particularly elevated nature – as follows, of course, from the treaty language and the extreme magnitude of the threat to the marine environment posed by greenhouse gas emissions.³

There are various helpful authorities to assist the Tribunal in this regard, including the advisory opinions on *Activities in the Area* and the *SRFC*, although it is to be emphasized that the reasoning of those decisions was focused on provisions that are less demanding,⁴ and, in particular, do not impose the stringent obligation to take “all necessary measures”.

Now, due diligence in this context naturally requires monitoring and assessment of risk,⁵ and Section 4 of Part XII gives concrete form to this. Within this section, articles 204 and 205 deal respectively with “monitoring of the risks or effects of pollution” and “publication of reports”, while article 206 concerns the obligations of assessment. Section 4 is thus concerned with obtaining and disseminating knowledge, and plays a critical role in ensuring the State's compliance with its obligations under articles 192 and, in particular, 194. As the precursor to taking all necessary measures, the State must first inform itself of the relevant risks and what is needed to prevent, reduce and control.

The obligation to assess can be seen as procedural in nature because taken in isolation – that is, leaving to one side for the moment the interplay with articles 192 and 194 – the State is not obliged to act in a particular way by reference to the knowledge acquired through the particular assessment, other than to ensure publication. However, that in no sense impacts on the binding nature and importance of article 206.

As correctly identified by the tribunal in the *Chagos Marine Protected Area Arbitration*, procedural obligations – and here, it had in mind obligations of environmental impact assessment – “may, indeed, be of equal or even greater importance than the substantive standards existing in international law”.⁶

If oil producer X is going to develop a new field that is going to lead to Y greenhouse gas emissions, and consequent harm to the marine environment, the relevant figures must be quantified and also identified in terms of the likely harm, and then published as required by article 205. And this really matters. Ultimately, well-informed public pressure may well be one of the most important tools leading to the protection and preservation of the marine environment.

Turning to the details, article 206 breaks down into three basic elements: first, the trigger for its application; then, the actual obligation of assessment; and, finally, the obligation of publicity.

² Belize's written statement, paras. 55-71.

³ As to magnitude of risk, see e.g. International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two at p. 155, para. 18.

⁴ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 4 at pp. 38–40, paras. 126–129; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, *Advisory Opinion*, 1 February 2011, *ITLOS Reports 2011*, p. 10 at p. 41, paras. 110–112.

⁵ See e.g., *Pulp Mills on the River Uruguay*, *Judgment*, *I.C.J. Reports 2010*, p. 14 at pp. 82–83, para. 204.

⁶ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 322.

Starting with the first of these, the trigger for application, the obligation to assess is engaged “[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”.

Whilst citing and seemingly approving the description of article 206 in the Nordquist Commentary as an “essential part of a comprehensive environmental management system” and as a “particular application of the obligation on States, enunciated in Article 194(2)”, the Tribunal in the *South China Sea Arbitration* saw the term “reasonable” as giving an element of discretion to the States concerned.⁷

If this is so, then any discretion can only exist within the confines of what is and is not reasonable, which is plainly a matter for objective determination.⁸ And to emphasize, what triggers the obligation of assessment is the objective perception of risk of pollution or harm, not actual pollution or harm, as follows from the formulation “may cause pollution or significant and harmful changes”.

There has been a debate as to how the two thresholds interact – and specifically over whether an activity that does not risk “substantial pollution” may nonetheless meet the threshold of “significant and harmful change”.⁹ It might be thought that the use of the disjunctive “or” provided the straightforward answer in this debate, but in any event, in the current context the question falls to be answered in light of the reports of the IPCC, from which it is self-evident that anthropogenic greenhouse gas emissions cause both “substantial pollution” and “significant and harmful changes” to the marine environment.

It is important also to emphasize that the trigger under article 206 centres around “planned activities” under a State’s jurisdiction or control, which is a notably broad formulation.

Most obviously, this includes all activities that meet the thresholds that are planned by a developer or contractor. But the term “planned activities under their jurisdiction or control” will also include a State’s intention to permit activities, including activities in a particular economic area, such as a plan to allow the exploitation of a particular area of oil or coal reserves, or to invest in energy production from fossil fuels. Thus, the State will be able to understand both individual and cumulative impacts of all planned activities and take these impacts into full consideration at an early stage of policy- and decision-making.

Of course, such decision-making may already take place within a framework of environmental or strategic impact assessment; we are not talking about article 206 imposing a massive burden. But article 206, correctly interpreted and applied, ensures a focus on adverse effects of anthropogenic greenhouse gas emissions specifically to the marine environment, and regardless of whether the proposed development is within a maritime zone.¹⁰

Moving, then, to the obligation of assessment: and this is of course cast in mandatory terms – “they shall ... assess” – while the words “as far as practicable” allow for the possibility

⁷ *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 948, referring to S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (M. Nordquist, gen. ed., 2002), para. 206.6(b).

⁸ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, para. 146.

⁹ Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary (2017)*, p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).

¹⁰ See also, e.g., *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 110, para. 82, p. 111, dispositif para. 1(c).

that there may be differential requirements as between developed and developing States.¹¹ The required assessment is then formulated in clear and straightforward language: the obligation to “assess the potential effects of such activities on the marine environment”.

There are four points to make.

First, the words “as far as practicable” do not operate as an escape valve for States that are able to commit, but do not wish to commit, resources to a meaningful assessment. What is “practicable” must be determined by reference to context, and the context here is one of high risk of very significant harm, predicted by the IPCC as a matter of “high confidence”.

With specific regard to “unique and threatened systems”, such as Belize’s coral reefs, the IPCC has moreover identified “increasing numbers of systems at potential risk of severe consequences at global warming of 1.5°C above preindustrial levels”,¹² and of course the impacts will only be much, much worse if 1.5°C figure is exceeded.¹³

Second, although no details are prescribed in article 206 as to the nature of the assessment, at a minimum, this will have to meet the criteria established in the domestic law of the relevant State,¹⁴ and must contain an evaluation of the possible harmful impact of the planned activities on the marine environment.

As explained in the ILC’s commentary to article 7 of the Draft Articles on Prevention of Transboundary Harm, which likewise does not specify what the content of the risk assessment should be: “Obviously, the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead.”¹⁵ In this respect, the inherent features of any meaningful EIA have been helpfully drawn out in the separate opinion of Judge *ad hoc* Dugard in the ICJ *Case concerning Certain Activities and Construction of a Road*.¹⁶

Third, I note that France in its written statement refers to the BBNJ in this context and it says: “The BBNJ Agreement also includes a section on environmental impact assessment to operationalize and give concrete form to the obligation set out in article 206 of the Convention.”¹⁷

But article 206 has no need to be operationalized and given concrete form. States may agree to elaborate on their obligations of assessment, but it would be quite wrong to suggest that article 206 does not already have hard-edged legal content.

As the Seabed Disputes Chamber aptly “stressed” in the *Activities in the Area* Opinion, “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention”.¹⁸

Fourth, in this respect it is also puzzling to see a passage in the Proelss Commentary deducing from the outcome of *Pulp Mills* and the *MOX Plant* case, that “it seems reasonable

¹¹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 54, para. 160.

¹² IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special Report: Global Warming of 1.5°C (2018), p. 253.

¹³ IPCC, Chapter 3: Impacts of 1.5°C of Global Warming on Natural and Human Systems, Special Report: Global Warming of 1.5°C (2018), pp. 179, 229–230 (Box 3.4).

¹⁴ *Pulp Mills on the River Uruguay, Judgment*, I.C.J. Reports 2010, p. 14 at pp. 83–84, para. 205.

¹⁵ International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two at p. 158 (commentary to Article 7, para. 6, and see also para. 7).

¹⁶ *Case concerning Certain Activities and Construction of a Road (Costa Rica v Nicaragua)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 849, para. 18 (Separate Opinion of Judge *ad hoc* Dugard).

¹⁷ France, Written Statement, para. 124.

¹⁸ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 at p. 50, para. 145.

to presume that international tribunals are – in the absence of precise treaty requirements – unlikely to find breaches of the duty except in cases where no EIA is conducted or the EIA carried out was evidently inadequate”.¹⁹

There is simply no basis for this, either in the language of article 206 or in the reasoning or outcome of those two cases. It is perhaps useful to recall that the decision in *MOX Plant* concerned provisional measures alone, contained no reasoning on article 206 and was decided chiefly by reference to the fact that there would be no export from the MOX plant for a considerable time, i.e., not until after constitution of an Annex VII tribunal.

So there was no urgency, although “prudence and caution” required that there be an order for cooperation in exchanging information concerning risks or effects of the operation of the MOX plant.²⁰ There is not a hint in the order of the Tribunal of it taking a less-than-stringent approach to the marine environment pursuant to Part XII; to the contrary.

If I may, I note in passing that this was a case on which I had the privilege to work with our dear and departed friend, Alan Boyle.

As to the final element of article 206, a State is obliged to “communicate reports of the results of such assessments in the manner provided in article 205”, that is, to publish the reports itself or to provide them to the competent international organizations.

Pulling these strands together, I make two final points.

First, as Belize explained in its written statement,²¹ if the marine environment is to be protected and preserved from the severe harms caused by anthropogenic greenhouse gas emissions, and if pollution from such emissions is to be prevented, reduced and controlled, it appears essential that the meaningful assessment of their environmental impacts becomes a form of reflex for planned activities within article 206, with the reports of such environmental assessments then being publicized.

Thus, not only the State concerned, but all States and, more broadly, the public become fully informed as to potential impacts, and this, I note, could be taken as reflecting an element of obligation of result.

Second, and picking up on this last point, there has been some focus before the Tribunal on the characterization of article 194(1) and whether this is to be seen as an “obligation of conduct” as opposed to an “obligation of result”. And Judge Kittichaisaree has, of course, also asked a broader question on this, looking for categorization of the relevant provisions of the Convention into obligations of conduct or of result.

Now, for Belize, this is not an issue with an easy answer, and it is to be recalled that the ILC elected not to include this distinction in the 2001 Articles on State Responsibility, explaining that:

Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, “regardless of its ... character”. In practice, various classifications of international obligations have been adopted.

For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has

¹⁹ Alexander Proelss, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 1375, para. 11, considering Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (2008).

²⁰ *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at pp. 109–110, paras. 72–89.

²¹ Belize Written Statement, para. 81.

occurred. But it is not exclusive, and it does not seem to bear specific or direct consequences as far as the present articles are concerned.²²

So, does the distinction assist the Tribunal in its current task of interpretation, where it is *not* seeking to ascertain whether a breach has occurred? Suppose the Tribunal were faced with a concrete case, where an environmental assessment under article 206 revealed that a given planned activity would inevitably lead to a massive release of methane gas and consequent adverse impact to the marine environment.

The obligations of due diligence under article 194 would likely require not merely conduct, but also a specific result in the form of a decision that the planned activity could not proceed as proposed. So we would not see this issue of characterization that is capable of a straightforward answer and respectfully query how much it could assist the Tribunal in the abstract.

To conclude, Mr President, members of the Tribunal; the entirety of Part XII is of the greatest importance in the current emergency and must be recognized as such if the endless torment of Sisyphus is to be cut short so far as concerns the marine environment.

And for Belize, it is critical that the Tribunal pay close attention to, and identify in its advisory opinion, the specific obligations under article 206 and interpret these in a way that gives them their true meaning and effect.

That concludes the oral submissions of Belize, and I thank you, Mr President, members of the Tribunal, for your attention.

THE PRESIDENT: Thank you, Mr Wordsworth.

This brings us to the end of this morning. The Tribunal will sit again tomorrow morning at 10 a.m. when it will hear oral statements from the Philippines and Sierra Leone.

This sitting is now closed.

²² International Law Commission, *Articles on State Responsibility with Commentaries*, 2001, at p. 56, para. (11).

PUBLIC SITTING HELD ON 19 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Philippines

Mr Carlos D. Sorreta, Permanent Representative, Permanent Mission to the United Nations, Geneva

Ms Irene Susan B. Natividad, Ambassador, Philippine Embassy, Berlin

Ms Maria Angela A. Ponce, Assistant Secretary, Maritime and Ocean Affairs Office, Department of Foreign Affairs

Mr Gilbert U. Medrano, Assistant Solicitor General, Office of Solicitor General

Mr Gerardo P. Abiog, Minister and Consul, Philippine Embassy, Berlin

Mr Zoilo A. Velasco, Director, Maritime and Ocean Affairs Office, Department of Foreign Affairs

Ms Jacqueline H. Acorda-Ragasa, Associate Solicitor, Office of Solicitor General

Ms Marie Sybil P. Tropicales, Associate Solicitor, Office of Solicitor General

Ms Dana Michelle C. del Rosario, Third Secretary and Vice Consul, Philippine Embassy, Berlin

Sierra Leone

Mr Mohamed Lamin Tarawalley, Attorney-General and Minister of Justice

Mr Alpha Sesay, Deputy Minister of Justice

Mr Michael Imran Kanu, Permanent Representative of Sierra Leone to the United Nations

Mr Robert Baoma Kowa, Solicitor-General

Ms Hawanatu Kebe, Sixth Committee Expert, Permanent Mission of Sierra Leone to the United Nations

Mr Tamba Sangba, Sierra Leone Environmental Protection Agency

Mr Charles C. Jalloh, Professor, Florida International University; Member, Special Rapporteur and Second-Vice Chairperson (74th session), International Law Commission

Ms Phoebe Okowa, Professor, Queen Mary University London; Member, International Law Commission

Mr Dire D. Tladi, Professor, University of Pretoria; former Member, Special Rapporteur and Chair, International Law Commission

Ms Christina Hioureas, Partner, Foley Hoag LLP

Mr Andrew Loewenstein, Partner, Foley Hoag LLP

AUDIENCE PUBLIQUE TENUE LE 19 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ÉTATS PARTIES

Philippines

M. Carlos D. Sorreta, Représentant permanent à la Mission permanente auprès de l'Organisation des Nations Unies à Genève
Mme Irene Susan B. Natividad, Ambassadrice, ambassade des Philippines à Berlin
Mme Maria Angela A. Ponce, secrétaire adjointe du bureau des affaires maritimes et océaniques du Ministère des affaires étrangères
M. Gilbert U. Medrano, *Assistant Solicitor General* au bureau du *Solicitor General*
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Mme Hawanatu Kebe, spécialiste de la Sixième Commission à la Mission permanente de la Sierra Leone auprès de l'Organisation des Nations Unies
M. Tamba Sangba, Agence sierra-léonaise de protection de l'environnement
M. Charles C. Jalloh, professeur à l'Université internationale de Floride ; membre, rapporteur spécial et deuxième vice-président (soixante-quatorzième session) de la Commission du droit international
Mme Phoebe Okowa, professeure à l'Université Queen Mary de Londres ; membre de la Commission du droit international
M. Dire D. Tladi, professeur à l'Université de Pretoria ; ancien membre, rapporteur spécial et président de la Commission du droit international
Mme Christina Hioureas, associée, cabinet Foley Hoag LLP
M. Andrew Loewenstein, associé, cabinet Foley Hoag LLP

THE PRESIDENT: Good morning. Today the Tribunal will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. This morning we will hear oral statements from the Philippines and Sierra Leone.

I now give the floor to the representative of the Philippines, Mr Sorreta, to make his statement. You have the floor, Sir.

STATEMENT OF MR SORRETA
PHILIPPINES

[ITLOS/PV.23/C31/12/Rev.1, p. 1–2]

Mr President, distinguished members of the Tribunal, good morning. It is an honour and an imperative for the Republic of the Philippines to appear before the Tribunal and be part of these proceedings – proceedings that could prove to be the crucial turning point in collective efforts to turn the tide on climate change.

I am Carlos D. Sorreta, Philippine Permanent Representative to the United Nations in Geneva and Representative for these proceedings. I am joined by my Co-Representatives, Ambassador Maria Angela A. Ponce, Assistant Secretary for Maritime and Ocean Affairs, Office of the Department of Foreign Affairs, and Assistant Solicitor General Gilbert U. Medrano of the Office of the Solicitor General.

We will speak for approximately 60 minutes. I will speak first, by way of introduction, followed by Assistant Solicitor General Medrano, who will touch on relevant Philippine laws and discuss jurisdiction, admissibility and applicable law. Ambassador Ponce will then expound on the Philippines' response to question (a), after which, I will address question (b) and conclude our presentation.

Mr President, from the time that COSIS filed the request for an advisory opinion last December to today's hearing, nine devastating typhoons have battered my country. Lives have been lost, people hurt and displaced, cities and towns flooded, and large areas of farmlands inundated. The trajectory and magnitude of our typhoons have become even more erratic and even less predictable.

Between 2011 and 2021, typhoons caused 12,000 deaths, countless injuries and US\$ 12 billion worth of loss to my country. The worst of these was super Typhoon Haiyan in 2013, which resulted in over 6,000 fatalities and remains among the top 10 deadliest in all of history.¹

When not battered by typhoons, we are hit by periods of drought caused by El Niño, a weather phenomenon which is exacerbated by climate change.² Farms dry up, coastal fishing areas end up empty and people go hungry.³

The Philippines ranks first among countries most at risk to disasters and extreme natural events such as tsunamis, floods and drought.⁴ Such vulnerability is evident in our coastal and marine ecosystems, which are now deteriorating at alarming rates. Studies and reports⁵ reveal

¹ Thelwell, K. (2019). *A look at the top 10 worst typhoons*. *The Borgen Project*. <https://borgenproject.org/top-10-worst-typhoons/>

² Kiest, K. (2023). *How will climate change change El Niño and La Niña?* *NOAA Research*. <https://research.noaa.gov/2020/11/09/new-research-volume-explores-future-of-enso-under-influence-of-climate-change/>

³ *Impact of El Niño on agriculture, fisheries and forestry - World* (15 November 1997). ReliefWeb. <https://reliefweb.int/report/world/impact-el-niper centC3per centB1o-agriculture-fisheries-and-forestry>

⁴ *The World Risk Report* (19 October 2022). *WeltRisikoBericht - WeltRisikoIndex*. *WeltRisikoBericht*. <https://weltrisikobericht.de/weltrisikobericht-2022-e/>

⁵ Villarin, J.T., Algo, J.L., Cinco, T.A., Cruz, F.T., de Guzman, R.G., Hilario, F.D., Narisma, G.T., Ortiz, A.M., Siringan, F. P., Tibig, L.V. (2016). *2016 Philippine Climate Change Assessment (PhilCCA): The Physical Science*

coastal erosion, bleaching of coral reefs, loss of sea grass and conversion of mangrove areas which, in turn, affect marine resources and the livelihood of our coastal communities.

As an archipelagic State comprised mostly of small islands and one of the most vulnerable to, and most affected by climate change, the Philippines stands in solidarity with COSIS and all the small island States that comprise it, and outside of its membership, and support their initiative to request the Tribunal's advisory opinion.

Fundamental to our position is that, while UNCLOS was not designed as a mechanism for regulating climate change, its mandate is broad enough to consider the connection between climate and the oceans. This 40-year-old framework agreement must be interpreted in light of changing global circumstances and changing laws.⁶ It is, among others, a strong, innovative and comprehensive global environmental treaty governing over two thirds of the planet.⁷ It must be interpreted and applied with subsequent developments in international law and policy in mind.⁸

At this point, Mr President, and with the Tribunal's permission, may I ask my Co-Representative, Assistant Solicitor General Gilbert Medrano, to continue by placing in context how Philippine law has been protecting the environment and contributing to the fight against climate change as well as discuss the issues of jurisdiction, admissibility and applicable law.

MR PRESIDENT: Thank you, Mr Sorreta.

I now give the floor to Mr Medrano to make his statement. You have the floor, Sir.

Basis. The Oscar M. Lopez Center for Climate Change Adaptation and Disaster Risk Management Foundation Inc. and Climate Change Commission; Cruz, R.V.O., Aliño, P.M., Cabrera, O.C., David, C.P.C., David, L.T., Lansigan, F.P., Lasco, R.D., Licuanan, W.R.Y., Lorenzo, F.M., Mamauag, S.S., Peñaflor, E.L., Perez, R.T., Pulhin, J.M., Rollon, R.N., Samson, M.S., Siringan, F.P., Tibig, L.V., Uy, N.M., Villanoy, C.L. (2017). *2017 Philippine Climate Change Assessment: Impacts, Vulnerabilities and Adaptation*. The Oscar M. Lopez Center for Climate Change Adaptation and Disaster Risk Management Foundation, Inc. and Climate Change Commission.

⁶ Ellycia Harrould-Kolieb, Margaret Youn (24 July 2023). *Could the law of the sea be used to protect small island states from climate change? The Conversation*. <https://theconversation.com/could-the-law-of-the-sea-be-used-to-protect-small-island-states-from-climate-change-208842>.

⁷ John R. Stevenson and Bernard H. Oxman (1994). "The Future of the United Nations Convention on the Law of the Sea", 88 *Am. Jl. Int'l. Law* 488

⁸ Alan Boyle (2020). *Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in The Law of the Sea and Climate Change: Solutions and Constraints*, edited by Elise Johansen, et al., Cambridge University Press.

STATEMENT OF MR MEDRANO
PHILIPPINES

[ITLOS/PV.23/C31/12/Rev.1, p. 2–6]

Mr President, distinguished members of the Tribunal, good morning.

When President Ferdinand R. Marcos, Jr. addressed the United Nations General Assembly last year, he stressed that “climate change is the greatest threat affecting our nations and peoples.” Our participation today emphasizes how the Philippines considers these advisory proceedings and the central role the Tribunal plays in addressing this existential threat in the Anthropocene epoch.

Before I proceed, allow me first to state the context in which the Philippines has been protecting the environment through our national laws, which shape and inform our position in these advisory proceedings.

The protection and advancement of the right to a balanced and healthful ecology is a fundamental right enshrined in Section 16, article II, of our Constitution. The highest court of our land, our Supreme Court, interpreted this provision in the landmark case of *Oposa v. Factoran*,¹ where it held that the right to a balanced and healthful ecology need not be written in our Constitution, for it is assumed – like other civil and political rights guaranteed in the Bill of Rights – to exist from the inception of humankind, and it is an issue of transcendental importance. Such right carries with it the correlative duty to refrain from impairing the environment.

Further, we have in our jurisdiction the concept of intergenerational responsibility which affords legal standing to sue for the enforcement of environmental rights in representation of future generations.

As a party to the United Nations Framework Convention on Climate Change (or the UNFCCC), the Philippines adheres to the Convention’s ultimate objective, which is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, to ensure food security and sustainable development. This objective is enshrined in our Climate Change Act.²

We have several other domestic laws on marine environmental protection that address marine pollution³ and toxic substances and hazardous wastes,⁴ establish an environmental policy⁵ and institutionalize a system of environmental impact assessment (or EIA) for marine protected areas.⁶ Non-compliance with the requirement of EIA has been ruled by our Supreme Court as a serious statutory violation.⁷

The Philippines has also led in climate legislation with laws to reduce black carbon,⁸ address wastewater pollution,⁹ promote clean, sustainable energy,¹⁰ strengthen climate

¹ G.R. No. 101083, 30 July 1993.

² Republic Act No. 9729 or the Climate Change Act (23 October 2009).

³ Presidential Decree No. 979 or the Marine Pollution Decree (18 August 1976).

⁴ Republic Act No. 6969 or the Toxic Substances and Hazardous and Nuclear Wastes Control Act (26 October 1990).

⁵ Presidential Decree No. 1151 or the Philippine Environment Policy (6 June 1979).

⁶ Republic Act No. 7586 or the National Integrated Protected Areas System Act (1 June 1992).

⁷ *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes*, G.R. No. 180771, 21 April 2015.

⁸ Republic Act No. 8749 or the Clean Air Act (23 June 1999).

⁹ Republic Act No. 9275 or The Clean Water Act (22 March 2004).

¹⁰ Republic Act No. 9513 or the Renewable Energy Act (16 December 2008).

governance,¹¹ finance local adaptation,¹² transition to a green economy¹³ and, more recently, pursue effective and judicious use of energy.¹⁴

Beyond the statutes, the Philippine Supreme Court likewise promulgated rules concerning environmental cases, that is, The Rules of Procedure in Environmental Cases,¹⁵ which aim, *inter alia*, to protect and advance the constitutional right of the people to a balanced and healthful ecology through a special remedy called *Writ of Kalikasan*.

All the foregoing demonstrates the Philippines' serious efforts and particular attention to marine environmental protection as an archipelagic and a developing State. These are our contributions to making marine environmental protection a global norm.

Mr President, I will now briefly tackle the issue of jurisdiction and admissibility.

The Tribunal's advisory jurisdiction, outside of the competence of the Seabed Disputes Chamber, is settled in the *Sub-Regional Fisheries Commission* Advisory Opinion. Here, the Tribunal pronounced that its advisory jurisdiction derives from article 21 of its Statute (or Annex VI of UNCLOS), read together with article 138 of its Rules.¹⁶ This is now set in stone, and for the Philippines there is no reason to depart from the said ruling.

Having satisfied of its competence in the said case, the Tribunal further indicated the prerequisites for its advisory jurisdiction, based on article 138 of its Rules, namely: first, an international agreement related to the purposes of the Convention that specifically provides for the submission to the Tribunal of a request for an advisory opinion; second, the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above; and, third, such an opinion may be given on "a legal question".

It is the Philippines' position that COSIS' request satisfies the prerequisites for the Tribunal to assume advisory jurisdiction. The *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*¹⁷ is an international agreement between and among small island States whose mandate is related to the purposes of UNCLOS, in particular, the protection and preservation of the marine environment.

Moreover, article 2(2) of the said Agreement empowers COSIS to request ITLOS advisory opinions "on any legal question within the scope" of UNCLOS. Equally important, the questions posed by COSIS are legal in nature, as they require the Tribunal to interpret specific provisions of UNCLOS without implicating any dispute between or among States Parties.

On the matter of admissibility, it would suffice for our presentation to state the jurisprudence of the International Court of Justice (ICJ) in the *Legality of the Threat or Use of Nuclear Weapons*, whereby the Court said "[i]t is well-settled that a request for an advisory opinion should not, in principle, be refused except for 'compelling reasons.'"¹⁸ The Philippines does not see any compelling reason for the Tribunal to refuse its advisory jurisdiction; rather, what exists are compelling reasons for the Tribunal to exercise its jurisdiction and carry on with its advisory competence.

¹¹ Republic Act No. 9729 or the Climate Change Act (23 October 2009).

¹² Republic Act No. 10174 or the People's Survival Fund Act (16 August 2012).

¹³ Republic Act No. 10771 or the Green Jobs Act (29 April 2016).

¹⁴ Republic Act No. 11285 or the Energy Efficiency and Conservation Act (12 April 2019).

¹⁵ A.M. No. 09-6-8-SC (13 April 2010).

¹⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 22, para. 58.

¹⁷ Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, U.N. Reg. 56940 (31 October 2021).

¹⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 235, para. 14.

Mr President, I will now lay down the foundation of our analysis by articulating the applicable laws that are pertinent to answering the questions before the Tribunal.

Article 23 of the Tribunal’s Statute states that “[t]he Tribunal shall decide all disputes and applications in accordance with article 293” of UNCLOS, with the understanding that the word “applications” covers requests for an advisory opinion. Article 293(1) states that “[a] court or tribunal having jurisdiction under this Section shall apply this Convention and other rules of international law not incompatible with this Convention.” By the strength of these two provisions alone, it is clear that UNCLOS allows cross-reference with other rules or sources of international law as long as they are compatible with it.

Part XII of UNCLOS on the *Protection and Preservation of the Marine Environment*, in particular Section 11, article 237, states the “provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements” relating to the protection and preservation of the marine environment that were previously concluded or which may be concluded “in furtherance of the general principles set forth” by UNCLOS.

Likewise, “specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of the Convention.” In other words, UNCLOS explicitly recognizes and advances its synergy with other related international instruments.

We are likewise reminded of the rules on treaty interpretation under article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which takes into account, together with the context, “[a]ny relevant rules of international law applicable in the relations between the parties.”

This interpretative approach was employed in the *South China Sea Arbitration*,¹⁹ particularly in the Award on Jurisdiction and Admissibility, whereby the arbitral tribunal considered relevant provisions of the Convention on Biological Diversity (CBD) “for the purposes of interpreting the content and standard of articles 192 and 194” of UNCLOS, relying on the strength of article 293(1) of UNCLOS and article 31(3) of the VCLT.²⁰ Likewise, in the Award on Merits, the arbitral tribunal considered the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as forming “part of the general corpus of international law that informs the content of articles 192 and 194(5)” of UNCLOS.²¹

In the same vein, in interpreting the specific provisions of UNCLOS that are implicated in these advisory proceedings, the Philippines will make reference to related conventions and rules of international law to arrive at a holistic position that extols the synergy which the UNCLOS invites with the relevant corpus of international law.

At this point, Mr President, with the Tribunal’s permission, allow me to turn over the floor to my Co-Representative, Ambassador Maria Angela A. Ponce, to continue the Philippines’ oral statement. Thank you.

THE PRESIDENT: Thank you, Mr Medrano.

I now give the floor to Ms Ponce to make her statement. You have the floor, Madam.

¹⁹ *In the matter of the South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China*, UNCLOS Annex VII Arbitral Tribunal, PCA Case N° 2013-19, 29 October 2015.

²⁰ *Ibid.*, Award on Jurisdiction and Admissibility, p. 69, para. 176.

²¹ *Ibid.*, Award on Merits, 12 July 2016, p. 380, para. 956.

STATEMENT OF MS PONCE
PHILIPPINES
[ITLOS/PV.23/C31/12/Rev.1, p. 6–13]

Mr President, distinguished members of the Tribunal, good morning. I will discuss the Philippines’ position on the first question; that is, what are the specific obligations of States Parties to the 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, including through ocean warming and sea-level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?”

Article 1(4) distills the elements of what constitutes “pollution of the marine environment.” First, is its nature: it is a substance or energy. Second, is its source: it is “anthropogenic” or introduced by man, directly or indirectly, into the marine environment. Third, is the result: it results or is likely to result in deleterious effects – of which an indicative list is provided – such as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The Philippines submits that greenhouse gas emissions fulfil these elements and therefore qualify as “pollution of the marine environment”.

Mr President, the science behind climate change and the effects of greenhouse gas emissions on the marine environment is unassailable.

The *Sixth Assessment Report of the Intergovernmental Panel on Climate Change (AR6)* confirms that “human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming”. The IPCC further stresses: “It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred”.¹

The IPCC’s Working Group II contribution to the AR6 – Chapter 3 on *Oceans and Coastal Ecosystems and their Services* – provides scientific evidence that climate change is affecting marine ecosystems through rising sea temperatures, ocean acidification and sea-level rise.²

Greenhouse gases, such as carbon dioxide, are both substance and energy that heat up the oceans. It is well-established that oceans are sinks and reservoirs of greenhouse gases. They have taken up 20-30 per cent of total anthropogenic carbon dioxide emissions since the 1980s.³ The global ocean is centrally involved in sequestering anthropogenic atmospheric carbon dioxide and recycling many elements, and it regulates the global climate system.⁴

¹ IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp. doi: 10.59327/IPCC/AR6-9789291691647.

² IPCC, 2022: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Lösche, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 3056 pp. doi:10.1017/9781009325844.

³ IPCC, 2019: *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35. <https://doi.org/10.1017/9781009157964.001>.

⁴ IPCC, 2022: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 385.

The impacts of greenhouse gases on oceans include ocean warming, ocean acidification and sea-level rise, which, in turn, cause harmful effects to marine life, human health and marine activities, such as fishing, among others.

Ocean warming causes migration of certain fish species, and kills corals, adversely affecting other marine resources. According to the 2016 and 2017 Philippine Climate Change Assessment Reports, “the highest positive anomaly occurred in 1998, during one of the most significant El Niño events in the equatorial Pacific which caused widespread drought in the Philippines”.⁵ Previously, in 1998-1999, the first massive coral bleaching was observed in the country. “It was noted that coral bleaching was correlated with abnormally high sea surface temperature.”⁶

Currently, moderate El Niño is present in the tropical Pacific, including in the Philippines, and is expected to strengthen in the coming months, until the first quarter of 2024. The Philippines’ agriculture sector will be most likely affected by the limited water supply, decreased agricultural productivity, fish kills and coral bleaching.

Ocean acidification, as a result of higher carbon dioxide in the atmosphere, disrupts carbonate chemistry, making it more difficult for marine organisms to build shells and structures. This could slow down their overall growth and reproduction, and thus reduce abundance. It could also suppress reef formation and production.⁷

Sea-level rise, on the other hand, could alter river flows and, in turn, change the distribution of salinity and freshwater in mangrove areas, eventually reducing their diversity and zonation. As sea levels rise, mangroves migrate inland to agricultural areas.⁸

In addition, the number and severity of typhoons will likely cause more structural damage to reef and sea grass systems due to increased tidal activities. Intense rainfall likewise causes inundation of nesting grounds of various marine species and could potentially increase fungal pathogen loads that leads to their mortality.⁹

Mr President, I will now discuss the specific provisions under Part XII that are relevant to answering the first question, and these are namely:

Under Section 1, General Provisions: article 194 on measures to prevent, reduce and control pollution of the marine environment; article 195 on the duty not to transfer damage or hazards or transform one type of pollution into another; and article 196 on the use of technologies or introduction of alien or new species.

Under Section 5, International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment, we have: article 207 on pollution from land-based sources; and article 212 on pollution from or through the atmosphere.

And under Section 6, Enforcement, we have: article 213 on enforcement with respect to pollution from land-based sources; and article 222 on enforcement with respect to pollution from or through the atmosphere.

This list is by no means exhaustive of all applicable provisions under Part XII. But for my delegation, these are the palpably relevant articles that relate to the first question.

In interpreting these provisions, and the other provisions of UNCLOS that bear significance on the questions before the Tribunal, the *South China Sea Arbitration*, which has been cited extensively by many States participating in these proceedings, provides a most

⁵ Villarin, J. T., et. al. (2016). *2016 Philippine Climate Change Assessment (PhilCCA): The Physical Science Basis*, p. 30.

⁶ Cruz, R. V. O., et. al. (2017). *2017 Philippine Climate Change Assessment: Impacts, Vulnerabilities and Adaptation*, p. 23.

⁷ *Ibid.*, p. 24.

⁸ *Ibid.*, p. 23.

⁹ *Ibid.*, pp. 23-24.

authoritative determination on the obligation to protect and preserve the marine environment. It pronounced legal doctrines that could help determine the outcome of these proceedings.

The *South China Sea Arbitration* is legally binding international law, with its proceedings faithfully carried out in accordance with UNCLOS. It has been cited by this Tribunal itself in its *Mauritius/Maldives* decision. Its validity cannot be assailed.

Article 192 provides the general obligation of States to protect and preserve the marine environment. As submitted by the Philippines in the *South China Sea Arbitration*, we consider this to form part of customary international law which covers areas within national jurisdiction as well as areas beyond national jurisdiction. This requires States to take “active measures” to prevent harm, to “conserve marine living resources,” and to “preserve the ecological balance of the oceans as a whole.”¹⁰

Article 194(1) establishes the obligation to “take, individually or jointly as appropriate, all measures that are necessary to prevent, reduce and control pollution of the marine environment.” This pertains to two specific obligations, namely, the obligation not to cause damage to the environment of other States and areas beyond the limits of national jurisdiction or the “no-harm” rule, and the obligation of due diligence. I will elaborate on these when discussing the subsequent provisions under Part XII.

This obligation applies regardless of where the greenhouse gas emissions – which, as posited earlier, qualify as “pollution of the marine environment” – originate. It also does not matter whether this marine pollution occurs within or outside a State’s national jurisdiction.

This point was clarified in the *South China Sea Arbitration* where the arbitral tribunal said that “the environmental obligations in Part XII apply to States irrespective of where the alleged harmful activities took place,”¹¹ and that “the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it.”¹²

We should relate this to article 194(3) which emphasizes that all necessary measures taken “shall deal with all sources of pollution of the marine environment”. “These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent” the release of greenhouse gases “from land-based sources”, and “from or through the atmosphere” as stated in subparagraph (a). This likewise applies to pollution from vessels and installations and devices mentioned in subparagraphs (b), (c) and (d), insofar as they contribute to greenhouse gas emissions. Greenhouse gases are emitted from land, air and sea, covering all areas where anthropogenic activities take place, and article 194(3) deals with all these sources of pollution.

In fulfilling their obligations under article 194(1), it is clear that States shall use “the best practicable means at their disposal and in accordance with their capabilities.” In the context of climate change, this pertains to the “common but differentiated responsibilities and respective capabilities” found in article 3(1) of the UNFCCC which is now a widely recognized principle of international law. We will discuss this further under question (b).

In this regard, article 194(1) mandates States Parties to “endeavour to harmonize their policies”.

Article 194(2) points to a more specific obligation that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage or pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [UNCLOS]”.

This is a clear reference to and a codification of the “no-harm” rule, that is, the principle of *sic utere tuo ut alienum non laedas*, which is customary international law. First stated as

¹⁰ *South China Sea Arbitration*, Award on Merits, 12 July 2016, p. 360, para. 907.

¹¹ *Ibid.*, p. 370, para. 927.

¹² *Ibid.*, p. 373, para. 940.

Principle 21 of the Stockholm Declaration¹³ that, “States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,” it was reiterated in subsequent important environmental pacts and instruments, such as Principle 2 of the Rio Declaration¹⁴ and article 3 of the Convention on Biological Diversity.¹⁵

The *Trail Smelter*¹⁶ and the *Corfu Channel*¹⁷ cases were the early cases that enunciated the “no-harm rule”. But it was the ICJ Advisory Opinion in *Legality of the Threat of Use of Nuclear Weapons* which established that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹⁸ This pronouncement has been reaffirmed in subsequent ICJ cases, such as the *Gabcíkovo-Nagymaros Project*¹⁹ and the *Pulp Mills on the River Uruguay*.²⁰

The Philippines is of the position that the “no-harm rule”, as a customary norm, is not limited to causing harm in the territory of another State, but includes damage caused in areas beyond national jurisdiction. This is solidified by the adoption of the *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, or the BBNJ Agreement,²¹ which among others, provides that

[w]hen a Party with jurisdiction or control over a planned activity that is to be conducted in marine areas within national jurisdiction determines that the activity may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction, that Party shall ensure that an environmental impact assessment of such activity is conducted.²²

The Philippines will join the international community in signing this landmark treaty tomorrow in New York.

As a customary norm that informs the content of article 194 of UNCLOS, the “no-harm rule” creates an obligation on all States Parties to ensure that their activities do not aggravate the current situation by further contributing to the warming of the planet and of the oceans.

This thus requires States to limit their greenhouse gas emissions, consistent with their obligations under the UNFCCC and the Paris Agreement.

Related to article 194(2) are articles 195 and 196 such that, in taking all these measures necessary to prevent, reduce and control pollution of the marine environment, including those “resulting from the use of technologies under their jurisdiction or control”, “States shall act so

¹³ Report of the United Nations Conference on Human Environment, Stockholm (5-16 June 1972), A/CONF.48/14/Rev.1, 25 July 1995.

¹⁴ Report of the United Nations Conference on Environment and Development, Rio De Janeiro (3-14 June 1992), A/CONF.151/26 (Vol. I), 12 August 1992.

¹⁵ Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992).

¹⁶ *Trail Smelter (United States / Canada)*, Award, 11 March 1941, III RIAA 1905, p. 1965.

¹⁷ *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 April 1949, I.C.J. Reports 1949, p. 22.

¹⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 242, para. 29.

¹⁹ *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, I.C.J. Reports 1997, p. 41, para. 53.

²⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order (Provisional Measures), 13 July 2006, I.C.J. Reports 2006, p. 132, para. 72; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, I.C.J. Reports 2010, pp. 55-56, para. 101.

²¹ Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/CONF.232/2023/4.

²² *Ibid.*, article 28 (2).

as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another”.

Articles 207 and 212 mandate that “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment” from land-based sources, and from or through the atmosphere. In addition to adopting such laws and regulations, articles 213 and 222 require States to enforce the laws and regulations they have so adopted. These provisions, taken together, serve to operationalize the obligation of due diligence, that is, the obligation for States to ensure that their laws and regulations are enforced effectively within their jurisdiction.

Articles 207 and 212 also mandate that “States shall take other measures as may be necessary to prevent, reduce and control” pollution of the marine environment, while articles 213 and article 222, respectively, further require that States “shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment” from land-based sources, and from or through the atmosphere.

With respect to the pollution from vessels and installations and devices in subparagraphs (b), (c) and (d) of article 194(3), the same obligation of due diligence could be derived from the provisions relating to enforcement by the flag, port and coastal States in articles 217, 218 and 220 respectively.

Mr President, the due diligence obligation is related to the “no-harm rule.” The “no-harm rule” is the obligation not to harm or pollute the marine environment, while due diligence is the obligation to undertake means to ensure that such obligation not to harm is carried out.

From the *South China Sea Arbitration*,²³ we can deduce that the obligation of due diligence is twofold: first is “adopting appropriate rules and measures to prohibit a harmful practice,” and second is ensuring enforcement or compliance with said rules and measures, with the qualification that “the obligation to ‘ensure’ is an obligation of conduct” and not of result.

As the ICJ pronounced in *Pulp Mills on the River Uruguay*,²⁴ and as reiterated by the Tribunal in its Advisory Opinion in the *Sub-Regional Fisheries Commission*, the obligation of due diligence “entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable” to all public and private entities under its jurisdiction.²⁵

But what exactly is the content of these rules and regulations, and all other necessary measures, that States shall enact and enforce within their jurisdictions to prevent, reduce and control greenhouse gas emissions? Employing the interpretative approach we have laid down earlier, and in the context of climate change and its deleterious effects on the marine environment, the provisions I just discussed can only have substantive meaning by making reference to the UNFCCC and the Paris Agreement.

In particular, these rules and regulations and other measures should, *inter alia*, aim towards the realization of article 2 of the UNFCCC for the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”, and, as fleshed out in article 1(a) of the Paris Agreement, by “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”

²³ *South China Sea Arbitration*, Award on Merits, 12 July 2016, paras. 944, 956, 964 and 971.

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, *I.C.J. Reports 2010*, pp. 79-80, para. 197.

²⁵ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 41, para. 131.

For this purpose, the Philippines notes the universal or near-universal adoption of these two agreements which now make them part of the general corpus of international law, similar to the characterization of the CITES Convention made by the arbitral tribunal in the *South China Sea Arbitration*.

Mr President, article 194(5) states that measures taken “shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened and endangered species and other forms of marine life”. Indeed, as I have discussed, ocean warming, sea-level rise and ocean acidification have adversely affected critical marine ecosystems and habitats.

This article is peculiar because although it falls under the chapeau of “measures to prevent, reduce and control pollution of the marine environment” it pertains more to the protection and preservation of the marine environment. The provision highlights that inevitable nexus between pollution management and the protection and preservation of ecosystems.

As explained in the *Chagos Marine Protected Area* arbitration, “article 194 is ... not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems.”²⁶ The control of pollution forms an important part, but by no means the only aspect, of environmental protection.²⁷

Question (b) of the request for advisory opinion pertains to that wider net of environmental protection, which will be discussed by my Co-Representative, Ambassador Carlos D. Sorreta. May I ask, Mr President, that you give the floor to Ambassador Sorreta.

THE PRESIDENT: Thank you, Ms Ponce.

I now give the floor to Mr Sorreta to continue his statement. You have the floor, Sir.

²⁶ *In the matter of the Marine Protected Area Arbitration between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland*, UNCLOS Annex VII Arbitral Tribunal, Award, 18 March 2015, p. 211, para. 538.

²⁷ *Ibid.*, pp. 128-129, para. 320.

STATEMENT OF MR SORRETA (continued)
PHILIPPINES
[ITLOS/PV.23/C31/12/Rev.1, p. 13–20]

Thank you, Mr President. The second question relates to a key pillar of UNCLOS – the protection and preservation of the marine environment as enshrined in its Preamble and contained in article 192. This is complemented by article 193 that requires States to protect and preserve the marine environment in exploiting their natural resources.

Answering this question requires a reference to the *South China Sea Arbitration* which elaborated the scope of article 192. It said:

Although phrased in general terms, the Tribunal considers it well established that article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII *and other applicable rules of international law*. This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.¹

That arbitral tribunal also stated that “[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.”²

It is my task now to discuss the other UNCLOS provisions, the “other applicable rules of international law” and “other international agreements” that inform the content of article 192 as they relate to climate change impacts.”

Ambassador Ponce earlier discussed the “no-harm” rule as a customary norm and the obligation of due diligence as an imperative duty. These are rules of international law equally inform the content of article 192, following again the pronouncement in the *South China Sea Arbitration*. The Philippines emphasizes that it is the obligation of States to adopt appropriate rules and measures to preserve and protect the marine environment, and to ensure compliance by entities under its control and jurisdiction.

Let me now expound on the other provisions of UNCLOS and other rules of international law that are implicated in the obligations in UNCLOS to protect and preserve the marine environment from the harmful effects of climate change, namely: the duty to cooperate; the duty of due regard and good faith; the requirement for environmental impact assessment; the precautionary principle; equity; and sustainable development.

I will also incorporate discussions on the specific provisions of other international agreements relating to environmental protection that inform the content of article 192. These are: the Convention on Biological Diversity; the UNFCCC; the Paris Agreement; and the Agreement on biological diversity beyond national jurisdiction.

The Philippines would like to make the argument that in the field of international environmental law, various international agreements on environmental protection build upon each other to create a normative synergy between past, present and future agreements.

It is not only in article 237 that this normative synergy is found in UNCLOS, but also in various provisions, particularly in Part XII, which call for the application or enforcement of

¹ *South China Sea Arbitration*, Award on Merits, 12 July 2016, pp. 373-374, para. 941.

² *Ibid.*, p. 373, para. 942.

“generally accepted” or “applicable” international rules and standards “established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment”, and can be found from articles 207 to 222³ and include article 297(c), Section 3, Part XV of UNCLOS pertaining to settlement of disputes.

Mr President, there exists an obligation to cooperate. Article 197 requires States to cooperate on a regional basis to formulate standards and practices for the protection and preservation of the marine environment. The Tribunal in *MOX Plant* considered the duty to cooperate as “a fundamental principle in the prevention of pollution of the environment under Part XII of the Convention and general international law.”⁴ This is reiterated in the *South China Sea Arbitration*.⁵

Following the arbitral tribunal’s ruling, the Philippines emphasizes the duty under article 197 to cooperate on a global or regional basis, “directly or through competent international organizations [...] for the protection and preservation of the marine environment” in relation to climate change impacts.

Mr President, there are obligations to act in good faith and to not abuse rights. Outside of Part XII, article 300 of Part XVI bears significance, that “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.” Exercising rights in good faith is akin and relates to the obligation to give “due regard” set out in article 56(2).

These two obligations, good faith and non-abuse of rights, are moral guideposts within the Convention that must also inform the content of the States Parties’ obligation under article 192. Fulfilling all the obligations that we are discussing requires good faith and due regard to the rights of other States.

Mr President, related to good faith and due regard is the precautionary principle. Principle 15 of the Rio Declaration states that “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Similar language was incorporated in article 3 of the UNFCCC.

In its *Area Advisory Opinion*, the Tribunal’s Seabed Disputes Chamber pointed out that “the precautionary approach is also an integral part of the general obligation of due diligence,” which requires States “to take all appropriate measures to prevent damage that might result from the activities” in the Area, and this obligation “applies in situations where scientific

³ 1. Article 207(4) on pollution from land-based sources
 2. Article 208(5) on pollution from seabed activities subject to national jurisdiction;
 3. Article 210(4) on pollution by dumping;
 4. Article 211(1), (2) and (5) on pollution from vessels;
 5. Article 212(3) on pollution from or through the atmosphere;
 6. Article 213 on enforcement with respect to pollution from land-based sources;
 7. Article 214 on enforcement with respect to pollution from seabed activities;
 8. Article 216(1) on enforcement with respect to pollution by dumping;
 9. Article 217(1) and (4) on enforcement by flag States;
 10. Article 218 on enforcement by port States;
 11. Article 220(2) on enforcement by coastal States;
 12. Article 222 on enforcement with respect to pollution from or through the atmosphere.

⁴ *The MOX Plant Case (Ireland v. United Kingdom)*, Order, 3 December 2001, *ITLOS Reports 2001*, p. 110, para. 82.

⁵ *South China Sea Arbitration*, Award on Merits, 12 July 2016, pp. 394-395, para. 985.

evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.”⁶

The Chamber also 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” and that “[t]his has initiated a trend towards making this approach part of customary international law”,⁷ as clearly reinforced by the inclusion of the precautionary approach in the Nodules and Sulphides Exploration Regulations.

The latest in this trend, Mr President, is the BBNJ Agreement which provides in article 7 that in order to achieve these objectives, Parties shall be guided by, among others, “[t]he precautionary principle or precautionary approach, as appropriate”.

Another general obligation under UNCLOS and customary international law is to conduct environmental impact assessments (EIAs). Article 206, in relation to article 205, provides the obligation to conduct EIAs for activities to be undertaken in the marine environment. In the *Area Advisory Opinion*, the Seabed Disputes Chamber stressed that this is “a direct obligation under the Convention and a general obligation under customary international law.”⁸ Citing *Pulp Mills on the River Uruguay*, the Chamber said that this is a requirement under general international law “where there is risk that the proposed industrial activity may have a significant impact in a transboundary context, in particular, on a shared resource”, and considered that the obligation “also appl[ies] to activities with an impact on the environment in the area beyond the limits of national jurisdiction”.⁹

Related to articles 205 and 206 is article 204, which imposes the obligation to monitor the risks or effects of “any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.”

The *South China Sea Arbitration* emphasized that in order “to fulfill the obligations of article 206, a State must not only prepare an EIA but must also communicate it ... by the terms of article 205, to competent international organizations, which should make them available to all States.”¹⁰ The obligation, therefore, is twofold.

Of more recent significance is the BBNJ Agreement which has a dedicated part, from articles 27 to 39, on EIAs which elaborates on this twofold obligation.¹¹ Once it enters into force, the BBNJ Agreement could become a benchmark in elaborating these obligations.

Mr President, there exists an obligation to observe the norm of equity. Central to UNCLOS’ contribution to the strengthening of peace, security, cooperation and friendly relations is the principle of justice¹² – and from justice proceeds equity. In the *Continental Shelf* case, the ICJ said: “Equity as a legal concept is a direct emanation of the idea of justice”.¹³

Equity has had a long tradition in and has been robustly applied by the ICJ and the Tribunal maritime delimitations, most recently in *Mauritius/Maldives*.¹⁴ Equity’s application

⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 46, para. 131.

⁷ *Ibid.*, p. 47, para. 135.

⁸ *Ibid.*, pp. 50-51, paras. 145-148.

⁹ *Ibid.*, p. 51, para. 147.

¹⁰ *South China Sea Arbitration, Award on Merits, 12 July 2016*, p. 396, para. 991.

¹¹ These include, among others, provisions on thresholds and factors for conducting EIA, procedures for conducting the same, public notification and consultation and procedure for reporting and monitoring. More importantly, the BBNJ Agreement in its preamble recognizes “the need to address, in a coherent and cooperative manner, biological diversity loss and degradation of ecosystems of the ocean, due, in particular, to climate change impacts on marine ecosystems, such as warming and ocean deoxygenation, as well as ocean acidification...”

¹² 7th Preambular Paragraph, Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397.

¹³ *Continental Shelf (Tunisia v. Libya)*, Judgment, 24 February 1982, *I.C.J. Reports 1982*, para. 71.

¹⁴ *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment, 28 April 2023, para. 245.

should not be limited to maritime delimitation but should also apply with fervor to these advisory proceedings. To borrow the language of the ICJ in the *North Sea Continental Shelf* cases, whatever legal reasoning the Tribunal adopts, “its decision must by definition be just, and therefore in that sense equitable.”¹⁵ The International Panel on Climate Change has stated that equity remains a central element in the UN climate change regime.¹⁶

It is on the basis of equity, and in the context of climate justice, that the obligations under UNCLOS should be subject to the common but differentiated responsibility principle. Countries that have contributed to and benefited from environmental pollution more, should carry a greater share of this burden – a norm enshrined in article 3(1) of the UNFCCC¹⁷ and article 2(2) of the Paris Agreement¹⁸ as well as article 4(4).¹⁹

Mr President, there exists an obligation to promote sustainable development. UNCLOS aims to promote “the economic and social advancement of all peoples in the world”. Pursuing economic development is crucially linked to the preservation and protection of the marine environment. We cannot, as in the past, interfere with nature without considering its effects on the environment. We need to carefully balance these two ends. As the ICJ pronounced in its judgment in the *Gabcíkovo-Nagymaros Project*, “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

The obligation under article 192 is inextricably linked to the notion of sustainable development. In the context of climate change, the obligation to reduce greenhouse gas emissions is a cognate imperative in the pursuit of economic progress.

And in this context, we are reminded of article 4 of the Paris Agreement that States should “undertake rapid reductions ... in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”

To this end, the dictates of sustainable development should also inform the content of article 192 in the context of all our efforts to address climate change.

Mr President, in closing we would like to make several brief points. UNCLOS has been called the “the most significant achievement in international law in the 20th century”²⁰ and hailed as “the constitution of the oceans”.²¹ It ended confusion and chaos and brought stability, certainty and legal certainty to our seas and oceans.

As a living constitution of the oceans, it is the thread that weaves through the international rules and standards – past, present, and future – relating to the protection and preservation of the marine environment. Applying intertemporal rules in interpreting is allowed as long as it is consistent with the intention of the parties reflected, by reference to the object

¹⁵ The *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)*, Judgment, 20 February 1969, *I.C.J. Reports 1969*, para. 88.

¹⁶ IPCC, 2023, p. 101.

¹⁷ “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” (emphasis supplied)

¹⁸ “... to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

¹⁹ As such, under article 4(4), developed countries are obliged to take the lead “by undertaking economy-wide absolute emission reduction targets”, while developing countries are given time to move “towards economy-wide emission reduction or limitation targets”.

²⁰ UN Secretary General Javier Perez De Cuellar, Montego Bay, Jamaica, 10 December 1982.

²¹ Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, Montego Bay, Jamaica, 10 December 1982.

and purpose.²² And so, while climate change was not yet a prominent concern during the negotiations and adoption of UNCLOS in 1982, there is no other way to interpret this important document and its provisions now without taking into account climate change and its effects on the marine environment.²³

Treaty law icon, Professor Ian Sinclair, also believed that States can take an “evolutionary reading” like this under these circumstances.²⁴

Through the codification and progressive development of the law of the sea, UNCLOS contributes to the strengthening of peace, security, cooperation and friendly relations in accordance with the UN Charter.²⁵

The warming of the planet and the resulting changes to the natural environment pose numerous threats to humanity. Increased competition for resources like fertile land and fresh water are already disrupting societies and uprooting entire communities – exacerbating current conflicts and fuelling new ones.²⁶ There are alarming estimates of the potential scope of forced migration due to climate change.²⁷

The global climate crisis is, therefore, a key risk to international peace and security.²⁸ Climate change can unravel the architecture of UNCLOS itself and undermine the world order it has helped create over the past four decades.

The Security Council is responsible for the “maintenance of international peace and security”; however, the Charter does not define what exactly constitutes a ‘threat’, and the Council is tasked with determining its existence.²⁹ Today, eight of the countries that are hosting UN peacekeeping or special political missions are among the 15 most vulnerable to climate change.³⁰

As early as 1992, the President of the Security Council, speaking on behalf of its members, said:

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.³¹

At a meeting of the Security Council in June this year, the vast majority of speakers recognized that the climate change crisis is a threat to global peace and security, and that it must ramp up its efforts to lessen the risk of conflicts emanating from rising sea levels, droughts, floods and other climate-related events.³²

²² Rosalyn Higgins, *Some Observations on the Inter-Temporal Rule in International Law*. In Jerzy Makarczyk (ed), *ESSAYS IN HONOR OF KRZYSZTOF SKUBISZEWSKI* (Kluwer Law International 1996) 181.

²³ Ingvild Ulrikke Jakobson, Elise Johansen, Philipp Peter Nickels, *The Law of the Sea as Part of the Climate-Change Regime Complex*, in Elferink, A. G. O. (2005). *Stability and Change in the Law of the Sea: The Role of the LOS Convention*. In Brill | Nijhoff eBooks.

²⁴ I. Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (Manchester University Press 1984), p. 140.

²⁵ 7th Preambular paragraph, Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397.

²⁶ Explainer: How Is the Climate Crisis Impacting Conflict and Peace? Conciliation Resources, 2021.

²⁷ Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, *Climate Law* 2, no. 1 (2011): 345-374.

²⁸ Climate & Peace. Climate-Diplomacy. <https://climate-diplomacy.org/exhibition/climate-peace>

²⁹ <https://www.universal-rights.org/climate-change-a-threat-to-international-peace-and-security/>

³⁰ *Ibid.*

³¹ S/23500, 31 January 1992.

³² With Climate Crisis Generating Growing Threats to Global Peace, Security Council Must Ramp Up Efforts, Lessen Risk of Conflicts, Speakers Stress in Open Debate, <https://press.un.org/en/2023/sc15318.doc.htm>.

The rising levels of the oceans will inundate islands of low-lying coastal States, which could potentially shift maritime boundaries.³³ The potential loss of maritime boundaries as a result of sea-level rise will inevitably lead to conflicts in fisheries and other marine resources³⁴ but more importantly could impact the stability of boundaries³⁵ and trigger conflict.³⁶

The Philippines understands and respects the concerns of the arbitral tribunal in *Bangladesh v. India*,³⁷ that settled maritime boundaries would be jeopardized if climate-related changes were allowed to influence the delimitation process. The Philippines believes that international courts and tribunals, and the world itself, would not necessarily have to face this dilemma if we are able to stay a step ahead of climate change.

Mr President, staying a step ahead of climate change is the existential challenge for us all, as emphasized by President Marcos at the UN General Assembly last year when he said: “There is no other problem so global in nature that it requires a unified effort”.

The decision of the Tribunal as a consequence of these proceedings, could, and should, be a crucial and pivotal part of these efforts.

Mr President, based on the arguments and proof presented, the Philippines respectfully submits:

First, the Tribunal has jurisdiction to give an advisory opinion in response to the request submitted by COSIS;

Second, there exists no compelling reason for the Tribunal to decline giving an advisory opinion; rather, what exists, are compelling reasons for the Tribunal to exercise its discretion and issue an advisory opinion;

Third, the advisory opinion should rule that there are specific, identifiable obligations on the part of States Parties to 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; and (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea-level rise and ocean acidification; and

Fourth, there exist norms in conventional, customary, and general principles of international law that support and reinforce these legal obligations.

Mr President, members of the Tribunal, thank you.

THE PRESIDENT: Thank you, Mr Sorreta.

I now give the floor to the representative of Sierra Leone, Mr Sesay, to make his statement. You have the floor, Sir.

³³ David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 2 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2008).

³⁴ Redgwell, C. (2012). *UNCLOS and Climate Change*. *American Society of International Law Proceedings*, 106(1), 406-409.

³⁵ Frances Anggadi, *What States Say And Do About Legal Stability And Maritime Zones, And Why It Matters*, *International & Comparative Law Quarterly*, Volume 71, Issue 4, October 2022, pp. 767-798

³⁶ Snjolaug Arnadottir, *CLIMATE CHANGE AND MARITIME BOUNDARIES LEGAL CONSEQUENCES OF SEA LEVEL RISE*. Cambridge University Press, 2022.

³⁷ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, UNCLOS Annex VII Arbitral Tribunal, PCA Case N° 2010-16, Award, 7 July 2014, p. 117, para. 399.

STATEMENT OF MR SESAY
SIERRA LEONE
[ITLOS/PV.23/C31/12/Rev.1, p. 20–23]

Mr President, distinguished members of the Tribunal, good morning. It is my distinct honour to appear before you today in my capacity as the Deputy Minister of Justice representing the Republic of Sierra Leone in these historic proceedings. We appear before you, for the first time, because of the already significant impacts of climate change for my country. And its people.

Though the climate emergency poses the greatest threat to our planet and to this generation, there is simply no equity when it comes to managing its effects. This Tribunal's advisory opinion is an opportunity to change that.

Sierra Leone, located on the west coast of Africa, is among the lowest contributors of greenhouse gas emissions in the world. Yet, my country is also among the 10 per cent of countries that are most vulnerable to climate change. Sierra Leone hopes that the Tribunal will use the opinion not just to clarify States Parties' obligations under the Convention, but also to help strengthen the foundation for equitable solutions to the climate emergency.

Members of the Tribunal, starting with the legal framework, there can be no doubt that the two questions that the Commission of Small Island States on climate change and International Law have put to this Tribunal in its request for an advisory opinion address fundamental issues that lie at the heart of modern international law. The Tribunal is asked to clarify how UNCLOS obligations agreed upon more than four decades ago are aligned with the demands of the climate emergency the global community faces today. In answering those questions, taking into careful account the latest scientific consensus on climate change, the Tribunal has an historic opportunity to make at least three fundamental contributions.

First, to play a vital role in outlining not just how those obligations under the Convention might be interpreted under international law, but also interpreted in a manner that shows appropriate sensitivity to the disproportionate impact of the climate emergency on developing countries such as ours.

Second, the Tribunal has an opportunity to set the historical record straight. For it is a fact that those most affected by climate induced changes to the marine environment have contributed the least to the problem. Legal consequences must flow from this fact if we are really serious about addressing marine pollution and climate change more broadly.

Finally, building on this last point, the Tribunal could make clear that international law can play a meaningful role in offering solutions to address this practical problem. This will require paying due regard to the reality: the reality of differential capabilities of States to mitigate and adapt to the various harms caused by climate change; the reality that, if we are to solve the climate challenge, those with the means must step up to their responsibilities; the reality that, those who have not been industrialized and are still developing, are essentially being asked to subsidize the polluters by being left to deal with the climate mess not of their own making.

Mr President, these are among the important reasons why these advisory opinions are so important to Sierra Leone as a country. They are an opportunity for law and justice to be served, not just for Sierra Leone, but also for the many other developing countries in the Global South that find themselves in a similar position. Developing countries from all regions, which have contributed the least to the pollution of the marine environment and the pollution of the atmosphere, are shouldering a disproportionate burden of the existential threats posed to our planet by the deleterious effects of climate change. The polluters, who have produced most of the greenhouse gas emissions that got us where we are today, reap the benefits while we the non-polluters pay, and continue to pay the price. The polluters must pay.

Mr President, for Sierra Leone, the science is clear; the science is uncontested. It is this clear and uncontested science which makes our presence in these proceedings imperative. For us, the risks from human-induced climate change are particularly high. This is due to our particular geography as a low-lying coastal State. In fact, the negative effects of climate change on the marine environment have already been keenly felt in Sierra Leone. The impacts are multiple. They range from rising seas, to the forced displacement of our people inhabiting certain islands and low-lying coastal areas, to dramatic changes to our fisheries economy.

Economically, the fisheries sector is an important facet of Sierra Leone's future growth. The industry provides food security and employment opportunities. In addition to generating substantial economic activity, and providing a valuable source of export earnings, the fisheries sector represents a major lifeline for Sierra Leone as a recovering post-civil war society, to provide both sustenance and opportunities for its people. The harm that climate change is currently causing threatens to undo hard-fought progress that has been made thus far.

Moreover, Sierra Leone has had to grapple with the impact of food insecurity, particularly amongst rural households, for decades. Fisheries are vital for food security. They are especially important to our poorest communities. Yet climate change-induced ocean warming has contributed to an overall decrease in maximum catch potential. This has compounded the impacts from overfishing for some fish stocks.

Mr President, Sierra Leone is both particularly susceptible to climate change impacts and, at the same time, lacking in capacity to adapt to these impacts. Sadly, Sierra Leone is not alone. There are many Sierra Leones. Generally, coastal ecosystems in West Africa are among the most vulnerable to climate change because of extensive low-lying deltas exposed to sea-level rise, erosion, saltwater intrusion and flooding. Already, sea-level rise has caused significant challenges to the livelihoods of our coastal inhabitants. Coastal erosion is taking place. The result is a shifting of the coastline – sometimes dramatically so.

At a 1.5°C global temperature increase, among the principal hazards to ecosystems, are continued sea-level rise and increased frequency and magnitude of extreme sea-level events that encroach on coastal human settlements and damage coastal infrastructure. There is a serious risk of committing low-lying coastal ecosystem to submergence and loss, and expanding land salinization with cascading risks to livelihoods, health, well-being, food and water security.

If no action is taken, a total of 26.4 square kilometres of the Sierra Leonean coastline is estimated to be lost to the sea by the year 2050. Sea-level rise is expected to affect almost 2.3 million Sierra Leoneans who are at risk of experiencing a one-metre rise of the sea level along coastal areas. Already, in various parts of Sierra Leone, islands have fallen victim to sea-level rise. For instance, inhabitants of Yelibuya Island have had to be relocated due to flooding and partial and permanent inundation.

The human impact of the climate-related displacement of our people from their homes is immense. People lose their homes. People lose their livelihoods. People even lose memories of where they were born, of where they were raised, of where they started their own families. Generations of memories. Generations of property. Gone. With no hope for return or for recovery.

Even worse, the science indicates that we are all approaching a point of no return. The marine environment – a shared resource – is especially susceptible to climate change and should therefore be of special concern given the significance of the oceans to the health of our planet as a whole.

Mr President, I want to be clear: we are not helpless, nor are we resting on our laurels. Sierra Leone has already undertaken various measures to mitigate and adapt to the deleterious effects of climate change on our country and on our people. We have taken significant steps to implement various projects over many years.

But the stark reality is that, as a developing State, Sierra Leone has limited resources. We also have limited technological capacity to meet all the increasing demands of the climate problem. Finance is a particularly important barrier for government programmes generally, and for ocean health, governance and adaptation to climate change for Sierra Leone.

What we put in climate-related mitigation is food out of the mouths of our children. What we put in climate-related mitigation is money we do not use to educate our children. What we put in climate-related mitigation is money we do not use to nurse our sick children back to good health.

We therefore believe that the obligation to protect and preserve the marine environment under the Convention must be understood in the context of State obligations under general international law and consistent with principles of equitable burden sharing. We further believe that meaningful progress, for the sake of all of humanity, requires strong international cooperation, certainly more cooperation than we have now. Stronger international cooperation means providing sufficient financial and technical assistance to developing States, consistent with the relevant provisions of the Convention, including the common but differentiated responsibilities principle.

Sierra Leone is proud to be among one of the many African States Parties to UNCLOS to participate in these proceedings. We stand here as the only country from the west coast of the continent to participate.

Our hope is that this process provides greater clarity on State Party obligations in relation to the legal questions posed.

Our hope is that this Tribunal gives meaningful content to the common but differentiated responsibilities principle and the technical assistance provisions under the Convention.

Our hope is that the Tribunal recognizes the vital importance of the marine environment as a shared global resource which needs strong protection from pollution, whether from oceanic sources or from land-based sources.

Sierra Leone acknowledges that the Tribunal has a significant task ahead of it. We are confident that this Tribunal, whose contributions to the interpretation of the Convention have been remarkable, will continue to play its role; its critical role as a principal interpreter and guardian of the Convention in accordance with its founding instruments and existing international law.

Sierra Leone very much hopes that its own arguments and those by other States will assist the Tribunal in answering the questions before it. It should ultimately lead the Tribunal to pronounce itself clearly on the legal obligations that may lead to the actual prevention, reduction and control of marine pollution.

Mr President, distinguished members of the Tribunal, I am grateful for your kind attention and in conclusion, I would like now to request that you invite Professor Tladi to the podium. I thank you.

THE PRESIDENT: Thank you, Mr Sesay.

I now give the floor to Mr Tladi to make his statement. You have the floor, Sir.

STATEMENT OF MR TLADI
SIERRA LEONE
[ITLOS/PV.23/C31/12/Rev.1, p. 24–28]

Mr President, distinguished members of the Tribunal, it is an honour for me to appear before you today in these proceedings on behalf of the Republic of Sierra Leone.

On the question of jurisdiction, Sierra Leone wishes only to recall its written submissions that the Tribunal indeed has jurisdiction and should exercise it. And in this context, we would only recall what was said yesterday by Mozambique and just now, this morning, by the Philippines.

So my task today is really only twofold. First, with a view to assisting the Tribunal, I wish to set out the proper approach to interpreting the obligations under the Law of the Sea Convention.

My second task will be to address the obligations of due diligence – the overarching obligations contained in articles 192 and 194 of the Convention, and which is relevant to both questions A and B.

On the basis of the rules of interpretation that I will momentarily set out, Sierra Leone believes that the specific content of this obligation is to be informed by relevant international rules and standards, as well as scientific evidence. It effectively requires States to adopt necessary measures, individually and collectively, to limit the increase in global average temperatures to under 1.5°C above pre-industrial levels.

I will thereafter hand over to Professor Jalloh, who will argue that the obligation of due diligence necessarily encompasses the precautionary principle, obliging States to act even in the face of scientific uncertainty, whatever scientific certainty there may still be.

I turn now to the question of the interpretation of the Law of the Sea Convention.

The Convention, the “constitution of the ocean”, is not only comprehensive; it is also flexible, which allows it to adapt to new developments and scientific knowledge. It was Judge Lucky that observed in the *Sub-Regional Fisheries Commission* Advisory Opinion that the Convention is a “living instrument”, which “grow[s] and adapt[s] to changing circumstances”.¹ It is, in part, because of the rules of interpretation that it is able to do so, and it is for that reason that we wish to spend some time on these rules.

It is the case that the words “climate change” do not appear in the Convention. This, of course, is because the international community did not have the same awareness of climate change and its consequences, including impacts on the marine environment, that we have today. Nonetheless, we shall argue that a proper interpretation of the Convention, relying on the normal rules of interpretation, mandates the consideration of existing instruments, principles and scientific developments.

The rules of interpretation, of course, are to be found in article 31 of the Vienna Convention on the Law of Treaties, which, I think we all agree, reflects customary international law.² The general rule, which is expressed in article 31(1), provides that a treaty is to be “interpreted in good faith in accordance with the ordinary meaning of the words in the treaty in their context and in light of that treaties object and purpose.”

Now, in paragraphs 46 to 49 of our written submissions, we have showed how the ordinary meaning of the words in the Convention, in their context and in light of the Convention’s object and purpose, cover climate change related impacts. We illustrated, just for example, that article 1(1)(4) of the Convention, which defines “pollution to the marine

¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Separate Opinion of Judge Lucky, 2 April 2015)*, ITLOS Reports 2015, p. 96.

² See, e.g. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Rep 1999 (ICJ) 1059 para 18; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (ICJ) 46 para 65.

environment”, must necessarily cover excess anthropogenic greenhouse gas emissions into the atmosphere, in part because pollution includes pollution from or through atmosphere as provided for in article 212. We, in consequence, illustrated that the Convention “requires States to prevent, reduce and control marine pollution by, *inter alia*, taking measures to mitigate climate change.”

We note here, in particular, that the context would necessitate the consideration of available science and the continuously expanding human knowledge. And here, the relevant context here is Part XII of UNCLOS, which anticipates that its provisions would be interpreted in light of exchanges in scientific information and data.

It is our submission that this allows the content of such obligations to evolve with scientific developments which did not exist at the time the Convention was negotiated and adopted. Relevant in this regard, as many have noted, is the latest report of the Intergovernmental Panel on Climate Change (“IPCC”), which is based on decades of observation and laboratory results.

An argument has been made for a restrictive interpretation of article 1(1)(4) of the Convention which would exclude climate change impacts.³ With respect, Sierra Leone considers that such an approach would undermine the notion of the Convention as a “living instrument”. But more importantly, such an approach would not be in keeping with the ordinary meaning of the words of the Convention, in their context and in light of its object and purpose, a point illustrated more fully in our written submissions.

I pause here to add that in the view of Sierra Leone, the question is not whether the emissions of greenhouse gas emissions constitute pollution under general international law or any other instrument. The question, rather, is whether greenhouse gas emissions may constitute pollution under the Law of the Sea Convention itself.

Sierra Leone submits that under the ordinary meaning of the words of the Convention, in their context and in light of its object and purpose, emissions of greenhouse gases into the atmosphere, which leads to deleterious effects of the marine environment, does amount to pollution within the meaning of the Convention. Thus, under the Convention, States Parties are obliged to adopt measures to mitigate climate change. Moreover, the specific measures to be adopted are also to be arrived at on the basis of the application of these very same rules of interpretation.

Here, I turn to article 31(3)(c) of the Vienna Convention, which specifically requires the Tribunal to take into account “any relevant rules of international law applicable in the relation between the parties”.⁴ Such rules may, of course, include customary international law, other treaties having a similar object or in force between parties to the Law of the Sea Convention.⁵

Ultimately, this systemic integration approach, which is grounded in the principle of good faith, serves to ensure that States keep their obligations under the Law of the Sea Convention in conformity with their other obligations under international law. Indeed, the Seabed Disputes Chamber has itself affirmed the relevance of “other instruments” and principles in the *Responsibilities and Obligations of States* Advisory Opinion.⁶ You, of course, will recall that in that Advisory Opinion the Chamber took into account the precautionary

³ Written Statement submitted by the Government of the Republic of Indonesia to the International Tribunal on the Law of the Sea (15 June 2023), paras.

⁴ Oliver Dorr & Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: a commentary* (Springer 2018), Article 31 (Dorr), p. 605.

⁵ *Ibid.*

⁶ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 135

principle in its interpretation of the Convention,⁷ not withstanding the fact that the precautionary principle does not appear in the Convention.

Of course, the Convention itself reaffirms this principle of systemic integration, and here, I can point to articles 293, 237, 212, et cetera, et cetera. But read together, all of these provisions confirm the principle in article 31(3)(c) of the Vienna Convention, and thus require the Tribunal to take into account other instruments' principles relevant to UNCLOS.

Mr President, members of the Tribunal, applying these rules of interpretation to UNCLOS inevitably leads to the following:

The Tribunal must take into account other relevant rules and principles, including those contained in other instruments in ascertaining the content of the obligations relevant to both questions A and B. These include rules and principles contained in the United Nations Framework Convention on Climate Change, the Paris Agreement, the Convention on Biological Diversity, the agreement on Biodiversity Beyond National Jurisdiction. We would emphasize here the importance of the Paris Agreement in establishing the appropriate standard for assessing the specific measures required by States. I shall return to this point when addressing the point on due diligence.

To be clear, Mr President, Sierra Leone is not asking this Tribunal to interpret and apply other international instruments that are outside its jurisdictional scope. It only submits that the Tribunal has to interpret and apply the provisions of the UN Convention on the Law of the Sea in line with rules, principles and standards relevant to the protection and preservation of the marine environment in accordance with the ordinary rules of interpretation and consistent with its power to make any legal determinations that are necessary in the discharge of its judicial functions.⁸

It is important to emphasize, in this respect, that the Tribunal, by giving content to the broadly framed provisions in the Convention, would not be establishing new rules, but only describing the content of already existing obligations.

With that legal framework in mind, Mr President, I come now to the substance of the questions before you.

The Tribunal is asked to set out “specific obligations of State Parties [to the Convention], including Part XII” to “prevent, reduce and control pollution of the marine environment” and “to protect and preserve the marine environment” in relation to climate-change impacts. In Sierra Leone’s view, the obligation of due diligence, reflected in both articles 192 and 194, is the thread that ties both questions A and B together.⁹

In the words of the Seabed Disputes Chamber, this obligation requires States “to deploy adequate means, to exercise best efforts, to do the utmost”.¹⁰ The standard of due diligence, of course, may change over time in light of “new scientific or technological knowledge” but must be “more severe for riskier activities”.¹¹ Thus, the obligation is particularly exacting in respect of measures for the protection of the marine environment from impacts of climate change,

⁷ *Ibid.*

⁸ See, e.g., *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award (18 March 2015), para. 220 (“As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it”).

⁹ Article 192 provides that “States have the obligation to protect and preserve the marine environment”, while Article 194 requires States to “take ... all measures ... necessary to prevent, reduce and control pollution of the marine environment from any source” and to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”.

¹⁰ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 110.

¹¹ *Ibid.*, para. 117.

given the far-reaching impacts of climate change on the marine environment, as illustrated by scientific evidence.

Applying the rules of interpretation that I have set out earlier, the obligation of due diligence under the Law of the Sea Convention requires States, individually and collectively, to take “all necessary measures”, as required by the ordinary meaning of the words in the Convention, to prevent and mitigate [...] harm caused by greenhouse gas emissions.

Applying article 31(3)(c) permits us to look to the Paris Agreement, not as a ceiling, but as providing the standard for determining “all necessary measures”. Thus, the measures must be those necessary to, at a minimum, limit the increase in global average temperatures to 1.5°C above pre-industrial levels, as reflected in the Paris Agreement, which standard reflects the scientific consensus. We would only add that the identification of all necessary measures must be informed by the common but differentiated responsibilities principle.

Thus, in Sierra Leone’s views, it is not the Nationally Determined Contributions, nor the process for their establishment that is relevant in the context of article 31(3)(c); rather, it is the scientifically agreed standard which, in our view, can assist the Tribunal in identifying the concrete measures to be adopted by the Parties.

Mr President, members of the Tribunal, this concludes my presentation. I thank you for your patient attention and invite you to call to the podium Professor Jalloh.

THE PRESIDENT: Thank you, Mr Tladi.

We have now reached almost 11:30. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 12 o’clock.

(Pause)

THE PRESIDENT: Please be seated.

I now give the floor to Mr Jalloh to make his statement also on behalf of Sierra Leone. You have the floor, Sir.

STATEMENT OF MR JALLOH
SIERRA LEONE
[ITLOS/PV.23/C31/12/Rev.1, p. 28–34]

Mr President, distinguished members of the Tribunal, I am honoured to appear before you once again, this time on behalf of my home country of Sierra Leone.

Much has already been said in these proceedings, both in the written statements and during the oral phase of these proceedings which began over a week ago. For that reason, while recalling our written statement to the Tribunal, for the purposes of my presentation today I will only address three principles of international law which we think are particularly worthy to highlight, namely, the precautionary principle, the common but differentiated responsibilities principle, or the CBDR Principle and the duty to cooperate under UNCLOS and international law. I will then, with your permission, hand over to my colleague for our final submission today.

Mr President, starting with the precautionary principle, our argument boils down to the three following legal propositions: one, the precautionary principle is a core part of the UNCLOS jurisprudence and is thus directly relevant to interpreting States Parties' obligations of due diligence; two, the precautionary principle includes obligations to conduct environmental impact assessments and the duty on States Parties to cooperate in protecting the marine environment; three, the principle requires States Parties to drastically cut their greenhouse gases to at least the levels mandated by the Paris Agreement, if not lower, until they are no longer posing harm to the marine environment. In explanation of our basis for advancing these legal propositions, I wish to make four succinct points.

First, the precautionary principle is a recognized part of UNCLOS. This Tribunal observed in the *Area* Advisory Opinion that an integral part of the general obligation of due diligence is the precautionary approach.¹ This mandates that due diligence be observed even where “scientific evidence concerning the scope and potential negative impact of” activities or projects are “insufficient but where there [is] plausible indications of potential risks.”²

The importance of the precautionary principle has been reaffirmed by this Tribunal in several cases. For example, in *Southern Bluefin Tuna*, decided in 1999, the Tribunal noted the need to act with “prudence and caution,” when deciding whether to prescribe measures to prevent further deterioration of the marine environment notwithstanding scientific uncertainty.³

The precautionary approach has also been endorsed in the work of other bodies, for example, the International Law Commission, which in the context of its 2021 Guidelines on the Protection of the Atmosphere, *inter alia*, recognized, partly based on UNCLOS and this Tribunal's jurisprudence, the strong link between the oceans, marine pollution and atmospheric pollution.⁴

Sierra Leone therefore respectfully disagrees with the contention by one State in its written statement that the relevance of the precautionary principle, in the context of climate

¹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 (“*Area* Advisory Opinion”), para. 131.

² *Area* Advisory Opinion, para. 131.

³ *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Provisional Measures [1999] ITLOS cases Nos. 3 and 4, paras.77-80. See also *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 (“*MOX Plant*”), para. 71; *Land Reclamation In and Around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 74.

⁴ Official Records of the General Assembly, Seventy-second Session, Supplement No. 10(A/76/10), Chapter IV.

change and the marine environment, has diminished.⁵ Quite the opposite. The precautionary principle is even more important now. It will become even more so in the coming years.

In this regard, we agree with the United Kingdom that the precautionary principle is of particular importance in terms of evaluating the “remaining scientific uncertainty as to the nature or extent of the harm, the risk of it eventuating or eventuating as a result of any particular activity”.⁶ Even acknowledging the wide consensus that the full scope of the harm caused by climate change requires further scientific study confirms that there remains a role for the precautionary principle going forward.

Mr President, this brings me to Sierra Leone’s second point on the precautionary principle: that it reaffirms both the obligation to conduct Environmental Impact Assessments (or EIAs) and the duty of States Parties to cooperate in protecting the marine environment and controlling marine pollution, both of which are independently core substantive obligations of UNCLOS itself.

Beginning with EIAs, Sierra Leone reiterates the ICJ’s observation in *Pulp Mills* that: “It may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”⁷ EIAs are also required by article 206 of UNCLOS where there is “reasonable grounds” to believe that a planned activity “may cause substantial pollution” or “significant and harmful changes” to the marine environment.

The Convention does not elaborate on what should be included in an EIA. That said, amongst other substantive provisions, article 30 of the recently concluded agreement on marine biodiversity in areas beyond national jurisdiction (“the BBNJ Treaty”) provides various factors for conducting EIAs when a planned activity may have more than a minor or transitory effect on the marine environment.⁸ Where the effects of the activity are unknown or poorly understood, the Party with jurisdiction or control of the activity shall conduct a screening of the activity using specifically provided factors.⁹ Sierra Leone submits that the necessary components include the EIA study itself, community consultations, expert opinions and strategic environmental assessments.

Sierra Leone would also add that the due diligence obligations coupled with the precautionary principle are not performed in isolation. As was held in the *MOX Plant* case, “prudence and caution” require States Parties to cooperate in exchanging information concerning risks or effects of activities.¹⁰ This suggests a close link between the duty to cooperate and the precautionary approach. I will return in more detail to the duty to cooperate in due course.

The precautionary approach is especially, but not solely, relevant in cases of “irreparable damage to the rights of a nation,” or in cases of serious harm to the marine environment,¹¹ both of which are present in the excessive release of greenhouse gas emissions. The global and interconnected nature of this link requires that this Tribunal acknowledge that the precautionary principle and the duty to cooperate operate in tandem.

Mr President, Sierra Leone’s third point on the precautionary principle is this: the precautionary principle mandates drastic cuts to greenhouse gas emissions. The most recent

⁵ The United Kingdom, Written Statement of the United Kingdom, (16 June 2023), para. 78.

⁶ Written Statement of the United Kingdom, (16 June 2023), para. 78. See also, Written Statement of the Republic of Mauritius, (16 June 2023), para. 80.

⁷ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep. 14, para. 204.

⁸ United Nations, Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction (19 June 2023, A/CONF. 232/2023/4, Article 30.

⁹ Ibid. Article 30-31.

¹⁰ *MOX Plant*, para. 84.

¹¹ *MOX Plant*, para. 75.

IPCC studies have stressed limiting increases in global average temperature to 1.5°C above pre-industrial levels. Science confirms that the situation is dire. Our knowledge of the problem is constantly being updated by new scientific developments. Sierra Leone notes with serious concern that current submitted Nationally Determined Contributions under the Paris Agreement lead to warming closer to 2.4°C, which is equivalent to 3°C for Africa.¹²

As the African Union has observed in its written statement, and I quote, the “African region is especially vulnerable to, and affected by, the incremental warming between 1.5°C and 2°C.”¹³ Africa’s vulnerability, as the world’s second-largest continent, is particularly striking when African States have neither individually nor collectively contributed much to global greenhouse gas emissions.

We also fully agree with the African Union, that even if States were on a path to meet the proposed limit, 1.5°C falls short of “prevent[ing]” further marine pollution or “reduc[ing]” its current cumulative levels.¹⁴ To meet the obligations imposed by article 194, paragraph 1, State Parties must do more. Given the failure of many States to decrease their emissions, it may be beneficial to increasingly implement the precautionary principle and conduct environmental impact assessments to reduce their emissions to reach the common goal of a maximum of 1.5°C warming.

Finally, Sierra Leone supports the submissions of some States Parties¹⁵ that the precautionary principle should also be taken into account in the adoption of any mitigation and adaptation measures.

Mr President, distinguished members of the Tribunal, in complying with the obligations thus far discussed, in particular the due diligence obligation, which includes the precautionary principle, States Parties must take into account the CBDR principle, which is also a well-established principle of international environmental law that is applicable in the UNCLOS framework.

The CBDR principle is contained in the text of UNCLOS itself. Its preamble affirms that the Convention’s goals take into account “the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked”.

Article 203 is explicit in providing preferential treatment for developing States in the allocation of appropriate funds and technical assistance, and in the utilization of specialized services. Likewise, article 207 requires taking into account the economic capacity of developing States in taking measures to reduce and control land-based pollution of the marine environment.

The principle is also reflected in numerous climate change treaties and agreements, which can be relied on by this Tribunal in interpreting UNCLOS. This includes, *inter alia*, article 3 of the UNFCCC,¹⁶ principle 7 of the Rio Declaration on Environment and Development,¹⁷ as well as the preamble, substantive articles 2(2), 4(3) and 4(19) of the Paris Agreement.¹⁸

¹² Written Statement of the African Union, (16 June 2023), para. 62.

¹³ Written Statement of the African Union, (16 June 2023), para. 53.

¹⁴ Written Statement of the African Union, (16 June 2023), para. 21.

¹⁵ See French Republic, Written Statement of the French Republic, (16 June 2023), para. 146; Written Statement of the Republic of Mauritius, (16 June 2023), para. The United Kingdom, Written Statement of the United Kingdom, (16 June 2023), para. 78.

¹⁶ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189

¹⁷ The Rio Declaration on Environment and Development (12 August 2015), UN Doc. A/CONF. 151/26 (Vol. I), Annex I.

¹⁸ Paris Agreement to the United Nations Framework Convention on Climate Change (signed 12 December 2015, entered into force 4 November 2016), TIAS 16-1104.

All these provisions, which essentially express the same CBDR principle, share a common feature which makes crystal clear that developed countries should bear the greater responsibility for combating climate change. Developing States are disproportionately impacted by climate change but nonetheless must also take measures within their own means.

Sierra Leone therefore agrees with China that the CBDR principle is “the cornerstone of global governance on climate change”. This applies fully to the marine environment.¹⁹ We also support Brazil’s submission that the interpretation of UNCLOS in relation to the potential deleterious effects of climate change on the marine environment should be guided by the CBDR principle.²⁰

There should be a practical result of recognizing the relevance of the CBDR principle, and it is this: developed States must assist developing States to prevent pollution and protect and preserve the marine environment. This would include not just adopting economy-wide absolute emission reduction targets, but also providing support for developing States in implementing their obligations under the Convention.²¹

This principle recognizes that, in general, States that have contributed the least to climate change are both experiencing the brunt of the impacts and are, at the same time, the least able to mitigate them. The failure of UNCLOS to recognize this reality would render core provisions in Part XII nugatory, to the detriment of all States and their populations.

Mr President, distinguished members of the Tribunal, complementing the precautionary and CBDR principles is the obligation of States to cooperate to meet the severe risks posed by climate change. It is a standalone obligation under UNCLOS and is a general principle of international law.²²

Climate change is the most serious collective action problem of our time. The gravity of the effects of climate change justifies the highest level of cooperation among all States. Such global cooperation includes not just technological transfers to assist in the fight against climate change, but deeper, collaborative endeavours in taking meaningful mitigation measures, with specific focus on the vulnerability of developing States. Therefore, with respect to the duty to cooperate, which should not be controversial at all. Sierra Leone, for reasons of time, will only make three brief observations.

First, the duty to cooperate enjoys widespread support by States Parties as a general principle of international law. This is also evident in the UNFCCC, whereas the Kyoto Protocol and Paris Agreement fully acknowledge the importance international cooperation and provide the legal framework for climate change cooperation.²³ The duty to cooperate is also implicit in the due diligence obligation, on which my learned friend Mr Tladi addressed you.

Second, UNCLOS provides mechanisms for collective action to address the impact of climate change on the marine environment. Several provisions in Part XII of UNCLOS contain explicit duties of cooperation binding on States, as has also been pointed out by several participants in these proceedings, including just this morning by the Philippines.

These binding legal obligations are aimed at protecting and preserving the environment by cooperating to firstly, formulate various rules and guidelines, found in article 197; secondly, to eliminate and minimize the effects of pollution, found in articles 198 and 199; and, thirdly, to promote studies, conduct scientific research, and exchange information and data, found in article 200.

¹⁹ Written Statement of the People’s Republic of China, (15 June 2023), para. 21.

²⁰ Written Statement of the Federative Republic of Brazil, (16 June 2023), paras. 19-20.

²¹ COP Decision FCCC/CP/2012/L.14/Rev.1, para. 2.

²² *MOX Plant*, para. 82.

²³ Articles 6 and 12 of the Kyoto Protocol and article 6 of the Paris Agreement have made institutional arrangements for flexible compliance mechanisms to promote mitigation actions through international cooperation and support sustainable development.

The Tribunal has already elaborated in *MOX Plant* that the duty to cooperate includes obligations “to exchange information, to consult with other States potentially affected by the planned activities, to jointly study the impacts of the activity on the marine environment, monitor risks or the effects of the operation and devise measures to prevent pollution of the marine environment.”²⁴

In the *SRFC* Advisory Opinion, the Tribunal explained that consultations “should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures.”²⁵ The stance of this Tribunal in its previous jurisprudence should inform its approach to the COSIS advisory request.

Third, coupled with the duties of cooperation in the provisions of Part XII are UNCLOS provisions which provide for additional scientific and technical assistance for developing States. Article 202 provides for scientific and technical assistance to developing States, aimed at capacity-building, as well as scientific training, supplying necessary equipment and facilities. Article 266 provides for the development and transfer of marine technology, again especially to developing States. However, due to these provisions’ discretionary wording, coupled with the absence – the absence – of political will by the developed polluting States, means that, in practice, such assistance has not really been forthcoming.

Sierra Leone hopes that the Tribunal will elaborate on the content of the duty to cooperate with respect to States Parties’ obligations under Part XII of UNCLOS and confirm that they provide *concrete* obligations regarding assistance to developing States. They may be guided by several provisions of the Paris Agreement which provide for additional assistance for developing States. In terms of the UNCLOS provisions and the CBDR principle, Sierra Leone submits that that the duty to cooperate includes technological transfers and financial assistance to developing States.

Lack of funding, technology transfer and capacity building are key barriers for Sierra Leone, and other developing countries, to combat the deleterious effects of climate change. Many States, despite having national climate change strategies, lack the necessary resources to carry them out. We heard this over the course of the past week.

So, in our respectful submission, one way in which developed States could comply with their obligations to cooperate under Parts XII and XIV of the Convention would be to provide robust technical, financial, scientific and capacity-building assistance to the developing countries to protect and preserve the marine environment from the impact of climate change. This type of knowledge- and resource-sharing would significantly contribute to the protection and restoration not only of the marine environments of the coastal States most affected by sea-level rise and the effects of climate change, but also likely of the marine environment as a whole.

I will conclude on this final part of our three fundamental arguments on the precautionary principle, the CBDR principle and the duty to cooperate under UNCLOS and international law, by echoing the African Union’s submission that I now quote: “Climate change is a global problem, and can be addressed effectively only if States act together in a cooperative manner.” Sierra Leone, like probably all African States, could not agree more.

Mr President, this brings me to the end of my presentation. I wish to conclude my remarks by joining the many speakers before me who have underlined – underlined – the importance of this advisory opinion for the people of the world, especially – especially – those from the Global South.

With further advisory opinions on climate change, albeit with different scopes, on the horizon, this Tribunal has an opportunity, an historic opportunity, to take the lead through its

²⁴ *MOX Plant*, para. 37.

²⁵ *SRFC* Advisory Opinion, para. 210.

interpretation of UNCLOS and the other relevant rules of international law. I hope that it will seize that opportunity, as it has done in the past, to make yet another remarkable contribution showing that international law can play a role, as humanity grapples with how best to address the climate change crisis, which is the existential threat of our time.

Mr President, distinguished members of the Tribunal, I thank you for the opportunity to present Sierra Leone's views. May I now kindly request you give the floor to my learned colleague, Ms Christina Hioureas. Thank you very much.

THE PRESIDENT: Thank you, Mr Jalloh.

I now give the floor to Ms Hioureas to make her statement. You have the floor.

STATEMENT OF MS HIOUREAS

SIERRA LEONE

[ITLOS/PV.23/C31/12/Rev.1, p. 34–39]

Mr President, members of the Tribunal, it is an honour to appear before you today on behalf of Sierra Leone. The purpose of my statement is to respectfully request that the Tribunal explicitly recognize that all climate change obligations under UNCLOS are not just obligations, they are also rights. More specifically, Sierra Leone respectfully suggests that the Tribunal reinforce the recognized principle of international law of the margin of appreciation enjoyed by States to regulate in the public interest, including with respect to the protection and preservation of the environment.

Explicit recognition of the deference owed to the judgment of States in adopting appropriate environmental regulations would allow this advisory opinion to strengthen the capacity of States to protect the marine environment in practice, particularly in the face of claims by foreign investors in reaction to climate change legislation.

What does this mean? This means that UNCLOS State Parties do not just have the obligation to prevent, reduce and control pollution within their own territories; this means that they do not just have the obligation to protect and preserve the marine environment; they have the right to take measures aimed at doing so. In the context of the due diligence standard, this means that States Parties have the right to take measures to limit global average temperature to 1.5°C above pre-industrial levels.

So you might ask, why does the explicit recognition of the right to take action to protect and preserve the marine environment matter? It matters because around the world, efforts of States to adopt environmental regulations have faced challenges, particularly in the context of investment treaty arbitrations.

Take for example, a €1.4 billion suit that was filed against Germany in 2009 – the infamous *Vattenfall* arbitration – in response to its application of environmental regulations to a coal-fired power plant.¹ And in 2019, a coal company sued Canada for US\$ 470 million when a Canadian province took action to phase out anthropogenic greenhouse gas emissions from electricity generation.²

Even more recently, in 2021, two energy companies sued the Netherlands for a total of €4 billion for its decision to phase out coal-fired power by 2030.³ And in 2022, the Republic of Senegal faced an investment treaty claim arising from its change in energy policy following its ratification of the Paris Agreement. Sierra Leone itself has faced claims from foreign investors based on its exercise of regulatory authority.

So why does the ability of Germany, or of the Netherlands, or of Canada, or of Senegal, matter to a State like Sierra Leone?

It matters because the threat of such claims is preventing States from doing what they ought to do and what they are legally required to do.

It matters because a failure of the Global North to act has had, and will continue to have, devastating effects on the Global South.

¹ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration (30 March 2009), para. 79(ii).

² *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Notice of Arbitration and Statement of Claim (12 Aug. 2019), para. 111.

³ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.

It matters because if the right to regulate is not recognized and respected, States will be disincentivized from taking the necessary actions to address this existential crisis. This includes the largest contributors of greenhouse gas emissions that may wish to curtail their emissions, and it includes the Global South that may be penalized for attempting to take its own mitigating steps.

States have been placed between a rock and a hard place. The message has been, “take actions to curb anthropogenic greenhouse gas emissions as required under international law, but if you do so, you will face investment treaty claims.”

Mr President, a pronouncement of the obligation of States to adopt measures to combat climate change will only be effective if a corresponding right to take such measures is recognized. What good is an obligation if acting consistently with it results in the breach of another obligation?

International law has long recognized that States have the inherent right to regulate within their territories in the public interest, also known as the “police powers” doctrine. This is a well-established principle under public international law. This right to regulate is also reflected in investment and trade treaties, including those concluded by both developed and developing States.⁴

International courts and tribunals, including those interpreting international human rights law,⁵ as well as under the GATT and investment treaties,⁶ have also recognized the

⁴ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part (signed 30 June 2019, entered into force 1 August 2020), art. 2.2(1) (“The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of ... environment ...”); United States of America, Model Bilateral Investment Treaty (2012), Annex B, para. 4(b) (“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as ... the environment ...”); Kingdom of the Netherlands, Model Bilateral Investment Treaty (2019), art. 2(2) (“The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of ... environment ...”); Canada-Chile Free Trade Agreement (modernization of the agreement, signed 5 June 2017, entered into force 5 February 2019, art. G-14 (“Environmental Measures: 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”); General Agreement on Trade and Tariffs, 55 U.N.T.S. 187 (signed 30 October 1947, provisionally applied 1 January 1948), art. XX (“[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources.”); Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019), Preamble (“REAFFIRMING the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity”).

⁵ See, e.g., *Powell and Rayner v. the United Kingdom*, ECHR Application No. 9310/81 (A/172), Judgment, Merits, Case No 3/1989/163/219 (21 February 1990), para. 44 (“It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognized as enjoying a wide margin of appreciation.”); *Evans v. the United Kingdom*, ECHR Application No. 6339/05, Judgment (10 April 2007), para. 77 (“There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests”); *Fadeyeva v. Russian Federation*, ECHR Application No. 55723/00, Judgment, Merits and Just Satisfaction (9 June 2005), ECHR 2005-IV, para. 105 (same).

⁶ See, e.g., *Bélané Nagy v. Hungary*, ECtHR Application No. 53080/13, Grand Chamber, Judgment (13 December 2016), para. 113 (“[A]ny interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. ... The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.”); *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran*,

margin of appreciation enjoyed by States to regulate in the public interest. Prominent judges, arbitrators and commentators have also recognized this right.⁷ In the *Philip Morris v. Uruguay* arbitration, the tribunal, which included the late Judge Crawford, held that “greater deference should be given to governmental judgments of national needs in public policy matters.” As held by another distinguished investment tribunal, chaired by the late Professor David Caron (a personal mentor of mine), “[t]he sole inquiry for the Tribunal ... is whether or not there was a manifest lack of reasons for the legislation.”⁸

The late Professor Alan Boyle, whose recent passing is a great loss to the international community, also observed that States are entitled to a “wide margin of appreciation ... when balancing economic, environmental and social policy objectives.”⁹

This right is reaffirmed in the UN General Assembly’s 1974 Charter of Economic Rights and Duties of States, which declared that “[e]ach State has the right ... [t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities”.¹⁰

IUSCT Case Nos. 128 and 129, Interlocutory Award (Award No. ITL 55-129-3) (17 September 1985), para. 90 (“It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police power of states.”); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), para. 262 (“In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.”); *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), paras. 295, 300, 301 (“[A] range of investment decisions have contributed to develop the scope, content and conditions of the State’s police powers doctrine, anchoring it in international law. . . . [T]he police powers doctrine has found confirmation in recent trade and investment treaties. . . . In the Tribunal’s view, these provisions ... reflect the position under general international law.”); *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), para. 7 (“[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”); *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para. 268 (“[A] sovereign state deserves a degree of deference in its determinations of public policies. As stated by the *LIAMCO* tribunal, a State is ‘free to judge for itself what it considers useful or necessary for the public good.’ ... [T]reaty tribunals ought to respect the government’s policy preferences. A number of tribunals have found that it is not for them to second-guess the policy choices of governments.”).

⁷ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th ed., CUP 2021), p. 282 (“The idea existed in customary international law that certain measures, such as taxation, the exaction of criminal fines, customs duties and antitrust dissolutions, cannot be regarded as compensable expropriations.”); Catherine Yannaca-Small, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law,” *OECD Working Papers on International Investment 2004/04* (September 2004), p. 5, note 10 (“It is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police powers of the State, compensation is not required.”).

⁸ *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, (2008), para 357 (D. Caron, M. Young, K. Hubbard).

⁹ Alan Boyle, “Human Rights and the Environment: Where Next?” 23(3) EJIL (2012) 613, at 641.

¹⁰ UN General Assembly, Resolution 3281 (XXIX), *Charter of Economic Rights and Duties of States*, UN Doc. A/RES/3281(XXIX) (12 December 1974), art. 2(2)(a). According to Article 30 of the same, “The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.” *Id.*, art. 30 (emphasis added).

Importantly, the right to regulate is now widely recognized to apply to matters of environmental regulation specifically. Indeed, many investment treaties¹¹ and arbitral tribunals¹² have expressly recognized this right as to environmental regulation. In other words, if a State is regulating in the public interest, including with respect to the environment, its decisions should not be second-guessed.

Mr President, in the specific context of the first question posed by COSIS, Sierra Leone observes that articles 207 to 212 of the Convention require States Parties to adopt laws and regulations to prevent, reduce and control anthropogenic greenhouse gas emissions. In so doing, as Professor Tladi explained, they must take into account international rules and standards, such as the UNFCCC and the Paris Agreement. Articles 213 and 222 further require States to enforce these laws and regulations, and to implement international rules and standards.

These obligations correspond to rights under international law. States thus have the right to adopt and enforce laws that, for example, phase out coal-fired power plants, limit oil and gas exploration, and incentivize the development of clean tech and clean energy.

Mr President, turning now to the second question posed by COSIS, Sierra Leone observes that it is broader than the first question. The obligation to protect and preserve the marine environment under article 192 goes well beyond the prevention, reduction and control of pollution of the marine environment as referenced in article 194.

It also encompasses the obligation to take action to minimize the impacts of climate change on biodiversity, habitats, fisheries, ocean acidity and sea level. These obligations also correspond to rights under international law.

The freedom to enact such laws and regulations is absolutely essential if States are to be expected to fulfil their obligations under the Convention.

Mr President, members of the Tribunal, this Tribunal has a unique opportunity today; the opportunity to affirm that international law will be a tool in the fight against climate change and will not be manipulated by corporations seeking to dissuade States from taking the regulatory action that the Law of the Sea Convention requires. The inclusion of such language in an advisory opinion would serve as authoritative guidance for the many investor-State, free trade and regional human rights tribunals that will be adjudicating on States' climate change policies in the future.

Mr President, distinguished members of the Tribunal, this brings the presentation of the delegation of Sierra Leone to a close. On behalf of the delegation, I thank the Tribunal for its kind attention.

THE PRESIDENT: Thank you, Ms Hioureas.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3 p.m. when we will hear an oral statement from Singapore. This sitting is now closed.

(Lunch adjournment)

¹¹ See note 8, *supra*.

¹² See, e.g., *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 103 (“[G]overnments must be free to act in the broader public interest through protection of the environment ... and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.”).

PUBLIC SITTING HELD ON 19 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: *President* HOFFMANN; *Vice-President* HEIDAR; *Judges* JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCIOLLO, KAMGA; *Registrar* HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Singapore

Mr Lionel Yee, Deputy Attorney-General, Attorney-General's Chambers
Ms Amanda Chong, Deputy Senior State Counsel, Attorney-General's Chambers
Mr Ashley Ong, Deputy Senior State Counsel, Attorney-General's Chambers
Ms Jessie Lim, State Counsel, Attorney-General's Chambers
Ms Jennifer Mary Dhanaraj, Second Secretary (Political), Embassy of the Republic of Singapore, Berlin

AUDIENCE PUBLIQUE TENUE LE 19 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ÉTATS PARTIES

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Mme Amanda Chong, *Deputy Senior State Counsel*, cabinet de l'*Attorney-General*

M. Ashley Ong, *Deputy Senior State Counsel*, cabinet de l'*Attorney-General*

Mme Jessie Lim, *State Counsel*, cabinet de l'*Attorney-General*

Mme Jennifer Mary Dhanaraj, deuxième secrétaire (affaires politiques), ambassade de la République de Singapour à Berlin

THE PRESIDENT: Good afternoon. The Tribunal will continue its hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. This afternoon we will hear an oral statement from Singapore.

I now give the to the representative of Singapore, Mr Yee, to make his statement. You have the floor, Sir.

STATEMENT OF MR YEE

SINGAPORE

[ITLOS/PV.23/C31/13/Rev.1, p. 1–12]

Mr President, distinguished members of the Tribunal, I am honoured to appear before you on behalf of Singapore in these proceedings today.

It is almost 20 years to the day that Singapore last had the privilege of addressing this Tribunal in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*. That case concerned a matter of great significance to Singapore as a very small island State with no natural resources. Those realities have not changed, and they are the reason why climate change, which is the focus of the present proceedings, is also a matter of great importance to us.

Apart from causing profound consequences on the marine environment, climate change is also an existential threat to Singapore, with 30 per cent of our land area no higher than five metres above mean sea level and more than half of our population living within 3.5 kilometres from the coast. Singapore, therefore, has a vested interest in ensuring that all States do their part to mitigate and adapt to climate change because the consequences of inaction fall disproportionately on more vulnerable States. This is the motivation for our participation in these proceedings.

The Commission of Small Island States on Climate Change and International Law (“COSIS”) has raised two important questions on how the United Nations Convention on the Law of the Sea (“UNCLOS”) operates in the context of climate change.

The first question focuses on the specific obligations of UNCLOS States Parties to “prevent, reduce and control pollution”. The second question speaks of specific obligations to “protect and preserve the marine environment”, a term which includes but goes beyond the prevention, reduction and control of pollution.

Mr President, distinguished members of the Tribunal, Singapore’s statement will address these questions in turn. In doing so, I am conscious that 24 participants have already addressed the Tribunal. Singapore agrees with many of the points which they have made. I can therefore briefly indicate in this statement the points which we concur with, without fully repeating the reasons others have already given. Many of these are also covered in Singapore’s written statement of 16 June.

Singapore’s oral statement will focus on a specific issue which has arisen in a number of written and oral statements. It is how, in the context of climate change, UNCLOS provisions interact with norms established by other treaties and international law instruments, in particular the United Nations Framework Convention on Climate Change (“the UNFCCC”) and the Paris Agreement, and specifically the global temperature goal articulated in the Paris Agreement.

Mr President, distinguished members of the Tribunal, with that introduction, I now turn to the first question posed by COSIS, which concerns the obligations of UNCLOS States Parties to prevent, reduce and control pollution of the marine environment in relation to climate change. As I indicated earlier, I will start by briefly stating Singapore’s views which we share with many other participants. I have seven points to make.

First, the key provisions of UNCLOS relating to question 1 are found in article 194, article 207 on pollution from land-based sources, article 212 on pollution from and through the atmosphere, and articles 213 and 222, which are their corresponding enforcement provisions.

Second, anthropogenic greenhouse gas emissions constitute “pollution of the marine environment” under article 1(1)(4) of UNCLOS and, therefore, where Part XII of UNCLOS refers to “pollution of the marine environment”, it covers climate change and its related processes and impacts. This conclusion is based on the scientific evidence found in the reports of the Intergovernmental Panel on Climate Change (“the IPCC”). These reports are authoritative, as COSIS and many participants have said.

Third, the obligation under article 194(1) of UNCLOS, for States to take all measures that are necessary to prevent, reduce and control these emissions, and the obligation under article 194(2) to take all measures necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage to other States and their environment, are both due diligence obligations. They are obligations of conduct rather than result.

Fourth, as the International Court of Justice observed in the *Pulp Mills* case, due diligence requires “the adoption of appropriate rules and measures” as well as “vigilance in their enforcement and the exercise of administrative control applicable to public and private operators”.¹

Fifth, as this Tribunal pointed out in the *Area Advisory Opinion*, due diligence is a variable concept and is context-specific.² While it allows a degree of State discretion, the exercise of that discretion must take into account the individual capacities, capabilities and constraints of a State; the level of risk and nature of activities involved; as well as scientific knowledge and technological developments.

In addition, how States exercise that discretion must also be informed by international rules and standards, and that includes their obligations under the UNFCCC and the Paris Agreement.

My sixth point, as this Tribunal has stated, States must act in good faith, which means that “reasonableness and non-arbitrariness must remain the hallmarks of any action taken”.³ Compliance with due diligence obligations under article 194 is not merely a self-judging exercise.

Seventh, due diligence requires the application of the precautionary approach. States therefore cannot disregard plausible indications of threats of serious or irreversible environmental damage, even when scientific evidence on the scope and impacts of an activity may be insufficient.⁴

Mr President, members of the Tribunal, I turn now to the question of how, in the context of climate change, the obligations under UNCLOS interact with other treaties and international law instruments.

Let me make two observations by way of introduction. My first observation is that, insofar as climate change is concerned, UNCLOS, and in particular its Part XII, exists as part of a wider body of international instruments with their respective norms and processes. The most notable of these are the UNFCCC and the Paris Agreement.

That UNCLOS forms part of this wider body reflects the fact that the causes and impacts of climate change extend well beyond the oceans to terrestrial and freshwater ecosystems, urban environments, and so on. And so must the global response. The

¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 79, para. 197.

² *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10 (“*The Area Advisory Opinion*”), at p. 43, para. 117.

³ *Area Advisory Opinion*, at p. 71, para. 230.

⁴ *Area Advisory Opinion*, at p. 46, para. 131.

interpretation and application of UNCLOS must, accordingly, seek harmony with, or as COSIS said last week, be complementary to, related legal regimes with neither regime undermining or supplanting the other.

Article 237 of UNCLOS recognizes the need to achieve this harmony. As Italy and New Zealand have stated, article 237 sets out “a double relationship of compatibility” by stipulating in paragraph 1 that Part XII does not prejudice obligations assumed by States under other treaties on the protection and preservation of the marine environment; and conversely, by providing in paragraph 2 that obligations assumed under these other treaties should be carried out consistently with the general principles and objectives of the Convention.

Second, what is remarkable about Part XII of UNCLOS is the multiple and variously formulated references to international rules, standards, practices and procedures. The slide on the screen lists various articles in Part XII where they can be found.⁵

I draw the Tribunal’s attention to these articles because they define obligations which expressly incorporate external treaties and instruments. Two implications flow from this.

First, Guatemala pointed out last Thursday that the Tribunal may interpret the Paris Agreement and other treaties if it is necessary to do so in order to meaningfully determine the content of obligations under UNCLOS. In the case of UNCLOS articles such as these, which expressly incorporate external instruments, it may be necessary for the Tribunal to interpret those instruments in order to determine the content of the UNCLOS obligations. That is what the ordinary meaning of these UNCLOS articles requires us to do.

Secondly, it also means that to a large degree, we do not need to rely on provisions like article 31(3)(c) of the Vienna Convention on the Law of Treaties or article 293 of UNCLOS. The significant exceptions are, in the case of COSIS’s first question, article 194 of UNCLOS, and, in the case of the second question, article 192, both of which articulate due diligence obligations but do not explicitly incorporate external norms by reference. I will address the extent to which article 31(3)(c) of the Vienna Convention and article 293 can and cannot be used for interpreting article 192 in my response to question 2.

Mr President, distinguished members of the Tribunal, how, then, do the obligations under UNCLOS incorporate by reference other treaties and international law instruments? The short answer is that they do so through various provisions using different formulations, even if there are some common terms like “international rules” and “standards”. The different formulations used reflect the different ways in which States Parties to UNCLOS intended them to operate and therefore to be interpreted.

In Singapore’s view, there are four major gateways through which external normative instruments are substantively incorporated into Part XII of UNCLOS. I will call them “entry points”. Depending on the specific language used in the provisions which govern these entry points, what norms are incorporated and what States are supposed to do with these norms differ from one entry point to another.

The first entry point can be found in paragraph 1 of articles 207 and 212 on pollution from land-based sources and atmospheric pollution, respectively. These provisions are shown on the screen. What they require States to do is to adopt laws and regulations to prevent, reduce and control such pollution. But they must do so “taking into account internationally agreed rules, standards and recommended practices and procedures”. I will call this Entry Point 1.

Of the four entry points, it is the widest in terms of the norms covered because it refers to not just rules and standards, but also recommended practices and procedures. It therefore covers not just legally binding rules and standards, but also soft law norms that are not legally binding. However, these norms must be “internationally agreed”. What this means is that there should be: first, broad participation by States in their making; and, second, broad acceptance

⁵ Articles 207(1), 211(2), 212(1), 213, 214, 216(1), 217(1), 218(1), 219, 220 and 222.

by States of their normative status which may be evidenced by the number of States which are parties to the instrument or have adopted or implemented the norm.

As for the action required of States under these articles, it is to take into account these hard and soft law norms when they formulate laws and regulations. It is an obligation relating to the process of law-making rather than prescribing a particular outcome. States can adopt more or less stringent laws and regulations than what these norms prescribe, but they must consider them and must do so in good faith.

Entry Point 2 is found in article 211(2), which is shown on the screen. It obliges flag States to adopt laws and regulations pertaining to pollution from vessels which “at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.”

In terms of the range of norms it admits, Entry Point 2 is a little narrower than Entry Point 1, in that it only applies to international rules and standards, without mentioning recommended practices and procedures. In addition, these rules and standards must be “generally accepted”, in that there must be broad participation and acceptance by States, but they do not need to be formally accepted by the specific State concerned.

In the context of climate change, a treaty that may be incorporated through Entry Point 2 is Annex VI of the International Convention for the Prevention of Pollution from Ships (or MARPOL), which sets standards to minimize airborne greenhouse gas emissions from ships and the carbon intensity of global shipping. It was adopted by a diplomatic conference, and its membership represents more than 96 per cent of global tonnage.⁶

While the scope of norms covered by Entry Point 2 is narrower than Entry Point 1, the obligation under article 211(2) is more demanding. It is for States to adopt laws and regulations that at least have the same effect as these international rules and standards. It is not an obligation related to the process of law-making, but one which requires a minimum outcome.

Mr President, distinguished members of the Tribunal, I turn to Entry Point 3. This gateway is created by articles 213 and 222, which you now see on the screen. These are enforcement provisions that correspond to articles 207 and 212 on land-based and atmospheric pollution, respectively. They require States to “adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference”.

The range of external norms admitted through Entry Point 3 is the narrowest of all the entry points discussed so far. “Applicable international rules and standards” refers to rules and standards which are binding on the State concerned, either as treaty obligations or as customary law. As the Virginia Commentary and the Proelss Commentary recall, this was the general understanding of the negotiators in the Third Conference of UNCLOS.⁷ It accords with the ordinary meaning of the word “applicable”, where the relevant question is: What rules or standards apply to a particular situation? “Applicable” does not mean merely relevant, appropriate or material.

The narrow scope of the norms covered by Entry Point 3 also makes sense because the action demanded of States is to “adopt laws and regulations and take other measures necessary to implement” them. What articles 213 and 222 therefore require of States is the taking of all measures to implement their legally binding obligations in treaties addressing land-based pollution and atmospheric pollution. It is unlikely that the UNCLOS negotiators intended that

⁶ See para. 55 of the International Maritime Organization’s written statement.

⁷ Myron H. Nordquist, Satya Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea Commentary 1982 Online Publication* (Center for Oceans Law and Policy, University of Virginia) (Brill, 2013), at p. 220, para. 213.7(c). See also Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos, 2017), at p. 1455, para. 10.

States would be bound to implement present and future norms in instruments that they are not party to.

Finally, I turn to Entry Point 4, which is found in article 194(1) and (2). The screen shows these provisions. They do not expressly mention international rules and standards; however, as I indicated earlier, these provisions establish due diligence obligations which are informed by, *inter alia*, compliance by States with their legally binding obligations. In the climate change context, these include binding obligations under the Paris Agreement. Therefore, in this respect, Entry Points 3 and 4 are fairly similar.

Mr President, distinguished members of the Tribunal, I now turn to how the “entry points” apply in the context of the Paris Agreement, and in particular the temperature goal set out in that treaty.

Singapore would like to state at the outset that limiting global warming to 1.5°C above pre-industrial levels is critical to the survival of Small Island Developing States, and the global community must correct its course towards a 1.5°C resilient world.

At the same time, Singapore is mindful that, while that is our aspiration, this Tribunal’s opinion is sought on “the specific obligations of States Parties” to UNCLOS. What this calls for is the proper legal interpretation and application of the provisions of the Convention as well as any other treaties and sources of international law insofar as these are relevant.

But if I may begin with the conclusion before the explanation. Do one or more of the entry points I have just described allow the Paris Agreement to feature among the legal obligations imposed by UNCLOS? And, if so, do one or more of those entry points allow the 1.5°C ambition in the Paris Agreement to feature among the legal obligations of UNCLOS? The answer to both questions is a clear “yes” through Entry Points 1, 3 and 4, although the effect is slightly different for each of these entry points. I will now elaborate.

Let me begin with Entry Point 1. As explained earlier, paragraph 1 of articles 207 and 212 oblige States to enact laws and regulations, taking into account “internationally agreed rules, standards and recommended practices and procedures” which may be legally binding or non-binding.

The Paris Agreement was negotiated with the widespread support of States and has no less than 195 Parties. It is clearly an “internationally agreed” instrument under both articles 207 and 212. The Agreement consists of some legally binding and some non-legally binding provisions, with the legally binding ones using operative words like “shall”, and the non-legally binding ones using words like “should” or “will”.

By way of illustration, article 4(2), which you see on the screen, uses the operative word “shall”, and therefore expresses a legally binding obligation to prepare, communicate and maintain successive nationally determined contributions.

By contrast, what is on the screen is article 2(1)(a), which is the provision that refers to 1.5°C or, more precisely, to “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.

This temperature goal set out in article 2(1)(a) is preceded by a chapeau which reads: “This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by ...”, and the subparagraphs, including subparagraph (a) follow.

It is evident from the language used that article 2(1) articulates aims of the Paris Agreement. It is, in and of itself, not legally binding. Article 2 does, however, have legal effect in a different way, which I will explain when we get to Entry Points 3 and 4.

But this is not material as far as Entry Point 1 is concerned. This is because Entry Point 1 does not require the norm to be legally binding. It can, therefore, encompass the temperature

goal in article 2(1)(a) as a standard which the Paris Agreement seeks to achieve. Through Entry Point 1, paragraph 1 of articles 207 and 212 of UNCLOS therefore impose obligations on States, when enacting laws and regulations, to take into account the Paris Agreement temperature goal, and that includes the pursuit of efforts to limit the temperature increase to 1.5°C.

Mr President, distinguished members of the Tribunal, I turn to the other entry points. Entry Point 2 is not relevant to the Paris Agreement because it largely concerns the International Maritime Organization's international rules and standards which address pollution from vessels.

We now consider Entry Point 3. As explained earlier, articles 213 and 222 of UNCLOS require States to take all necessary measures, whether it is through adopting laws and regulations or otherwise, to implement their binding legal obligations contained in treaties which address land-based pollution or atmospheric pollution.

The binding legal obligations of the Paris Agreement clearly fall within the scope of both articles 213 and 222. But the question is: which are the binding obligations of that Agreement that are incorporated through this entry point?

As I explained when I addressed the Tribunal on Entry Point 1, the obligation on Parties to the Paris Agreement under article 4 to prepare, communicate and maintain successive nationally determined contributions is a binding obligation. But article 2, and in particular article 2(1)(a), which establishes the temperature goal of holding the increase in the global average temperature to well below 2°C and pursuing efforts to limit the temperature increase to 1.5°C, does not, by itself, articulate a binding obligation.

However, that is not the end of the inquiry. We have to examine other provisions of the Paris Agreement to determine if they do impose binding legal obligations that cover that temperature goal.

And it is article 3 which does that. The text of that article is on the screen and the relevant portion of it states that "all Parties are to undertake and communicate ambitious efforts as defined in articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in article 2."

The use of the formulation "are to" in "all Parties are to undertake and communicate" may be different from the usual "shall" as the operative verb. But the ordinary meaning of the words "are to" as having a mandatory and not discretionary character is clear. If, Mr President, you were to say to me, "Counsel, you are to stop speaking by 4 o'clock," I have no doubt that it is not a request which I can choose to comply with or not comply with.

The mandatory effect of article 3 is to add an additional element to the articles that it refers to. That additional element is that actions set out in those articles must be done with the view to achieving the purpose of the Agreement in article 2. And if those articles establish legally binding obligations, then Parties are bound to fulfil those obligations with the view to achieving that purpose.

Mr President, distinguished members of the Tribunal, it therefore follows that the legally binding obligation in article 4 of the Paris Agreement is to prepare, communicate and maintain successive nationally determined contributions with the view to achieving the article 2 purpose. It also means that articles 213 and 222 of UNCLOS must be interpreted as imposing an obligation on States to take necessary measures to implement, *inter alia*, article 4 of the Paris Agreement with the view to achieving the same purpose.

In other words, through article 3, article 2 features in the legally binding obligations of the Paris Agreement and therefore features in the legal obligations of articles 213 and 222 of UNCLOS. You can see this interaction depicted on the screen.

What, then, is the purpose of article 2 that Parties have to take into consideration? It is to strengthen the global response to climate change through a number of modalities. Among

them is the temperature goal set out in paragraph 1(a). So 1.5°C falls within the ambit of the legal obligations created by articles 213 and 222, but it does so with the nuances of paragraph 1(a) as a whole, and it does so together with the other modalities set out in the rest of article 2.

These other modalities are set out on the screen. They include paragraphs 1(b) and (c); and significantly, under paragraph 2, to implement the Agreement “to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”

It is important that any incorporation of binding obligations under the Paris Agreement or indeed any other treaty through Entry Point 3 must be a faithful incorporation of those obligations, which often represent a careful balance of various interests that the negotiating parties intended to achieve in the legal texts.

Indeed, even the reference to 1.5°C reflects a compromise because, as Mozambique reminded us yesterday, and Sierra Leone this morning, the evidence from the IPCC is that even if global warming were limited to 1.5°C above pre-industrial levels, there would still be very serious harm to the marine environment. This includes a 70-90 per cent decline in average coral cover.⁸

To conclude, 1.5°C in the context of article 2(1)(a) does feature in the legal obligations incorporated into UNCLOS through Entry Point 3. But also featuring are equity, the principle of common but differentiated responsibilities, and the respective capabilities and national circumstances of the States Parties. They reflect the fact that the Paris Agreement temperature goal is a collective aim that does not automatically or directly translate into specific measures for any one individual State. This is because different States face different constraints, whether in terms of capacity, access to technology or availability of alternative energy options.

I now turn to Entry Point 4. As explained earlier, the obligation of due diligence in article 194 of UNCLOS is informed by, *inter alia*, the fulfilment of legal obligations undertaken in relevant treaties. In the climate change context, these include the legal obligations under the Paris Agreement and, in this respect, my analysis on Entry Point 3 would largely apply.

There is, however, one other relevant and separate facet of due diligence, and that is the taking into account of scientific knowledge. As COSIS and others have described, there is an ample body of scientific evidence on the marine environmental impacts of global temperature increases at 1.5°C as compared with other temperature levels. The due diligence obligation to address greenhouse gas emissions imposed by article 194 of UNCLOS would, in Singapore’s view, require States Parties to take into account this body of evidence in determining what measures they should take.

Mr President, distinguished members of the Tribunal, I now turn to the second question on the obligations to protect and preserve the marine environment in relation to climate change impacts. I have five points to make and, with one exception, can be brief because Singapore’s views have already been addressed by many participants.

First, the obligations under articles 192, 194, 197 and 202 are relevant to answering this second question.

Second, article 192 imposes due diligence obligations and comprises the positive obligation to take active measures in good faith to protect and preserve the marine environment, and the negative obligation not to degrade the marine environment. I have identified the

⁸ Hans-Otto Pörtner, Debra C. Roberts, *et al.* (eds.), IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, Chapter 5, at p. 498, available at <<https://doi.org/10.1017/9781009157964>>; and Ove Hoegh-Guldberg, Daniela Jacob, *et al.* (eds.), IPCC Special Report on Global Warming of 1.5°C, at p. 254, available at <<https://doi.org/10.1017/9781009157940>>

elements of due diligence earlier when addressing article 194, and they also apply in the context of article 192.

Third, the contours of the article 192 obligation are concretized by the subsequent provisions of Part XII, including article 194. Singapore draws particular attention to article 194(5), which requires that States consider measures necessary to protect and preserve rare or fragile ecosystems and marine life threatened by climate change impacts and processes.

Mr President, distinguished members of the Tribunal, at this juncture, I would like to address the relationship between UNCLOS and international human rights law. There have been observations made that the corpus of international law relating to human rights informs the content of the general obligation in article 192. Some appear to suggest that international human rights obligations have been incorporated into article 192 through article 293 of UNCLOS, which is the provision titled “Applicable Law”, or through article 31(3)(c) of the Vienna Convention on the Law of Treaties.

Singapore fully agrees with the view that climate change does adversely affect the human rights of many. The failure to take adequate action to deal with climate change can amount to breaches of both UNCLOS obligations as well as international human rights treaty obligations.

Singapore also agrees that we must seek to interpret UNCLOS harmoniously with other international law obligations and if the notion of UNCLOS being “informed by” these other obligations is an expression of this principle, we fully agree. But whether we can go further to say that these obligations are substantively incorporated into UNCLOS, in the sense that a breach of these other obligations is necessarily a breach of UNCLOS provisions, requires an analysis of how article 293 and article 31(3)(c) operate.

As regards article 293, as the tribunal in the *Arctic Sunrise Arbitration* observed, it does not provide a means to obtain a determination that some treaty other than UNCLOS has been violated, unless that treaty directly applies pursuant to the Convention. Instead, article 293 enables resort to foundational or secondary rules of general international law, such as the law of treaties, or in the case of some broadly worded or general provisions, primary rules of international law in order to interpret or apply particular UNCLOS provisions.⁹

As for article 31(3)(c) of the Vienna Convention, it allows “relevant rules of international law applicable in the relations between the parties” to be taken into account in interpretation. “Relevant” is understood in the light of its ordinary meaning that the rules should relate to the treaty provision under interpretation.

If the UNCLOS provision to be interpreted is one like article 230(3), which requires that “recognized rights of the accused shall be observed” when penalties may be imposed on foreign vessels violating laws and regulations under Part XII, article 31(3)(c) and article 293 may permit recourse to international human rights treaties to interpret the term “recognized rights”, such that a breach of those treaty obligations is a breach of article 230.

But if, on the other hand, the provision to be interpreted is one like article 192, which refers to no more than “the obligation to protect and preserve the marine environment”, it is doubtful if we can incorporate wholesale external rules of international law which do not address the protection and preservation of the marine environment. We need to appreciate that there are limits to incorporation.

For example, a State may decide that it is necessary to shut down a power plant as a due diligence measure under article 192. But its obligations relating to the expropriation of property under its bilateral investment treaties and its obligations against arbitrary deprivation of property under international human rights treaties are not incorporated into article 192. This

⁹ *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award of 14 August 2015, PCA Case No. 2014-02, at p. 44, paras. 190–192.

does not detract from whether the State’s actions are in breach of its international economic law or international human rights law obligations, but they are not a breach of UNCLOS provisions.

Next, and this is my fourth point, I turn to article 197 which imposes a duty of cooperation in the climate change context. It is an obligation of conduct, is of a continuing nature and must be fulfilled in good faith. UNCLOS, therefore, requires States, in good faith, to participate and continue to participate, in international normative processes, with a view to establishing rules, standards and recommended practices and procedures for the protection and preservation of the marine environment from climate change impacts.

These include discussions under UNFCCC and Paris Agreement processes, as well as future cooperative work upon becoming States Parties to the BBNJ Agreement,¹⁰ which is open for signature tomorrow. The BBNJ Agreement provides for “vulnerability including to climate change and ocean acidification” as a criterion in the establishment of area-based management tools, including marine protected areas.¹¹

Finally, there is an obligation under article 202(a), for States to promote assistance programmes to developing States for the protection and preservation of the marine environment from climate change impacts.

Mr President, members of the Tribunal, in conclusion, Singapore invites the Tribunal to reply to question 1 as follows:

First, the references to “pollution of the marine environment” in Part XII of UNCLOS cover anthropogenic greenhouse gas emissions.

Second, article 194(1) and (2) impose due diligence obligations on States to prevent, reduce and control such emissions. Due diligence requires States to consider, in good faith, taking practicable measures within their capabilities to address such emissions from activities within their jurisdiction or control. In doing so, they must take into account scientific knowledge, including evidence on the marine environmental impacts of global temperature increases at 1.5°C compared with other temperature levels. Due diligence is also informed by States’ legally binding obligations, including those of the Paris Agreement.

Third, under paragraph 1 of articles 207 and 212, States are obliged to adopt laws and regulations to prevent, reduce and control anthropogenic greenhouse gas emissions, taking into account binding and non-binding internationally agreed rules, standards and practices and procedures, including the temperature goal in article 2(1)(a) of the Paris Agreement.

Fourth, under article 211 paragraph 2, States are obliged to adopt laws and regulations for vessels flying their flag that at least have the same effect as generally accepted international rules and standards addressing greenhouse gas emissions from vessels.

Fifth, under articles 213 and 222, States are obliged to implement international rules and standards which are binding on the State concerned, including those under the Paris Agreement.

Singapore invites the Tribunal to reply to question 2 as follows:

First, article 192 imposes due diligence obligations similar to those under article 194 to take measures in good faith to protect and preserve the marine environment, and not to degrade it.

Second, article 194(5) requires States to consider measures necessary to protect and preserve all rare or fragile ecosystems and marine life threatened by climate change impacts and processes.

Third, article 197 requires States to cooperate and to participate in good faith and on a continuing basis to establish international rules, standards and recommended practices and

¹⁰ Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (“BBNJ Agreement”).

¹¹ See article 19(4)(a) and (b), as well as Annex I, paragraph (f) of the BBNJ Agreement.

procedures for the protection and preservation of the marine environment in relation to climate change impacts.

Finally, under article 202(a), States are obliged to promote assistance programmes to developing States for the protection and preservation of the marine environment from climate change impacts.

Mr President, distinguished members of the Tribunal, this concludes Singapore's oral statement, which I hope will be of assistance to the Tribunal. I thank the Tribunal for its attention.

THE PRESIDENT: Thank you, Mr Yee.

This brings us to the end of this afternoon's sitting. The Tribunal will again sit tomorrow morning at 10:00 a.m. when it will hear oral statements made on behalf of Timor-Leste, the European Union and Viet Nam. The sitting is now closed.

(The sitting closed)

PUBLIC SITTING HELD ON 20 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

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Ms Elizabeth Exposto, Chief of Staff to the Prime Minister; Chief Executive Officer, Land and Maritime Boundary Office

Mr John Middleton AM KC, Senior Advisor, DLA Piper; Former Judge, Federal Court of Australia

Mr Eran Sthoeger, Legal Counsel

Mr Simon Fenby, Principal Legal Advisor, Land and Maritime Boundary Office

Ms Ana Catarina Sereto Antunes, Senior Policy and Strategy Advisor, Land and Maritime Boundary Office

Ms Adelsia Coelho da Silva, Junior Legal Advisor, Land and Maritime Boundary Office

Ms Ines Fatima da Luz, Third Secretary, Embassy to the Kingdom of Belgium and the European Union

Mr Stephen Webb, Partner, Head of Energy Asia-Pacific, DLA Piper

Ms Gitanjali Bajaj, Partner, Co-Head for International Arbitration Asia-Pacific, DLA Piper

Ms Claire Robertson, Solicitor, DLA Piper

Ms Austyn Campbell, Solicitor, DLA Piper

Ms Lee Hale, Support Executive, DLA Piper

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AUDIENCE PUBLIQUE TENUE LE 20 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCIOLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

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M. John Middleton AM KC, conseiller principal au cabinet DLA Piper ; ancien juge de la Cour fédérale de l'Australie
M. Eran Sthoeger, conseiller juridique
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Mme Nguyen Thi Tuong Van, assistante du Directeur général du département du droit international et des traités au Ministère des affaires étrangères

THE PRESIDENT: Good morning. Today the Tribunal will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. This morning we will hear oral statements from Timor-Leste, the European Union and Viet Nam.

I now invite the representative of Timor-Leste, Ms Exposto, to make her statement. You have the floor, Madam.

STATEMENT OF MS EXPOSTO

TIMOR-LESTE

[ITLOS/PV.23/C31/14/Rev.1, p. 1–4]

Mr President, members of the Tribunal, it is an honour to appear before the Tribunal in these historic advisory proceedings as Representative of the Government of the Democratic Republic of Timor-Leste, in my position as Chief of Staff to His Excellency, the Prime Minister Kay Rala Xanana Gusmão, and Chief Executive Officer of Timor-Leste’s Land and Maritime Boundary Office. I appear with our legal counsel, the Honourable Former Justice John Middleton AM KC and Eran Sthoeger, Esquire.

We thank the Commission of Small Island States for the request for this advisory opinion. As a small island State, Timor-Leste is supportive of small States utilizing international law to have their voices heard and to contribute to peace and social justice.

Turning now to the matter at hand. *Hau nia Tasi, Hau nia Timor*. In Tetum, this translates to “My sea, My Timor”. While it is possible to translate this Tetum expression literally, words cannot convey the special relationship between the Timorese people and the sea.

Timor-Leste may be a small island nation, but we have a complex, vibrant culture. A culture in which our very identity is anchored in the sea.

The ocean has forged Timor-Leste’s past and is central to our vision for the future. For the people of Timor-Leste, the ocean is critical to our way of life. The seas have spiritual significance for the Timorese people. According to legend, the Timorese are grandchildren of the crocodile – upon its death, its body became the land of Timor, the ridges on its back became the mountains and the valleys, and the oceans its final resting place.

As the saying goes, a rising tide lifts all boats. That said, as developed countries pursue economic growth while generating substantial greenhouse gas emissions, sea-level rise risks submerging small island States.

As such, we want to add our voices, and most importantly our actions, to those committed to defending the ocean on which we all depend. Even though we are not all equally responsible for the pressures placed on the environment, particularly our oceans, we will all suffer from these pressures. And some of us suffer disproportionately compared to the little we contributed to the problem.

Many Timorese depend on the oceans for their sustenance and livelihoods by fishing and harvesting marine species, such as tuna, snapper and seaweed. The rich coral reefs and steep underwater cliffs that surround Timor-Leste are part of a diverse ecosystem, attracting scientists and tourists. Protection and preservation of the marine environment is therefore critical to protecting Timor-Leste’s way of life and economic development.

As an island, we have access to the broad and rich biological, geological, mineral and geostrategic resources of the sea. Our development and the sea are inseparable. This interdependency must be managed in a way that is balanced and, most importantly, sustainable. This is why our communities follow *Tara Bandu*, an ancestral practice that respects and

protects our nature, which is sacred to us. This traditional custom seeks both to manage our natural resources sustainably as well as to contribute to the development of our communities.

The request before the Tribunal raises important issues for Timor-Leste regarding the protection and preservation of our marine environment, alongside our rights as a developing State to pursue economic development, particularly via our natural resources. Although Timor-Leste has proved its resilience time and time again, we are living in a time where climate change threatens our very survival. Timor-Leste is recognized as highly vulnerable to climate change impacts.¹

A key contributor to our vulnerability to the impacts of climate change is Timor-Leste's status as a Least Developed Country and Small Island Developing State.² As a new nation, just 21 years old, we have faced many challenges arising from our history of colonization, conflict and occupation.

Timor-Leste has limited avenues to generate revenue to support its people. At the time of our independence, Timor-Leste had nothing. To build an independent State, we faced numerous challenges: scarce human and financial resources, non-existent infrastructure, reduced access to education, technology and know-how.³ Today, we have overcome many of those challenges, providing security and stability to our people, moving us forward as a democratic nation.

For years Timor-Leste fought hard to secure sovereignty over its seas to achieve a permanent maritime boundary with Australia, which included the allocation of certain proved resource rights in the Timor Sea. Timor-Leste is now in a position where it wishes to develop those resources and to do so in an environmentally responsible way, to deliver long-term social and economic benefits to our people.

Timor-Leste has recently formed its IXth Constitutional Government. Our Prime Minister, Kay Rala Xanana Gusmão, in his address at the swearing-in ceremony of the IXth Government set a clear vision for Timor-Leste, and I quote: “Our vision is that of a nation with a prosperous, healthy, educated, skilled, innovative and dynamic society, with comprehensive access to essential goods and services, and where production and employment in every productive sector corresponds to that expected from an emerging economy”.⁴

The Government wants to transform Timor-Leste's natural wealth derived from its soils or seas, into food security, health, productivity and job opportunities. This includes developing infrastructure, the private sector and encouraging economic diversification and job creation.⁵

Our independence came late and at a high price. Many Timorese people have fought and died for our sovereignty.⁶ Our people deserve the same opportunities that were afforded to

¹ University of Notre Dame (2021), *Notre Dame Global Adaptation Initiative*, available at: <https://gain.nd.edu/our-work/country-index/>

² United Nations Conference on Trade and Development, *UN list of least developed countries* (online, 2021), available at: <https://unctad.org/topic/least-developed-countries/list>

³ Address by His Excellency the Minister for Planning and Strategic Investment and Chief Negotiator on Maritime Boundaries, Kay Rala Xanana Gusmão, at the Compulsory Conciliation Proceedings at the Peace Palace at The Hague (29 August 2016), pp. 5 – 6, available at: <https://www.gfm.tl/wp-content/uploads/2021/01/Conciliation-Open-Hearing-Minister-Xanana.pdf>

⁴ Speech by His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the swearing-in ceremony of the IX Constitutional Government (1 July 2023), p. 4, available at: http://timor-leste.gov.tl/wp-content/uploads/2023/07/EN-Discurso_Tomada-de-Posse_01_07_2023.pdf

⁵ Speech by His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the swearing-in ceremony of the IX Constitutional Government (1 July 2023), p. 7, available at: http://timor-leste.gov.tl/wp-content/uploads/2023/07/EN-Discurso_Tomada-de-Posse_01_07_2023.pdf

⁶ Address by His Excellency the Minister for Planning and Strategic Investment and Chief Negotiator on Maritime Boundaries, Kay Rala Xanana Gusmão, at the Compulsory Conciliation Proceedings at the Peace Palace at The Hague (29 August 2016), p. 9, available at: <https://www.gfm.tl/wp-content/uploads/2021/01/Conciliation-Open-Hearing-Minister-Xanana.pdf>

developed countries to fund basic services and combat poverty. While our people are still poor, Timor-Leste is relatively rich in natural resources. It is this wealth that we must use to progress the development of our country.⁷ After so much suffering, after enduring so much sacrifice, States like Timor-Leste cannot be expected to bear a disproportionate share of the brunt of solving a problem to which we did not contribute.

The Government will continue implementing the *Hau nia Tasi, Hau nia Timor – My Sea, My Timor* – awareness campaign. Timor-Leste is also prioritizing the development of a Timor-Leste Blue Economy Policy for the sustainable growth of the Nation, including the preservation, conservation and sustainable use of our ocean resources, and the promotion of initiatives and programmes aimed at environmental, economic and social sustainability. This approach will also reinforce our strategy of preserving and valorizing natural resources, our biodiversity, and safeguarding, in general, the environment, land and sea for the sustainable development of the economy.⁸

States must have clear guidance on their obligations under international law to manage their greenhouse gas emissions to reduce potential impacts on the marine environment and limit the effects of climate change, for current and future generations. This is true for the world's major emitters, as well as States like Timor-Leste which contribute the most miniscule amount of greenhouse gases, just 0.003 per cent of global emissions⁹ but suffer the consequences of the actions of others. While doing so, the Tribunal must consider, as States have agreed in the Paris Agreement, that developing countries, and specifically the least developed such as Timor-Leste, are afforded their basic rights to pursue their own sustainable economic development. Timor-Leste has the right to give its people a better life.

Just as we fought so hard and suffered so much for our independence, we will not rest until we have lifted our people out of poverty and secured our nation's future economic development, whilst also protecting our oceans.

As our Prime Minister Xanana Gusmão has said:

People never fight for their independence alone. They do not fight for a flag, an anthem, a president, their own government or periodic elections. There are other dreams that come together around the ideal of independence, such as enabling the development and progress of both country and in the context of people.

Timor-Leste welcomes the opportunity to make submissions in this Tribunal's advisory jurisdiction. This is not a fight amongst States. This is a fight for our oceans, our planet, our people, our development. Individually, we are one drop. Together, we are an ocean.¹⁰

Mr President, members of the Tribunal, thank you for your attention.

I now ask that the Tribunal please invite the Honourable Former Justice John Middleton AM KC to continue Timor-Leste's submissions.

⁷ Keynote Address by His Excellency Kay Rala Xanana Gusmão on Economic Diversification in the Region: "Sustainable Best Practices and Business Models: Lessons learned by Timor-Leste," at the Atlantic Council Global Energy Forum (13 January 2018), p. 4, available at: https://www.gfm.tl/wp-content/uploads/2021/01/Xanana-speech-Eng-ver-Timor-Leste-Economic-Diversification_17.1.2018.pdf

⁸ Speech of His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the presentation of the programme of the IX Constitutional Government to the National Parliament (18 July 2023), p. 12, available at: <http://timor-leste.gov.tl/wp-content/uploads/2023/07/2023-07-18-Presentation-Programme-9th-Government-National-Parliament-.pdf>

⁹ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, p. 1, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

¹⁰ Ryunosuke Satoro, Japanese poet.

REQUEST FOR ADVISORY OPINION – COSIS

THE PRESIDENT: Thank you, Ms Exposto.

I now give the floor to Mr Middleton to make his statement. You have the floor, Sir.

STATEMENT OF MR MIDDLETON
TIMOR-LESTE
[ITLOS/PV.23/C31/14/Rev.1, p. 4–15]

Mr President, honourable members of the Tribunal, you have as recently as Monday been taken to the mythical times of Sisyphus and the punishment imposed on him by the god Zeus to endlessly push a boulder uphill. And you have also been taken to outer space to view from afar our blue ocean dominated planet.

I am going to ask you to transport yourselves outside this splendid building and outside this beautiful town of Hamburg. I am asking you to place yourselves in the present time by reflecting on the future and to travel to Timor-Leste and to place yourself in the position of its inhabitants.

With that prelude, and at this stage of the proceedings, we will not repeat many points that have already been made, that have been addressed by other submissions and interventions. In answering the important questions before the Tribunal, Timor-Leste will emphasize three points.

First, that States have a right to develop their natural resources in accordance with their right to protect and preserve the marine environment. The Tribunal’s interpretation of States’ obligations under UNCLOS must not compromise that right.

Second, States, especially the least developed, have a right to development. The Tribunal’s interpretation of a State’s obligations under UNCLOS must not compromise that right either.

And third, the Tribunal must apply the principle of common but differentiated responsibilities to the relevant obligations of States under UNCLOS.

I will be addressing the first two points and question (b) put to the Tribunal. Mr Sthoeger will speak to the third point on common but differentiated responsibilities and answer question (a) put to the Tribunal.

Before turning to the law, let me first very quickly summarize the significant impacts of greenhouse gas emissions on Timor-Leste’s marine environment. It is important to note, at the outset, that there is very limited data as to the effects of climate change on Timor-Leste. As such, it is difficult to comprehensively report and monitor the impacts of climate change on its marine environment. The unavailability of such information stresses the importance of protecting and preserving global marine resources, particularly for Small Island Developing States.

The available data does demonstrate that the continued increase in greenhouse gas emissions has a significant impact on Timor-Leste in three major areas: first, on its coral and marine ecosystems; second, on its fisheries sector; and, third, on its coastal communities and sea-level rise.

As to Timor-Leste’s coral and marine ecosystems, Asia supports approximately 40 per cent of the world’s coral reef area, mostly in Southeast Asia. The world’s most diverse reef communities are in the “Coral Triangle”,¹ in which Timor-Leste is located. The Coral Triangle is a high biodiversity hotspot comprising several globally significant ecosystems and endemic species. Due to the emission of greenhouse gasses, ocean acidification of Timor-Leste’s waters has increased in recent decades.

Climate modelling projects this to continue. This will impact the ecosystem’s health alongside other pressures, which we all know of, including storm damage, coral bleaching, and fishing pressure. Continuation of current trends in sea surface temperatures and ocean

¹ IPCC Fifth Assessment Report, Chapter 24 “Asia”, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

acidification would result in large declines in coral-dominated reefs in the region by mid-century.²

Tied to its marine ecosystems is Timor-Leste’s fisheries sector. Fish production is a vital component of regional livelihoods. The limited studies into the future climate impact on local fisheries available suggest that climate change may lead to a massive redistribution of fisheries’ catch potential, with large declines in the tropics, particularly around Timor-Leste and Indonesia.³ A decline of an order of 5 per cent to 10 per cent in local fisheries is expected by the year 2050.⁴ This presents serious food security implications, as Timor-Leste relies almost exclusively on ocean and coastal ecosystems for its domestic fish consumption.⁵

Finally, as a Small Island Developing State, Timor-Leste’s communities are coastal communities that will be heavily impacted by sea-level rise. The Intergovernmental Panel on Climate Change’s Fifth Assessment Report notes sea-level rise will be the key issue for many coastal areas in Asia, particularly if combined with changes in cyclone frequency or intensity.⁶

Approximately 66 per cent of Timor-Leste’s population lives in coastal areas and lowlands below 500 metres. Timor-Leste’s capital, Dili, is particularly vulnerable to coastal flooding, situated only a few metres above sea level.⁷ Natural resources available in the coastal zone are vital for the economy of coastal populations.⁸ Mean sea levels in Timor-Leste are projected to rise throughout the 21st century.⁹ When combined with other changes, this sea-level rise will increase the impact of storm surges and coastal flooding.

So the science is clear as to the link between the health of the marine environment and ecosystems and greenhouse gas emissions, as has already been established by other statements.¹⁰

Before answering the questions put to the Tribunal, let me briefly address two preliminary points. And these have been gone over quite a great deal by other participants.

On jurisdiction, we submit the conditions for the Tribunal to exercise its advisory jurisdiction are satisfied. Furthermore, there are no “compelling reasons” for the Tribunal not to exercise that jurisdiction. In this context, we note that to the extent the Tribunal refers to rules of international law external to UNCLOS is to inform its interpretation of the latter, there is a clear distinction between applicable law and jurisdiction. As the Tribunal itself has noted,

² IPCC Fifth Assessment Report, Chapter 24 “Asia”, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

³ IPCC Fifth Assessment Report, Chapter 24 “Asia”, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1345.

⁴ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 17, available at: <https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

⁵ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 17, available at: <https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

⁶ IPCC Fifth Assessment Report Chapter 24 “Asia”, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

⁷ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 15, available at: <https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

⁸ Government of the Democratic Republic of Timor-Leste, National Adaptation Plan, p. 30, available at: <https://www4.unfccc.int/sites/NAPC/Documents/Parties/Timor%20Leste%20NAP.pdf>.

⁹ Australian Bureau of Meteorology and CSIRO (2014), *Climate Variability, Extremes and Change in the Western Tropical Pacific: New Science and Updated Country Reports, Pacific-Australia Climate Change Science and Adaptation Planning Program Technical Report, Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organization, Melbourne, Australia*, available at: https://www.pacificclimatechangescience.org/wp-content/uploads/2014/07/PACCSAP_CountryReports2014_WEB_140710.pdf.

¹⁰ See for example oral submissions of the Commission of Small Island States, (11 September 2023, ITLOS/PV.23/C31/2), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_2_E.pdf

the applicable law “*may not be used to extend the jurisdiction of the Tribunal*”.¹¹ Applicable laws are limited to the interpretation of rights and obligations under UNCLOS. This point was made in the written submissions of France. We further agree with the position advanced by Guatemala, for example, as to issues of jurisdiction and admissibility.

Further, as a preliminary point, a small number of participants have raised the issue of the effects of sea-level rise on basepoints and maritime entitlements. Whilst these are very important issues, Timor-Leste is of the view that these are not at the crux of these proceedings. The focus of these proceedings should, however, be on the environmental issues that are at the core of the questions and which most States have expressed views upon.

This brings me to my next point. Timor-Leste submits the interpretation of UNCLOS is informed by other rules of international law. The customary rules of treaty interpretation, as reflected in articles 31 to 33 of the Vienna Convention on the Law of Treaties, set that out.¹² Article 31(3)(c) particularly prescribes that when interpreting a treaty, “*any relevant rules of international law applicable in the relations between the [States]*” be taken into account together with its context.¹³

As the Tribunal well knows, this approach is considered “*well established*” by international courts and tribunals, including, specifically, with respect to the content of article 192 of UNCLOS, which is informed by “*other applicable rules of international law*”.¹⁴

Relatedly, not only may the Tribunal apply “*other rules of international law not incompatible*” with UNCLOS, in the words of UNCLOS article 293, it should furthermore adopt an interpretation of UNCLOS that coincides with other applicable obligations of States Parties “*to the extent possible*”, over an interpretation that creates conflicting obligations for States. This is often a principle referred to as “*harmonization*” or “*harmonious interpretation*”.¹⁵ If harmonization is not possible, the law of treaties dictates that between two treaties on the same subject matter at least, the later treaty prevails.¹⁶

There are various environmental, human rights and other international obligations that may be relevant for the correct interpretation of UNCLOS. As noted by many submissions, most relevant are the obligations and commitments of States, including Timor-Leste, under the Framework Convention on Climate Change¹⁷ and the Paris Agreement.¹⁸

Article 237 of UNCLOS¹⁹ reflects the understanding that States *will continue to develop* the rules of international environmental law. UNCLOS is intended to apply in harmony with the *specific* environmental rights and obligations of States rather than undermining or superseding them. When it comes to the protection and preservation of the environment, the Framework Convention on Climate Change and the Paris Agreement are the operative special

¹¹ ITLOS, Judgment, 10 April 2019, *The M/V “Norstar” Case (Panama v. Italy)*, ITLOS Reports 2019, p. 47, para. 136; see also Written Submission of France, para. 18.

¹² Vienna Convention on the Law of Treaties 1155 UNTS 331; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Reports 43, p. 110, par. 160; *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (1 February 2011)* [2011] ITLOS Reports 10, p. 27, par. 57.

¹³ Vienna Convention on the Law of Treaties 1155 UNTS 331, article 31(3).

¹⁴ *South China Sea Arbitration (Philippines v. China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941.

¹⁵ See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 178.

¹⁶ Vienna Convention on the Law of Treaties 1155 UNTS 331, article 30(3).

¹⁷ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

¹⁸ The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015).

¹⁹ Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, article 237.

texts.²⁰ Concluded after UNCLOS, their drafters – including many UNCLOS parties – *were presumably aware of their obligations under UNCLOS when they adopted these texts.*

Rights and obligations in UNCLOS, particularly those in Part XII, should therefore be without prejudice to the rights and obligations of States contained in other international agreements which protect and preserve the marine environment, regulate greenhouse gas emissions and allow for negotiations between States on climate change.

Certain international human rights are also other relevant and will be explained later: the right to development and the right to self-determination.

Turning now to the specific questions put to the Tribunal.

Mr President, honourable members of the Tribunal, I propose to address question (b) first, which relates to the general obligation placed on all States to protect and preserve the marine environment.

In its recent judgment in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the International Court of Justice acknowledged that, “all States have the obligation under customary international law to protect and preserve the marine environment”.²¹ In UNCLOS, that obligation is articulated in article 192.

As a preliminary point, we wish to echo the sentiments expressed by Guatemala as to how the Tribunal should interpret articles 192 and 194 of UNCLOS. In particular, that any specific obligations found to exist under Part XII are without prejudice to the specific obligations agreed by States under the Framework Convention on Climate Change and the Paris Agreement.

Article 192 requires States to “protect” the marine environment from future damage, whilst also taking actions to “preserve” or maintain and improve the marine environment’s present condition.²² Therefore, the obligation in article 192 extends to the restoration of parts of the marine environment or ecosystems that have experienced degradation.²³ These obligations, as with many other obligations related to the environment in UNCLOS, are of a “due diligence” character. Not only must States refrain from certain actions, but they are also required to *positively* take action to meet their obligations.

Due diligence entails that a State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.²⁴

In considering the content of a “due diligence obligation”, the Seabed Disputes Chamber in its Advisory Opinion on *Activities in the Area*, concluded that a “due diligence” obligation required States to take affirmative measures *within its legal system*, consisting of “laws and regulations and administrative measures”.²⁵

And it is to be recalled that the exercise of due diligence requires in addition to adopting rules and measures, there must be “a certain level of *vigilance in their enforcement* and the exercise of administrative control applicable to public and private operators, such as the

²⁰ Alan Boyle, Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in *The Law of the Sea and Climate Change: Solutions and Constraints* (Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen, eds., 2021) 81-103, at pp. 93-94.

²¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, par. 95, <https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf>.

²² *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941; see also United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol I, pp. 39-40.

²³ *United Nations Convention on the Law of the Sea* (Myron H. Nordquist et al. eds. 2013), vol I, pp. 39-40.

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment [2010] ICJ Reports 14, p. 56, par. 101.

²⁵ See also *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (1 February 2011)* [2011] ITLOS Reports 10, 74.

monitoring of activities undertaken by such operators”.²⁶ Importantly, this is a continuing obligation.²⁷ The obligation evolves over time taking into account “new scientific or technological knowledge ... [or] change[s] in relation to the risks involved in the activity”.²⁸

The general obligation to protect and preserve the environment is informed by, and does not negate, other rights and obligations of States Parties. Immediately following article 192, article 193 provides that, “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment”. Principle 21 of the United Nations Declaration on the Human Environment also recognizes this right.²⁹

As is stated in the Virginia commentary, “[i]t is clear from the Convention as a whole (and not merely from Part XII), that the obligation of article 192 (and with it the right of article 193) is always subject to the specific rights and duties laid down in the Convention”.³⁰

During the negotiations of UNCLOS, the discussions in the Third Committee acknowledged that the potential resources of the sea “offered developing States a genuine opportunity to improve their living standards”.³¹

UNCLOS recognizes the exploitation of a State’s natural resources is not mutually exclusive from the protection and preservation of the marine environment.

Timor-Leste believes in the inalienable sovereign right of Small Island Developing States to exploit their natural resources but in an environmentally responsible way. The rights and obligations of States in this regard must complement each other. This has been the position recognized by the Working Groups during the negotiation of the Framework Convention on Climate Change and is expressly recognized in the text of article 4(10).

I will read it out, even though it is rather longer than most matters I would normally read out to a court, but it is worthy of attention in what it says:

The Parties shall, in accordance with article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.³²

In seeking to provide a harmonious interpretation of UNCLOS, article 193 should be read having regard to the commitments made in article 4(10) of the Framework Convention on Climate Change, which I have just read out. This is further supported by the United Nations General Assembly resolution on ensuring access to affordable, reliable, sustainable, and modern energy for all, which was adopted by consensus in 2022.³³

²⁶ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 2010 *ICJ Rep.* 14 (20 April), par. 197.

²⁷ *Trail Smelter* (United States / Canada), Award, III RIAA 1905 (11 March 1941), p. 1963.

²⁸ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* (1 February 2011) [2011] *ITLOS Reports* 10, par. 117.

²⁹ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, A/CONF.48/14/Rev.1 (United Nations publication, Sales No. E.73.II.A.14), p. 5, principle 21.

³⁰ *United Nations Convention on the Law of the Sea* (Myron H. Nordquist et al. eds. 2013), vol I, p. 43.

³¹ Third United Nations Conference on the Law of the Sea, Third Committee, A/CONF.62/C.3/SR.7, par. 30, available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c3_sr7.pdf

³² United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, article 4(10).

³³ A/RES/77/170, *Ensuring access to affordable, reliable, sustainable and modern energy for all* (14 December 2022), article 9.

A developing State should not be placed in a position where it is forced to choose between the protection of the global marine environment, and the protection and advancement of its nation and people. The rights and obligations of States, in this regard, should account for various factors. This includes the level of development of each nation in accordance with its common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

Therefore, article 193 should be seen as representing a balance between the interests of individual States in their economic development and the universal interests in the protection and preservation of the marine environment.³⁴ The correct interpretation of article 192 must be read in tandem with the subsequent article which expressly refers to its content.

Closely related to States' right to develop their natural resources is the right to development. This is an "inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" as recognized in the Declaration on the Right to Development Resolution.³⁵

Importantly, States bear the primary responsibility for the "creation of national and international conditions favourable to the realization of the right to development".³⁶

During the first session of the Intergovernmental Negotiating Committee, Working Group I considered the impacts of the Framework Convention on Climate Change on living standards and the right to development. The Working Group recognized "developing countries have as their main priority *alleviating poverty and achieving social and economic development and that their net emissions must follow from their, as yet, relatively low energy consumption to accommodate their development needs*".³⁷ The Working Group further recognized the right to development as an "inalienable human right".³⁸

It is true that the express wording of the "right to development" was not included in the final text of the Framework Convention on Climate Change. However, its preamble clearly recognizes that, "per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow *to meet their social and development needs*".³⁹

Since the Framework Convention on Climate Change, every major climate commitment, including the Paris Agreement,⁴⁰ the Glasgow Climate Pact⁴¹ and the Sharm-el-Sheikh Implementation Plan,⁴² has expressly acknowledged the right to development in its preamble.

Since 2018, the United Nations General Assembly has adopted annual resolutions in respect of the right to development. In its most recent 2022 resolution, the United Nations

³⁴ *United Nations Convention on the Law of the Sea* (Myron H. Nordquist et al. eds. 2013), vol IV, p. 49.

³⁵ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 1(1).

³⁶ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 3.

³⁷ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part III.B.4, and 1.

³⁸ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part III.B.3.

³⁹ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble.

⁴⁰ The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015).

⁴¹ The Glasgow Climate Pact, Decision 1/CP.26 contained in FCCC/CP/2021/12/Add.1 (13 November 2021).

⁴² The Sharm el-Sheikh Implementation Plan, Decision 1/CP.27 contained in FCCC/CP/2022/10/Add.1 (20 November 2022).

General Assembly has acknowledged “the negative impact on the realization of the right to development owing to the further aggravation of the economic and social situation, in particular of developing countries, as a result of the effects of international energy, food and financial crises, as well as the increasing challenges posed by global climate change and the loss of biodiversity”.⁴³

The right to development reflects the realities of the decolonization process and the quest for newly and developing States to gain economic independence and control over their natural resources.⁴⁴ Timor-Leste is a nation that is just 21 years old, as you have heard. An interpretation of UNCLOS should be read taking into account the right to development and that developing countries have, as their main priority, alleviating poverty and achieving social and economic development.

Then, this right to development is closely interlinked to the full realization of the right of peoples to self-determination. According to the *Declaration on the Right to Development* this includes “the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”.⁴⁵

Respect for the right of self-determination is also one of the purposes of the United Nations.⁴⁶ As already explained by Chile⁴⁷ and Nauru,⁴⁸ the right to self-determination is found in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁹

The General Assembly’s Declaration on Friendly Relations, adopted unanimously in 1970, considered to reflect customary international law, states that: “all peoples have the right freely to determine, without external influence, their political status and to pursue their economic, social and cultural development”.

The International Court of Justice has also emphasized that the proper exercise of self-determination pays regard to the express free will of peoples.⁵⁰ As Nauru emphasized, self-determination is unfilled when people are deprived of their “own means of subsistence”.⁵¹ Contemporary international law considers self-determination as a *jus cogens* right, from which no derogation is permitted.⁵²

Mr President, it is impossible to disconnect the reality of States that have fought in fulfilment of their right to self-determination, from the current topic under discussion. Timor-Leste, as you have heard, fought hard to secure its sovereign rights over its seas to achieve a permanent maritime boundary with Australia. This included the allocation of significant

⁴³ United Nations General Assembly, *The right to development: resolution / adopted by the General Assembly*, 15 December 2022, A/RES/77/212, par. 29.

⁴⁴ Roman Girma Teshome, ‘The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?’ (2022) 22(2) *Human Rights Law Review* 1, 9 see also Nicolaas Schrijver, ‘Self-determination of Peoples and Sovereignty over Natural Wealth and Resources’ in the United Nations, *Realizing the Right to Development* (Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development), (2013) HR/PUB/12/4 <https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en>.

⁴⁵ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 1(2).

⁴⁶ UN Charter, article 1.

⁴⁷ Oral submissions of Chile (14 September 2023, ITLOS/PV.23/C31/7), page 12, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_7_E.pdf

⁴⁸ Oral submissions of Nauru (14 September 2023, ITLOS/PV.23/C31/8), page 29, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf

⁴⁹ ICCPR, ICESCR, article 1.

⁵⁰ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, par. 55; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, par. 157.

⁵¹ Written Statement of Nauru, pars. 62-66.

⁵² It is listed in the annex to the ILC’s draft conclusions on *Identification and legal consequences of peremptory norms of general international law* (*jus cogens*), adopted on second and final reading in 2022.

resource rights in the Timor Sea that had historically been exploited with disregard for Timor-Leste’s entitlements under international law.

It has been 21 years since the restoration of Timor-Leste’s independence. Timor-Leste has made significant progress in managing its overall development and securing its future. While Timor-Leste has made this remarkable progress, this new nation continues to face challenges in recovering from its recent history of colonization, conflict and occupation. It remains a Least Developed Country.⁵³ Remaining challenges include widespread poverty and high levels of unemployment.

Timor-Leste has limited avenues to generate revenue to support its people. The reality is that for the Timorese people to freely pursue their economic, social and cultural development – to fulfil their right to self-determination – they must be able to pursue their right to development and exercise their sovereign right to exploit their natural resources. Without the ability to develop its natural resources, Timor-Leste’s development will be challenged. Its people will be deprived of their “own means of subsistence”.

Mr President, with these important rights and considerations in mind, I turn to the States’ obligations to protect and preserve the marine environment under article 192.

The primary means of avoiding the impacts of climate change on the marine environment is to reduce and minimize greenhouse gas emissions through a transition to a low carbon economy.⁵⁴ In that sense, Timor-Leste’s contribution to global emissions is already minimal and miniscule. In 2021, Timor-Leste’s per capita energy consumption was 1,615 kilowatt hours.⁵⁵ As the Representative for Timor-Leste noted, Timor-Leste only contributes to 0.003 per cent of global emissions.⁵⁶

Since Timor-Leste’s independence, it has maintained similar levels of negligible energy consumption despite taking significant steps to towards the development of the nation.

Despite Timor-Leste’s negligible emissions, Timor-Leste intends to undertake the development of its natural resources in an environmentally responsible manner that complies with its obligations under international law.

The transition to net zero will not happen overnight. While Timor-Leste’s emissions may increase in the short term as it continues its nation-building path, the reality is that its energy consumption needs remain minimal compared to other States. Importantly, Timor-Leste recognizes that it must also do so taking into account its obligations under international law.

Through the exploitation of Timor-Leste’s natural resources it will be able to satisfy its negligible energy needs. The revenue received from such will be employed to deliver short- and long-term social and economic benefits to its people. This includes transition and investment to green energy sources. This in turn will provide Timor-Leste with the foundations it needs to graduate from its status as a Least Developed Country.⁵⁷

As a Small Island Developing State, the balance between pursuing effective and sustainable economic and social development against the need to decrease global greenhouse emissions and protect the marine environment must be considered.

As enumerated in the Paris Agreement, States’ obligations must “reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light

⁵³ United Nations Conference on Trade and Development, *UN list of least developed countries* (online, 2021), available at: <https://unctad.org/topic/least-developed-countries/list>

⁵⁴ Oceans and the law of the sea, on the theme “The impacts of ocean acidification on the marine environment”, Report of the Secretary-General, A/68/71 (8 April 2013), par. 93.

⁵⁵ Our World in Data, *Energy use per person (Timor-Leste)* (online, 2021), available at: <https://ourworldindata.org/grapher/per-capita-energy-use?tab=chart&country=~TLS>

⁵⁶ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, p. 1, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

⁵⁷ United Nations Conference on Trade and Development, *UN list of least developed countries* (online, 2021), available at: <https://unctad.org/topic/least-developed-countries/list>

of different national circumstances”. This extends the obligation of developed States to provide developing States with the financial resources to assist them in mitigation and adaptation efforts, as well as other forms of assistance.⁵⁸

In addition to being subject to other rights enshrined under UNCLOS, such as article 193, this interpretation of the general obligation in article 192 is in light of its context, and is informed by other related international obligations of States.⁵⁹ It has been recognized, and it is worth keeping in mind, that the 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 by article 237 of the Convention”.⁶⁰

Mr President, honourable members, I thank you for your attention. I would now ask the Tribunal to invite Mr Sthoeger to address the Tribunal on part (a) of the question for the Tribunal regarding States’ obligations and to make some observations on the principle of common but differentiated responsibilities and to make some concluding remarks. I thank you.

THE PRESIDENT: Thank you, Mr Middleton.

I now give the floor to Mr Sthoeger to make his statement. You have the floor, Sir.

⁵⁸ Paris Agreement articles 2(2), 9-11.

⁵⁹ *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941.

⁶⁰ *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 942.

STATEMENT OF MR STHOEGER
 TIMOR-LESTE
 [ITLOS/PV.23/C31/14/Rev.1, p. 15–21]

It is an honour to appear before this distinguished body once again, and on behalf of Timor-Leste.

My presentation will be in three parts: first, I will answer question (a) put to the Tribunal; second, I will say a few words about the principle of common but differentiated responsibilities; and, third, I will provide Timor-Leste’s concluding remarks.

Turning to question (a), Mr President, article 194(1) obligates States “to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities”. As already stated by many participants, the definition of “pollution of the marine environment” in UNCLOS article 1(1)(4), applies to anthropogenic greenhouse gases.

These participants further explained that the obligation in article 194 is an obligation of conduct, not result. The conduct in question requires the exercise of due diligence, and Mr Middleton has already addressed the concept of “due diligence”, which similarly applies to the obligation in article 194.

Mr President, as an obligation “of conduct”, due diligence cannot be measured by achieving a specific outcome, measured in degrees or “temperature goals”.¹ Nor can one assess the standard of conduct, by analogy to a State’s obligation to achieve a certain result by means of its own choosing, as some have effectively suggested.² Furthermore, whether a due diligence obligation is for objective or subjective assessment does not change its nature as conduct-based.³ I would add that, as a practical matter, a result-based obligation will tend to limit, rather than expand, the conduct required of States, as time progresses, and that these distinctions are not academic; they can have ramifications.

So how should the Tribunal identify the relevant standard of conduct? Several of Part XII’s provisions – such as 207 and 212 – refer to the adoption and existence of international rules and standards, external to UNCLOS. The standard of conduct is, therefore, informed by those rules. Furthermore, article 237 states that UNCLOS is “without prejudice” to the specific rights and obligations of States found in “*international agreements related to the protection and preservation of the marine environment*”.

In the context of climate change, the relevant agreements are first and foremost the UNFCCC and the Paris Agreement. What are the legal obligations therein? As one author puts it, “The Paris Agreement contains a mix of hard, soft and non-obligations between which there is dynamic interplay... The combination of elements in each provision is a reflection of the demands of the relevant issue area”.⁴

This so-called “mix” was a result of hard-fought negotiations. It is a delicate balance of obligations that States, including all UNCLOS parties, were willing to take upon themselves. But equally, what obligations they were not.

Mr President, for UNCLOS article 237, as well as for the principle of harmonious treaty interpretation, as explained by Mr Middleton, to have any meaning, the correct interpretation

¹ Oral submissions of Australia, (13 September 2023, ITLOS/PV.23/C31/5), page 10, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_5_E.pdf

² Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/3), pages 18-19, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf

³ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/3), pages 11-12, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf

⁴ Lavanya Rajamani, The 2015 Paris Agreement, 28(2) *Journal of Environmental Law*, pp. 337-358(2016), at 352.

of the more general UNCLOS obligations cannot be to negate and override the agreements of States found in the UNFCCC and the Paris Agreement. These nuanced and carefully negotiated texts are later in time relative to UNCLOS, and UNCLOS parties should not be assumed to have taken upon themselves conflicting obligations.

As the late Professor Boyle notes, these agreements are the *lex specialis* with respect to climate change.⁵ Not all participants in these proceedings agree on this point. But Timor-Leste believes this is evident.

First, environmental protections under UNCLOS are found Part XII of the 17 parts and annexes of UNCLOS. The UNFCCC and Paris Agreements, on the other hand, address climate change exclusively.

Second, it is not contested that UNCLOS is a framework agreement containing obligations of a more general nature.

Third, it has been pointed out that greenhouse gas emissions are but one of many forms of pollution covered by UNCLOS.⁶ The UNFCCC and Paris Agreements apply only to one form of pollution. Indeed, it is revealing that even those that disagree on this point, refer to these agreements as the “climate change regime” or “specialized conventions”.⁷

Of course, that the UNFCCC and Paris Agreement are *lex specialis* does not mean that UNCLOS is inapplicable or identical to them. As New Zealand has pointed out, the relationship concerns coherence, not prevalence.⁸ What *lex specialis* entails, is that UNCLOS’ application must be appreciated through the prism of the specialized regime.

Others have suggested that the relationship is that of complementarity.⁹ If so, true complementarity entails a role for both treaty regimes. It entails a role for the obligations contained in UNCLOS Part XII in the context of these proceedings. At the same time, it also entails that UNCLOS cannot overtake later agreements and render their mix of obligations and non-obligations redundant. A result-based legal standard, not found in the Paris Agreement or elsewhere, does just that. True complementarity, Mr President, is where both bodies of law are to play their part, to form a coherent normative framework.

Now, none of this changes the dire reality presented by COSIS, based on the best available science. Each increase in global temperatures, even incremental, can and will have devastating effects. The current legal framework has proven insufficient.

Others have pointed out that, with respect to other environmental issues related to the law of the sea, States have come together to address existing gaps in the law.¹⁰ Here too, Timor-

⁵ Alan Boyle, Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in *The Law of the Sea and Climate Change: Solutions and Constraints* (Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen, eds., 2021) 81-103, at pp. 93-94.

⁶ Oral submissions of Australia (13 September 2019, ITLOS/PV.23/C31/5), page 8-9, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_5_E.pdf

⁷ Oral submissions of Guatemala (14 September 2023, ITLOS/PV.23/C31/8), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf

⁸ Oral submissions of New Zealand (15 September 2023, ITLOS/PV.23/C31/1), page 5, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_10_E.pdf

⁹ Oral submissions of the Commission of Small Island States (11 September 2023, ITLOS/PV.23/C31/2), page 30, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_2_E.pdf; Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/3), page 24, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf; Oral submissions of Guatemala (14 September 2023, ITLOS/PV.23/C31/8), page 11, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf

¹⁰ Oral statement of the Federated States of Micronesia (15 September 2023, ITLOS/PV.23/C31/9), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_9_E.pdf

Leste calls on States to urgently agree on further necessary action to mitigate and adapt to climate change.

Furthermore, the obligation of States under article 194(1) is qualified by the “best practicable means at their disposal and in accordance with their capabilities”. In other words, a State’s capabilities and level of development influences the nature of the obligation imposed.¹¹

This reflects the concern of developing States that these obligations could impose an excessive burden in circumstances where they: first, lack the necessary capabilities and technology; and, second, are necessarily focused on improving the economic well-being of their own peoples.

This leads me to the principle of “common but differentiated responsibilities” (CBDR), as already highlighted by others, such as Guatemala and Sierra Leone.¹² The principle is embodied in Principle 7 of the Rio Declaration¹³ and reflected in UNFCCC¹⁴ and the Paris Agreement,¹⁵ among other treaties. It is a central principle of international environmental law.¹⁶

The principle of CBDR is understood as consisting of two elements.

First, concerning the common responsibilities of States for the protection of the environment, individually and collectively, including in the regulation of anthropogenic greenhouse gas emissions;

and, second, concerning the need to take into account different national circumstances’. In particular, each State’s contribution to the creation of a particular environmental problem and each State’s ability to prevent, reduce and control the threat.¹⁷

During the first session of the Intergovernmental Negotiating Committee for the UNFCCC, Working Group I noted that¹⁸ “[d]eveloped countries are the main contributors of GHGs and thus should take the lead and shoulder the main responsibility to stabilize and limit the greenhouse gas emissions”,¹⁹. This understanding is reflected in the texts of the UNFCCC and the Paris Agreement.

It is important that the obligations in Part XII are interpreted coherently with the principle of CBDR. Otherwise, certain standards may be inappropriate, and of unwarranted economic and social cost to some States, in particular developing States.²⁰ For States with limited means, imposing the same level of commitment would ultimately compromise their right to pursue sustainable and inclusive development.

¹¹ International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 3, 16.

¹² Oral submission of Sierra Leone (19 September 2019).

¹³ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

¹⁴ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, article 3(1).

¹⁵ The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015), preamble, articles 2(2), 4(3), and 4(19).

¹⁶ Ellen Hey, Sophia Paulini, Common but Differentiated Responsibilities, *Max Planck Encyclopaedia of Public International Law* (2021), para. 19.

¹⁷ P Sands, *Principles of International Environmental Law*, “General Principles and Rules”, Cambridge University Press, 2012, p. 233.

¹⁸ Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its First session, held at Washington, D.C. from 4 to 14 February 1991 (A/AC.237/6), p. 24.

¹⁹ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part I.E.7.

²⁰ Malgosia A. Fitzmaurice, *International Protection of the Environment* (Hague Academy of International Law), p. 65.

To address this disparity, UNCLOS, the UNFCCC, and the Paris Agreement place an obligation on developed States to provide technical and financial assistance to developing States. Such assistance is designed to support, in the words of UNCLOS article 202, “the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution”.²¹

Articles 202 and 203 of UNCLOS reflect the unique position of developing States in trying to balance their development and the protection of the marine environment. Article 202 calls on States Parties to promote programmes of “scientific, educational, technical and other assistance” to developing States and contains an open-ended list of specific forms of assistance.

Article 203 seeks to provide preferential treatment for developing States in the allocation of funds and technical assistance from international organizations. Both articles 202 and 203 seek to level the playing field and “ease the burden which the law could impose upon States not adequately equipped to meet those obligations”.²²

Similarly, article 9 of the Paris Agreement aims to reinforce this support. It calls on developed States to “provide financial resources to assist developing country Parties with respect to both mitigation and adaptation”.

With a GDP per capita of just over US\$ 2,300,²³ and little to no climate-related technical or financial assistance from high-emitting States, the challenge for Timor-Leste to protect the marine environment without compromising the social security of its people, is immense.

Notwithstanding Timor-Leste’s status as a Least Developed Country and an island State, Timor-Leste continues to uphold its obligations under the Paris Agreement. In accordance with article 4(6) of the Paris Agreement, Timor-Leste has submitted two Nationally Determined Contributions (or NDCs), the latest in November 2022.²⁴ Importantly, Timor-Leste’s NDC includes a section which sets out the means of implementing these priority areas. This section states: “The Government of Timor-Leste requires urgent technical support and financing to establish a robust National Greenhouse-Gas (GHG) Inventory to support its ability to report to the UNFCCC and comply with the requirements of the Paris Agreement”.²⁵

Timor-Leste’s NDC identifies specific priorities for capacity building, finance and technology transfer.²⁶

At the end of the day, States like Timor-Leste are reliant on support from the international community to help it fulfil its obligations in respect of climate change.

Mr President, Timor-Leste is a staunch supporter of international law. It has relied on it time and time again to support its most important battles on the world stage. As a member of the international community, Timor-Leste has carried out its obligations under the UNFCCC and UNCLOS. On the other hand, at COP27 last November, it was again acknowledged that the world’s largest and wealthiest economies have failed to deliver on their commitments to

²¹ United Nations Convention on the Law of the Sea, article 202.

²² *United Nations Convention on the Law of the Sea* (Myron H. Nordquist et al. eds. 2013), vol I, p. 107.

²³ The World Bank, GDP per capita (current US\$) – Timor-Leste (online, 2022), available at: <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=TL>

²⁴ United Nations Climate Change, *Nationally Determined Contributions Registry – Timor-Leste* (online), available at:

https://unfccc.int/NDCREG?gclid=Cj0KCCQjw84anBhCtARIsAISi-xFLPsfirA6mPdAiznR8tr95R6xlcCQeggRKjBwd-C2nMLFfx7Bq3ywaAhetEALw_wcB

²⁵ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, pp. 45, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

²⁶ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, pp. 46, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

provide US\$ 100 billion per year in climate funding for developing countries.²⁷ And, Sustainable Development Goal 14 (that is, Life Below Water) remains the most underfunded development goal.²⁸ Developed States and high-emitting States have not upheld their end of the deal.

Mr President, we've reached a tipping point. We must see meaningful cooperation between high-emitting States and low-emitting States to meet our shared, but ultimately differentiated, obligations; both under UNCLOS, to protect the marine environment, and under the UNFCCC to manage and reduce emissions.

In this context, UNCLOS article 197 also recognizes that the duty to cooperate to formulate international standards to protect the environment, must take “*into account regional features*”. Accordingly, specially affected regions and States with lesser capacities require assistance from developed States to cooperate in the development of mitigation and adaptation standards.

Timor-Leste submits that in light of the principle of CBDR, UNCLOS places a higher responsibility on developed and industrialized nations to reduce anthropogenic greenhouse gas emissions that may contribute to global pollution and damage marine ecosystems.

Mr President, members of the Tribunal, allow me to conclude on behalf of Timor-Leste. We stand at a critical juncture. As was noted by Professor Lowe, we're facing a matter of “*extreme gravity and urgency*”.²⁹ The international community, including UNCLOS parties, must act to address this intergenerational emergency.³⁰ It is for States to take the best available science, such as the conclusions of the IPCC, and agree on further legal commitments. In doing so, the community of States cannot leave developing States behind. Developing States deserve the same opportunities that have been afforded to developed States, to develop their resources for the benefit of their people.

Timor-Leste is grateful that COSIS has brought the defining issue of our time before you, supported by a youth-led movement. The Tribunal has been given a very important task. It must elucidate on the rights and obligations of States Parties relating to climate change, as well as existing gaps in the law. In doing so, it must also leave sufficient room for States to further develop the legal framework through the political process under the UNFCCC. The Tribunal should bear in mind that “(too much) coercion kills all noble, voluntary devotion.”³¹

Mr President, members of the Tribunal, that concludes the submissions for Timor-Leste, thank you for your kind attention.

THE PRESIDENT: Thank you, Mr Sthoeger.

I now invite the representative of the European Union, Mr Bouquet, to make his statement. You have the floor, Sir.

²⁷ Glasgow Climate Pact, Decision 1/CP.26 contained in FCCC/CP/2021/12/Add.1 (13 November 2021), par. 26 – 27, available at: https://unfccc.int/sites/default/files/resource/cp2021_12_add1_adv.pdf

²⁸ IISD, *Summary report, 27 June – 1 July 2022 – 2022 UN Ocean Conference* (online), available at: <https://enb.iisd.org/2022-un-ocean-conference-summary#brief-analysis-second-un-ocean-conference>

²⁹ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/4), page 25, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_4_E.pdf

³⁰ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/4), page 22, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_4_E.pdf

³¹ Maurus Wollensak, The Precautionary Principle/Approach and the United Nations Convention on the Law of the Sea: Management of Living Resources, in *The Environmental Rule of Law for Oceans designing legal solutions* (Froukje Maria Platjouw, Alla Pozdnakova, eds., 2023), pp. 136-148, at. 148, quoting Knigge, A.F., *Über den Umgang mit Menschen* (Leipzig: Reclam, 1878), 126.

STATEMENT OF MR BOUQUET
EUROPEAN UNION
[ITLOS/PV.23/C31/14/Rev.1, p. 21–29]

On behalf of the European Union, hereinafter also referred to as the “EU”, I have the honour to address this Tribunal on the two important questions that have been submitted by the Commission of Small Island States on Climate Change (COSIS). In this context, we would take stock of a number of points made by other delegations in these proceedings and which show a certain degree of convergence on most of the topics.

But let me first, from the outset, warmly compliment the COSIS, which is formed by small island States that are significantly impacted or at risk by the effects of climate change, for this commendable initiative to bring these fundamental legal questions to the Tribunal, and stress that the European Union considers that it is scientifically well established that the anthropogenic emissions of greenhouse gases are leading to climate change, bringing with it significant deleterious effect to the environment and in particular to the oceans (ocean warming, ocean acidification with consequential adverse impacts on marine biodiversity and also reduced absorption of heat and greenhouse gases, and, of course, sea-level rise).

These risks are existential, and this explains why the UN Secretary-General has recently said the climate crisis is a “code red for humanity”, and the EU Commission’s President referred to “a boiling planet” in her speech on the State of the European Union last week¹, echoing thereby the Secretary-General of the United Nations.

Most participants in this case agree that the scientific reports of the Intergovernmental Panel on Climate Change (IPCC), while lacking legally binding value by themselves, do reflect the global consensus of the scientific community on climate change.

In particular, the reports from the sixth assessment cycle and the Special Report on the Oceans and Cryosphere in a Changing Climate² reflect the current scientific knowledge on the implementation of international obligations regarding climate change and oceans.

As such, these scientific reports constitute an important contextual element which is relevant in the interpretation of the obligations incumbent on States Parties. Most participants in these proceedings agree on this point. In this regard, the EU invites the Tribunal to take the current scientific evidence on the effects of climate change on the marine environment as a fact, following an approach already deployed by the International Law Commission in its work on “Sea-level rise in relation to international law”,³ which will examine the law of the sea aspects, statehood and right of affected persons.

The European Union considers, thus, that greenhouse gas emissions constitute a major global existential concern for the entire planet, and this issue calls for global answers by the international community.

In order to find global answers, international cooperation, which is a general duty, is indispensable. The duty to cooperate is codified in article 197 of the United Nations Convention on the Law of the Sea (UNCLOS) and, as stated by this Tribunal in the *Mox Plant* case,⁴ is a fundamental principle underpinning the whole of Part XII of UNCLOS.

As COSIS has highlighted, three main components of this due diligence obligation can be identified: obligations to harmonize laws, policies and procedures; obligations to take cooperative action through international organizations; and obligations to grant assistance to

¹ Available at:

https://state-of-the-union.ec.europa.eu/system/files/2023-09/SOTEU_2023_Letter_of_Intent_EN_0.pdf

² Special Report on the Ocean and Cryosphere in a Changing Climate, available at: <https://www.ipcc.ch/srocc/>.

³ See A/76/10, Chapter IX Sea-level rise in relation to international law, para. 263.

⁴ *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 110, para. 82.

developing States – with a view to prevent, reduce and control pollution of the marine environment, including in the form of greenhouse gas emissions.

The European Union has taken a leading role in the implementation of these obligations. Not only has it significantly harmonized its laws and policies for the protection of the marine environment from the effects of climate change with other UNCLOS States Parties, notably through the conclusion of the Paris Agreement and the recent adoption of the BBNJ Agreement, but it has also provided meaningful assistance to developing States to tackle climate change. According to the latest OECD report (2022), the EU and its 27 Member States are, indeed, the largest contributors to international public climate finance, contributing over €3.4 billion⁵ – which is equivalent to US\$ 26 billion – to the collective US\$ 100 billion aim, and thereby almost 40 per cent of the EU’s contribution targeting climate adaptation.

In another legal context, partly overlapping questions have been raised by the UN General Assembly in a consensus resolution requesting an advisory opinion from the International Court of Justice (ICJ). The main distinction between the two requests is the particular focus of the present case on the marine environment, and the broader scope, including the fundamental rights angle and the intergenerational aspect, of the ICJ case.

UNCLOS, which is generally considered to be the “constitution of the oceans”, sets out the legal framework within which all the activities in the oceans and seas must be carried out, and this has also implications for activities on land with effects on the oceans and seas.

As has been recognized in almost all the written statements, UNCLOS is a living instrument which is capable, without compromising its integrity (which is essential for the European Union), to adapt to new realities as well as to address major new challenges which are related to the protection and preservation of the marine environment, such as climate change.

As stated by Judge Paik, here present, “[t]he challenge facing the Tribunal is ... how to make the Convention relevant in an area in which law and realities have changed rapidly and will continue to do so.”⁶

Now, in the following presentation, the European Union will proceed in five steps: first, I will make a remark in connection to the nature of the Tribunal’s advisory function (in order not to confuse it with adversarial procedures);

second, I will address the question of the applicable law;

third, I will turn to the general obligations of articles 192 and 194 of UNCLOS and their nature as obligations of conduct;

fourth, I will update the Tribunal on the high ambition implementation of these obligations by the European Union;

and, fifth, my co-agent will briefly address the two questions, in the order posed by COSIS.

Now, in this statement on behalf of the European Union, we will not address the issue of jurisdiction of the Tribunal. The written statement of the European Union was made without prejudice to the question of the jurisdiction of the Tribunal to examine the request for an advisory opinion in respect of questions put to it, and we will follow the same here today.

But this being so, we would wish to underline that this case is a request for an advisory opinion. In the 1950 Advisory Opinion on the *Interpretation of the Peace Treaties with*

⁵ See: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Accelerating the transition to climate neutrality for Europe’s security and prosperity EU Climate Action Progress Report 2022, 26.10.2022, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0514>, page 23.

⁶ 2018 WMU Global Ocean Conference; Statement by Judge Jin-Hyun Paik, then President of ITLOS, Building Transformative Partnerships for Ocean Sustainability: The Role of ITLOS. See to this effect: *Law of the Sea - UNCLOS as a Living Treaty*, 2016, edited by Jill Barrett and Richard Barnes.

Bulgaria, Hungary and Romania, the ICJ referred to a dispute as “a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations”.⁷

The present case does not concern a dispute between opposing parties or groups of opposing parties. By their very nature, advisory opinions are designed to contribute to the clarification of international law as it stands, including the explanation of all existing international legal obligations of States and international organizations, such as the European Union, in the implementation of UNCLOS.

Likewise, an advisory opinion is not well suited to adjudicate possible breaches of these international obligations or to indicate which remedies should be considered for such possible breaches. Notably, the questions before this Tribunal concern the primary rules of international law and, therefore, are not focused on secondary obligations, which are admittedly provided for under article 235 of UNCLOS.

Hence, it is not by way of an advisory opinion that the Tribunal could “hold accountable” certain States or groups of States for possible breaches. In its oral statement, COSIS stated that this case “the Tribunal is called upon to provide guidance on questions of international law; not to settle a dispute”.⁸ Therefore, it has to be stressed that the questions on whether compensation is available in this context is out of the scope of the present request for an advisory opinion.⁹ It is also in that logic that advisory opinions have no binding force.

Also, as highlighted by most other participants in this case, it is not the task of the Tribunal to create new legal rules.

Now, these observations, of course, do not take away the eminent influence of advisory opinions which this Tribunal, as well as the ICJ, are called upon to give in this matter. And in this case, the Tribunal is being called to pronounce first.

Now, turning now to the applicable law, the questions, which are focused on the marine environment and pollution by greenhouse gases, are clearly to be assessed under UNCLOS, and in particular its part XII.

The law applicable by this Tribunal is identified in article 293 of UNCLOS being (1) UNCLOS itself; and (2) other rules of international law not incompatible with UNCLOS.

Moreover, article 237 of UNCLOS, the final provision of Part XII, refers to specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in UNCLOS. Part XII of UNCLOS is without prejudice to these special obligations.

In addition, in a number of specific UNCLOS provisions, and not only in Part XII, reference is made to “*generally recognized international rules and standards*”, like those relating to shipping, to navigation, to marine pollution, that may inform particular provisions of UNCLOS, and this with a different degree of intensity, ranging from just taking into account, to ensuring at least a same protection. I refer here to articles 207 and 212 UNCLOS.

These provisions reflect that architecture of UNCLOS is not one of an isolated regime, but is a treaty interacting with other rules and principles of international law. Even if not all parties have always been citing the same international instruments and rules as the most

⁷ *Interpretation of Peace Treaties*, Advisory Opinion: *I.C.J. Reports 1950*, p. 65; at page 13.

⁸ Public sitting held on Tuesday, 11 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C31/1/Corr.1, Verbatim Record, page 24, at 33-34.

⁹ Public sitting held on Tuesday, 12 September 2023, at 3 p.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, ITLOS/PV.23/C31/4, page 25, at 27-32.

relevant ones for answering the questions addressed to the Tribunal, there is a clear convergence as regards this interplay of UNCLOS with other rules of international law.

As the questions raised in the present case relate to climate change and the marine environment, most of the written submissions recognize that the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement constitute the primary legal instruments informing UNCLOS obligations in this context.

Delegations have provided also pertinent examples of other legal instruments, conventions, agreements, generally recognized rules and standards, rules of reference, such as the regulations adopted in the context of the International Maritime Organization (IMO), the Convention on Biological Diversity (CBD), or the Convention for the Protection of the Marine Environment of the North-East Atlantic (the “OSPAR Convention”).

Consequently, the two questions addressed to the Tribunal are to be assessed under UNCLOS, and notably Part XII, taking into account also the UNFCCC, the Paris Agreement and certain specific rules of the IMO, or CBD and the OSPAR Convention. And this, by virtue of articles 293 and 237 UNCLOS, is in line with article 31, paragraph 3, of the Vienna Convention on the Law of Treaties.

Now, this, however, should not lead to a debate on the *lex specialis* principle because that principle is a conflict rule.

In the present case, no argument has been made that any specific provision of the UNFCCC or of the Paris Agreement would go against an obligation under UNCLOS Part XII. Indeed, the regime of the UNFCCC has put in place certain specific obligations with regard to climate change, but it has not lowered the threshold of the obligations under Part XII of UNCLOS. Rather, the UNFCCC and the Paris Agreement could even be considered as concluded in furtherance of the general principles set forth in UNCLOS for the purposes of article 237 UNCLOS.

Therefore, the different legal regimes are to be applied in conjunction, and, in the European Union’s view, there is no conflict between them, which, alone, would lead to a possible discussion on the application of the *lex specialis* principle in order to resolve such conflict.

Now, as to the general obligations and their nature: as is submitted in most of the written submissions, the general obligations of the States to preserve and protect the marine environment and to prevent, control and reduce pollution of the marine environment in relation to the deleterious effects of climate change, as well as to cooperate internationally, are a set of *due diligence obligations rather than* obligations of result.

Some statements have been made to the effect that certain of these obligations may be obligations of result because of the severity of the risks, as assessed by science.

We noted, in this context, the questions put by Judge Kittichaisaree – I hope I pronounce well – to COSIS and to the International Union for the Conservation of Nature.

For the European Union, we would still submit that the obligations of Part XII of UNCLOS, as well as those stemming from the other relevant instruments such as the UNFCCC and Paris Agreement, as discussed in questions (a) and (b), are, by their nature, obligations of conduct. At the same time, this is not to say that such obligations would be entirely discretionary, or weak or even just symbolic obligations.

This interpretation finds support in the jurisprudence of this Tribunal, in Case No. 17¹⁰ (*Seabed* case – decided by the Seabed Disputes Chamber) and Case No. 21¹¹ (*Illegal Fishing*

¹⁰ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 25.

¹¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

case), as well as in the jurisprudence of the ICJ (notably in the *Pulp Mills* case¹²) and in the case law of certain UNCLOS arbitral tribunals (*South China Sea Arbitration*¹³).

It emerges from that case law that the obligation of conduct is an obligation to take best possible efforts, to do the utmost to take all the measures which are necessary based on reasonableness, non-arbitrariness and good faith (so it is, thus, not just a symbolic effort). These measures may include, beyond measures binding upon activities in the own territory, also certain conditions upon imports in order to induce producers of importing goods to observe certain minimum standards in relation to the greenhouse gas footprint.

The obligation of conduct also takes into account the capability of the State concerned. This has certain similarities with the principle of common but differentiated responsibilities and respective capabilities under the UNFCCC and the Paris Agreement, whereby account is taken of the different national circumstances, which can evolve over time and whereby the capabilities of certain States can improve.

Here, the European Union would like to echo COSIS's concern expressed in its oral statement,¹⁴ that the differentiation should not become a pretext for certain high emitting States – even if generally still considered as developing States – to escape their obligations of conduct because in the past they may not have contributed significantly to greenhouse gas emissions, allowing them somehow to “harvest” an alleged entitlement to catch up with old industrialized countries and to emit high share of greenhouse gases.

Such an approach would push very far in the future the greenhouse gas “peaking”, with long-time overshooting and possibly irreversible adverse effects on the marine environment. Such an extensive interpretation of the differentiation would simply render impossible to collectively achieve the results aimed at by the relevant obligations of conduct, and this would thus be fundamentally inconsistent with the obligation of conduct under UNCLOS Part XII and the other relevant instruments.

In this regard, it is also worth recalling that the International Law Commission considered, in the context of the draft articles on the prevention on transboundary harm, that “while the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence”, it “cannot be used to dispense the State from its obligation[s]”.¹⁵

The obligation of conduct is also an evolutive one, which increases in intensity when the risk becomes clearer over time (as is shown by consensus in science).

And, finally, the obligation of conduct also entails a duty of vigilance and of enforcement of the measures taken.

Here, a confusion should be avoided, which is to consider that when a particular result is mentioned in the relevant provisions, quantified or not, like the reduction or prevention of pollution, or the limitation of the warming due to anthropogenic emissions of greenhouse gases to a maximum, that this would necessarily turn the obligations into an obligation of result, meaning into a positive legal obligation to achieve that result (and then only *force majeure* would be an excuse).

Here, the European Union would not see solid legal grounds to change the nature of these obligations of reduction or prevention of pollution by greenhouse gases or of limiting the

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.

¹³ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People's Republic of China)*.

¹⁴ Public sitting held on Tuesday, 12 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C31/3, Verbatim Records, Page 4 at 8.

¹⁵ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (13), p. 155.

temperature increase into obligations of result. It is also noted that no serious claim has been made that there would be a collective obligation on States and international organizations, like the European Union, to succeed in preventing all pollution by greenhouse gases and in limiting the temperature increase to 1.5°C.

This being so, the European Union considers that the obligations of conduct which are at stake in the present case are not undetermined obligations, but are serious obligations which are qualified by a rather high standard of due diligence, and it has, for its part, taken them very seriously.

This brings me to the steps taken by the European Union itself, which have been spelled out in detail in Section E of Chapter III of our written submission. Since the time of that submission, the following actions have been taken, which I will mention:

First, the European Parliament and the Council of the European Union have now formally adopted all essential elements of the legislative framework necessary to implement the ambitious “Fit for 55” package, which was proposed by the Commission, to implement the climate change target for 2030 and was laid down in the European Climate Law – being a net domestic reduction of at least 55 per cent in greenhouse gas emissions by 2030 compared to 1990. The adopted legislation has now been published in the Official Journal of the European Union and has entered into force.

Second, the EU is continuing to participate fully and actively in the First Global Stocktake under the Paris Agreement at all levels, including in the ministerial roundtables next week in New York. The EU will be pointing to what science says and what is increasingly part of every global citizen’s lived experience.

Further, the EU will be calling on all Parties to follow the lead the EU has set out in the European Climate Law and to respond to the Global Stocktake by committing to come forward, by 2025, with NDCs for the post-2030 period that are aligned with the Paris Agreement goals of avoiding 1.5°C global average temperature rise and achieving climate neutrality by 2050.

Still, in the fourth quarter of 2023, the Commission plans to adopt the Climate Action Progress Report. In addition to annual reporting on the progress towards the EU and Member States greenhouse gas reduction targets, this year the report will also include the assessments required by the Climate Law on progress made and the consistency of policies with respect to the climate-neutrality and adaptation objectives contained in that law.

Third, the EU is also working on the implementation of the Kunming-Montreal Global Biodiversity Framework adopted at COP15 of the Convention on Biological Diversity, including its goals and targets relevant for the marine biodiversity.

In her last State of the Union Speech last week, the European Commission’s President has also announced the launch of the “European Wind Power package”.

And, finally, the BBNJ¹⁶ Agreement will be signed by the European Union, and by other States, later today almost as we speak. The BBNJ Agreement will be crucial in addressing the triple planetary crisis of climate change, biodiversity loss and pollution. The BBNJ Agreement will reinforce the rules on, notably, environment impact assessments (which is based on a customary law obligation), on area-based management of marine areas, and it will also include cooperative tools to share expertise and assist developing States to protect the marine environment beyond areas of national jurisdiction.

It is to be underlined that the BBNJ Agreement contains a provision on the advisory jurisdiction of ITLOS. This UNCLOS implementing agreement will thereby contribute to the achievement of the aims of the provisions of Part XII of UNCLOS as well as of other relevant

¹⁶ Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

instruments. The European Union encourages States to sign and ratify the BBNJ Agreement as soon as possible.

Now I would like to invite the Tribunal to call my co-agent Ms Bruti Liberati to address briefly the two questions before or after the break.

PRESIDENT: Thank you, Mr Bouquet.

We have now reached almost 11:30. At this stage, the Tribunal will withdraw for a break of 30 minutes and will continue the hearing at 12:00 when I will give the floor to Ms Bruti Liberati.

(Pause)

PRESIDENT: I now give the floor to Ms Bruti Liberati to make her statement on behalf of the European Union. You have the floor, Madam.

STATEMENT OF MS BRUTI LIBERATI
 EUROPEAN UNION
 [ITLOS/PV.23/C31/14/Rev.1, p. 29–39]

Mr President, honourable members of the Tribunal, it is my honour to address you today on behalf of the European Union.

In my intervention, I will outline the main elements that, in the view of the European Union, this Tribunal should consider when replying to the specific questions referred to it by COSIS.

I will consider question (a) first.

As recognized by most written submissions in this case, the wording of this question reflects the text of article 194 of UNCLOS.

To delineate the EU’s proposed answer to this question, I will proceed in this order:

first, I will briefly recall the *nature* of the obligations under article 194 of UNCLOS specifically to address certain arguments made by other participants in this case;

second, I will delineate the *content* of the obligations under article 194 of UNCLOS, and, to this effect, I will:

first, consider the definition of “pollution” laid down in article 1(1)(4) of UNCLOS;

second, discuss the elements which inform the content of the obligations under article 194 of UNCLOS, including in relation to the deleterious effects of climate change; third, and based on the foregoing, I will outline the specific actions required by States under article 194(1) and (2) to prevent, reduce and control greenhouse gas emissions.

As concerns the *nature* of the obligations referred to in question (a), my colleague has already mentioned that, according to settled case law, the general obligations under articles 192 and 194 paragraph 2 of UNCLOS are obligations of due diligence. That is, obligations of conduct, qualified by the duty to exercise a certain level of care.

While this Tribunal has not yet pronounced itself on the nature of the obligations under article 194(1) of UNCLOS, it is clear that also this provision entails an obligation of due diligence. In the view of the EU, this stems notably from the findings of the ICJ in the *Pulp Mills* case, where the Court has unequivocally found that “[a]n obligation to adopt regulatory or administrative measures” – which is precisely the prescription under article 194 paragraph 1 – “is an obligation of conduct”.¹

Further, article 194, paragraph 1, can be considered an expression of the customary international law principle of prevention of transboundary harm which, according to the International Law Commission, entails an obligation of due diligence.²

According to the jurisprudence of this Tribunal,³ the precise *level of due diligence* is context-dependent, changing notably in function of the current scientific and technological knowledge, and of the risks at stake, so that an activity scientifically known to entail severe risks would require a higher degree of diligence. In principle, it is possible that the combination of these contextual factors leaves virtually no doubt as to the precise measures to be taken.

In this sense one may argue, as some participants in this case do, that the required standard of diligence is *objectively determined*. However, no matter how “objective”, no matter how stringent the standard of due diligence is, the *nature* of such obligation could not be

¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at 187.

² Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (7), page 154: “the obligation to take preventive or minimization measures is one of due diligence”.

³ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 132, citing: Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 43, para. 117.

transformed from one of conduct to one of result. Arguments relating to the standard of due diligence indeed concern the requisite attributes of a certain prescribed conduct but have nothing to do with the *objective* that that conduct aims to achieve.

This conclusion is reinforced by the fact that, as mentioned by my colleague, this Tribunal has interpreted the duty of due diligence as requiring a *highly stringent standard, a maximum duty of care*, namely “to exercise best possible efforts, to do the utmost”.⁴

In this regard, I shall make a clarification in relation to the judgment of the ICJ in the case on the *Jurisdictional Immunities of the State*.⁵ Reference to this judgment has been made during the present oral proceedings to substantiate that “the duty under article 194(1) is a direct and immediate duty, which is to reach a precise result that is neither materially impossible nor out of proportion”.⁶

However, the EU respectfully submits that this reference is squarely out of context here. In that case, the Court did no more than literally applying article 35 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts,⁷ according to which:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Besides departing from the parameters already identified by this Tribunal precisely in relation to the general obligations under UNCLOS, the conditions set out in article 35 of the Draft Articles concern “secondary rules of State responsibility”; that is to say, in the words of the International Law Commission, “the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom”. On the other hand, the draft articles “do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules”.⁸

The EU, therefore, fails to see how the parameters considered and the conclusion drawn in the case on the *Jurisdictional Immunities of the State* would be relevant in the interpretation of the obligation to prevent, reduce and control pollution of the marine environment under article 194 of UNCLOS. It is, in fact, unquestionable that this provision lays down primary rules of international law.

Having clarified the *nature* of the obligations under article 194 of UNCLOS, I will now turn to their precise *content*, particularly in relation to the deleterious effects of climate change. I will focus to this effect on paragraphs 1 and 2 of article 194.

⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, para 128, citing *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 110.

⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

⁶ Public sitting held on Tuesday, 12 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law, ITLOS/PV.23/C31/3, Verbatim Record*, page 18, at 9-25.

⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, 2001, General Commentary, paragraph (1), page 31.

Virtually all States and international organizations participating in this case agree that greenhouse gas emissions fall under the definition of “pollution of the marine environment” under article 1(1)(4) of UNCLOS. Indeed, science clearly shows that greenhouse gas emissions constitute substances which, when introduced in the marine environment, result or are likely to result in deleterious effects such 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 seawater and reduction of amenities.

It follows that paragraph 1 of article 194 requires States to take all measures, consistent with UNCLOS, that are necessary to prevent, reduce and control greenhouse gas emissions from any source. Such efforts to reduce or prevent greenhouse gas emissions are usually referred to as “climate mitigation measures”.

Second, as already mentioned, the identification of the “necessary” measures to be taken in this respect depend on a number of factual and legal elements.

As to the factual elements, article 194 itself mentions “the best practicable means at the disposal [of a State]” and “its capabilities” as factors determining the measures to be taken. These requirements have a certain similarity with the principle of Common but Differentiated Responsibilities and respective capabilities (in the light of different national circumstances) as laid down in the UNFCCC and in the Paris Agreement, but, crucially, do not render this latter principle legally binding by virtue of UNCLOS.

Further, in the *Seabed* case, it was established that the due diligence duty is informed by: (1) the current scientific or technological knowledge; and (2) the risks involved in the activity (so that the standard of due diligence has to be appropriate and proportional to the degree of risk involved). This Tribunal also supported this conclusion in the *Illegal Fishing* case.⁹

Additional factors are identified in the Draft Articles of the International Law Commission on the prevention of transboundary harm from hazardous activities, in the severity and foreseeability of the harm¹⁰ and in the economic level of a State.¹¹

The role of science and of factual developments more generally is, likewise, considered a relevant factor by the ICJ, which in the *Gabčíkovo-Nagymaros Project* case stated that the impacts of a certain activity on the environment, as evidenced in scientific reports, are a key issue in the interpretation of States’ environmental obligations. The Court also found that a requirement to take into account *current* standards existed insofar as the relevant treaty provision established “continuing – and thus necessarily evolving – obligations”.¹² As other participants in this case have noted, this is definitely the case for the general obligations under UNCLOS Part XII.

As to the legal factors determining the content of the obligations under article 194, the arbitral tribunal in the *South China Sea Arbitration*¹³ found that article 192 of UNCLOS is to be informed by the other provisions of Part XII and by other applicable rules of international law. The EU submits that the same finding must necessarily apply to article 194 of UNCLOS.

As agreed by most participants in this case, the UNFCCC and the Paris Agreement contain the most relevant international rules to be taken into account when interpreting article 194 of UNCLOS. However, this conclusion does not mean that States Parties to UNCLOS have

⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, para. 132.

¹⁰ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, *inter alia* Commentary to Article 3, paragraph (18), page 155.

¹¹ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (13), page 155.

¹² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para 140.

¹³ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, paras. 941-942.

an obligation to comply with the Paris Agreement or with any other international rule applicable to the interpretation of UNCLOS as a matter of UNCLOS itself. In other words, these external rules do not become binding by virtue of UNCLOS but are simply to be taken into account in accordance with articles 293 and 237 of that Convention.

Even less would this harmonious interpretation result in an UNCLOS obligation to *achieve* the temperature goal established under the Paris Agreement, as the Paris Agreement itself does not provide for such an obligation of result.

Finally, the due diligence obligation under article 194 is further specified by other obligations of Part XII of UNCLOS, and notably by those under Section 5 thereof, which regulate the different sources of pollution of the marine environment.

The EU submits that greenhouse gas emissions fall primarily within the categories of pollution from land-based sources, regulated by articles 207 and 213 (and which may also consist in plastic materials discharged in the ocean from land); and of pollution from or through the atmosphere, regulated by articles 212 and 222 of UNCLOS.

In relation to the deleterious effects of climate change, articles 207 and 212, *inter alia*, require States to adopt laws, regulations and other necessary measures to prevent, reduce and control greenhouse gas emissions, *taking into account internationally agreed rules, standards and recommended practices and procedures*. While these requirements make explicit UNCLOS' openness to other legal regimes, they do not render the referred external rules and standards binding on States Parties to UNCLOS, but merely establish a minimum standard of conduct.

Articles 207 and 212 are completed, respectively, by articles 213 and 222 which deal with the enforcement in relation to, respectively, pollution from land-based sources and pollution from or through the atmosphere. In light of States' duty of due diligence as interpreted by both this Tribunal and by the ICJ, "a certain level of vigilance and the exercise of administrative control applicable to the public and private operators"¹⁴ is required in the enforcement of the laws and regulations adopted pursuant to article 207 and 212 of UNCLOS.

Besides developing the general obligations of articles 192 and 194, articles 207, 212, 213 and 222 of UNCLOS reflect the obligation of international cooperation which, according to this Tribunal,¹⁵ constitutes a "fundamental principle" for the protection of the marine environment underpinning the whole Part XII of UNCLOS.

I now turn to the second paragraph of article 194. In this regard, the EU would limit itself to two clarifications. First, as already mentioned, the due diligence nature of this provision was already established in the *Seabed* case. Those findings are fully relevant in the present case for the following reasons:

(a) In that case, the *Seabed* Disputes Chamber did not limit its analysis to the expression "to ensure" under article 139 of UNCLOS, but also considered the expression "taking all measures necessary to ensure" under article 153(4) UNCLOS. This is exactly the same expression used in article 194(2);

(b) Further, in that case, the *Seabed* Disputes Chamber dealt with the duties of States in relation to the conduct of entities operating under their control. Again, this is exactly the same scenario dealt with by article 194(2);

(c) Finally, having defined the obligations "to ensure" as obligations of due diligence, the *Seabed* Disputes Chamber referred precisely to article 194(2) as an example of such

¹⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 4, para 131, citing the *Seabed* Disputes Chamber in ITLOS case No. 17, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, in turn citing the ICJ in the '*Pulp Mills*' case.

¹⁵ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at p. 110, para. 82.

obligations, which give rise to liability not for any violation thereof but for the failure to adopt a certain duty of care.

This Tribunal also upheld these clarifications on the meaning of the expression “responsibility to ensure” and on the interrelationship between the notions of obligations “of due diligence” and obligations “of conduct” in its advisory opinion in the *Illegal Fishing* case.¹⁶

The second clarification concerns the concept of “damage by pollution” under article 194(2). According to the EU, this concept should be interpreted to mean *significant* damage or *significant* harm. This is indeed the threshold characterizing the customary law principle of prevention of transboundary harm,¹⁷ which article 194(2) reflects.

As to the precise meaning of “significant” harm, in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the International Law Commission explained that the threshold of “significant” is something more than “detectable”, but need not be at the level of “serious” or “substantial” and is to be assessed based on the combined effects of the risk and the harm involved in the concerned activity.¹⁸

The EU submits that also article 195 of UNCLOS is an expression of the customary principle of prevention of transboundary harm and, as such, is an obligation of due diligence.

Mr President, I am now coming to my last point in relation to question (a) before this Tribunal; that is, the specific actions required by States under article 194(1) and (2) to prevent, reduce and control greenhouse gas emissions.

Based on the foregoing considerations, the EU submits that article 194 requires UNCLOS States Parties to do their utmost, to exercise their best efforts to prevent, reduce and control their greenhouse gas emissions, based on the best available science and taking into account relevant international rules and standards, using for this purpose the best practicable means at their disposal, in accordance with their capabilities, and in a manner proportional to the level of risk and to the foreseeable harm involved in the concrete activities at stake.

The current best available science, reflected in the IPCC reports, shows that limiting temperature rise to 1.5°C is necessary to avoid even more significant deleterious effects of climate change, including on the oceans. For instance, the most recent Assessment Report of the IPCC on climate change, in its Summary for policy-makers, states that: “Overshooting 1.5°C will result in irreversible adverse impacts on certain ecosystems with low resilience, such as polar, mountain, and coastal ecosystems, impacted by ice-sheet melt, glacier melt, or by accelerating and higher committed sea-level rise”¹⁹. At the same time, the report also states that limiting warming to 1.5°C with no or limited overshoot, involve “*rapid and deep*” greenhouse gas emission reductions”.²⁰

Both article 2 of the Paris Agreement and the later decisions of the Conference of its Parties reflect this scientific awareness, recognizing that “limiting the temperature increase to

¹⁶ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 4, para 125.

¹⁷ See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010*, p. 14, para. 101. According to the ICJ, States are obliged “to use all the means at [their] disposal in order to avoid activities which take place in [their] territory, or in any area under [their] jurisdiction, causing significant damage to the environment of another State”; and Award of the Arbitral Tribunal, *Iron Rhine Arbitration (Belgium/Netherlands)*, 24 May 2005, para 59, according to which the duty to “prevent, or at least mitigate”, significant harm to the environment has become a principle of general international law.

¹⁸ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 2, paragraph (4), page 152.

¹⁹ IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report*. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001, page 23, B.7.2.

²⁰ *Ibid*, page 20, B.6.

1.5 °C above pre-industrial levels ... would significantly reduce the risks and impacts of climate change”.²¹

On this basis, the EU submits that the measures to be taken by States to comply with article 194 of UNCLOS must include measures for the reduction of greenhouse gas emissions in line with the temperature objective under the Paris Agreement. These measures are to include the adoption of laws and regulations, as well as the exercise of vigilance in the enforcement of such rules and administrative control on public and private operators in that respect.

Further, they are to cover efforts to establish new international rules and standards for the prevention and minimization of greenhouse gas emissions, and reflect the best efforts of States to prevent and minimize significant damage by greenhouse gas emissions to other States. As such, they also include carrying out environmental impact assessments in accordance with the provisions of the BBNJ Agreement once it has entered into force.

The precautionary principle is also to be applied in taking these measures, so that, in the words of the Seabed Disputes Chamber, where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks, a State would not meet its obligation of due diligence if it disregarded those risks.²²

Mr President, I will now address question (b) referred to this Tribunal.

In the *Illegal Fishing* case, this Tribunal has clarified not only the due diligence nature of article 192 of UNCLOS, but also its *content*. First, it has provided guidance on the meaning of the concept of “marine environment”, which is not defined in UNCLOS, explaining that this concept also covers “living resources and marine life”.²³ This finding is in line with the ICJ’s Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, according to which “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.²⁴

Second, this Tribunal clarified that the obligations under article 192 are not constrained *ratione loci* as “article 192 applies to all maritime areas, including those encompassed by exclusive economic zones”.²⁵ This interpretation was echoed in the *South China Sea Arbitration*,²⁶ when the arbitral tribunal also found that article 192 reflects the principle of prevention of transboundary harm which constitutes a principle of customary international law.²⁷

I have already mentioned that the obligations under article 194 of UNCLOS to prevent, reduce and control pollution of the marine environment in the form of greenhouse gas

²¹ See Paris Agreement, article 2(1)(a). See also Decision 1/CMA.3, Glasgow Climate Pact, para 21: “[The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement] Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and resolves to pursue efforts to limit the temperature increase to 1.5 °C”.

²² *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 131

²³ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 216.

²⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 29.

²⁵ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 120.

²⁶ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 940. The Arbitral tribunal when it concluded that: “the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it” and that, accordingly, “questions of sovereignty are irrelevant to the application of Part XII of the Convention”.

²⁷ *Ibid*, para. 941: “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.” citing: *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at pp. 240-242, para. 29.

emissions require States to take mitigation measures. This requirement is also a component of the broader obligation under article 192 of UNCLOS.

However, article 192 goes well beyond the issue of pollution of the marine environment. In the above-mentioned *South China Sea Arbitration*, the arbitral tribunal found that article 192, read together with article 194(5) of UNCLOS, imposes a due diligence obligation to take those measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”²⁸

According to the arbitral tribunal, such obligation “extends both to ‘protection’ of the marine environment from future damage and to ‘preservation’ in the sense of maintaining or improving its present condition” and “thus entails both the positive obligation to take active measures to protect and preserve²⁹ the marine environment” and, “by logical implication”, also “the negative obligation not to degrade” it.

The EU therefore agrees with the COSIS³⁰ that under article 192 of UNCLOS, States must take also adaptation measures, to increase the resilience of marine ecosystems *vis-a-vis* the deleterious effects of climate change, and protect natural ocean-based carbon sinks. Following the IPCC “Special Report on the Ocean and Cryosphere in a Changing Climate”, this may require, for instance, the “protection, restoration, precautionary ecosystem-based management of renewable resource use, and the reduction of pollution and other stressors” as well as “integrated water management and ecosystem-based adaptation approaches”.³¹

Further, the content of article 192 is informed and further detailed by the subsequent provisions of Part XII, as well as by reference to specific obligations set out in other international agreements.³² In the context of the protection from deleterious effects of climate change, relevant international provisions to be taken into account include: the requirement under the Paris Agreement to engage, *inter alia*, in the implementation of adaptation measures; in the assessment of climate change impacts and vulnerability; in the monitoring and evaluation of adaptation actions; and in building the resilience of socioeconomic and ecological systems.³³

They also include the requirement under the UNFCCC to promote sustainable management, to cooperate in the conservation and enhancement of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, and in preparing for adaptation to the impacts of climate change; and to develop appropriate and integrated plans for coastal zone management and water resources.³⁴

Finally, they include the requirement under the Convention on Biological Diversity, which was explicitly considered by the arbitral tribunal when interpreting article 194(5) in the *South China Sea Arbitration*,³⁵ to establish a system of protected areas; regulate or manage biological resources important for the conservation of biological diversity; rehabilitate and restore degraded ecosystems; and promote the recovery of threatened species.³⁶

²⁸ Ibid, para. 983.

²⁹ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 941.

³⁰ See public sitting held on Tuesday, 12 September 2023, at 3 p.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, ITLOS/PV.23/C31/4, Verbatim Record, page 3 at 7-9.

³¹ IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35. <https://doi.org/10.1017/9781009157964.001>, page 30, C2.

³² See in this regard: PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 941-941.

³³ Paris Agreement, article 7(9). Ex article 5(1) parties to the Paris Agreement should also take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases.

³⁴ UNFCCC, article 4(1)(d) and (e).

³⁵ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 945.

³⁶ Convention on Biological Diversity, article 8 (a), (c) and (f).

A further international agreement which will need to be taken into account in the interpretation and implementation of article 192 UNCLOS, once entered into force, will be the BBNJ Agreement. As previously mentioned, this agreement is an example of international cooperation that strengthens the framework for the protection and preservation of the marine environment and that will also help in addressing climate change.

In particular, the general objective of the BBNJ Agreement is “to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.³⁷ In order to achieve this objective, Parties shall be guided, among others, by an “approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate”.³⁸

The BBNJ Agreement also operationalizes existing environmental impact assessment obligations in a concrete and robust way to ensure that activities which may cause substantial pollution of, or significant and harmful changes to, the marine environment are assessed and conducted to prevent, mitigate and manage significant adverse impacts to the marine environment.³⁹

Mr President, the European Union invites this Tribunal to take all these internationally agreed rules into account when determining the specific obligations under UNCLOS to preserve and protect the marine environment in relation to the deleterious effects of climate change. In the view of the European Union, such international rules inform, together with the other parameters detailed in reply to question (a), the duty of due diligence required under article 192 of UNCLOS in the context of climate change deleterious effects.

Mr President, let me now conclude the oral statement of the European Union.

The European Union greatly welcomes the initiative by COSIS to seek clarification by this Tribunal on States’ obligations under UNCLOS concerning the protection of the marine environment from the effects of climate change.

The European Union considers this case a meaningful opportunity to further understand the interactions and synergies between the climate change and the law of the sea legal regimes, notably based on the current scientific evidence, and thereby foster the clarification of international law in those fields.

At the same time, the European Union invites the Tribunal to apply the *lex lata* and hence to focus its opinion on the actual scope of the questions referred to it by COSIS. These questions concern the content of *primary* – rather than *secondary* – rules of international law *under* UNCLOS as regards the preservation and protection of the marine environment from the deleterious effects of *climate change*.

The EU also takes the opportunity to recall the fundamental distinction between obligations of conduct and obligations of result, and invites the Tribunal to delineate the exact contours of the due diligence obligations under Part XII in relation to the deleterious effects of climate change.

Mr President, let me conclude by quoting the conclusions of the latest Report of the UN Secretary-General on the Oceans and the Law of the Sea, published this month:

With the arrival of the “era of global boiling”, addressing climate change remains an urgent priority. Growing awareness of the ocean-climate-sustainable development nexus will help to ramp up ambition in the ocean space. Ocean-

³⁷ Article 2 of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (certified true copy available at: [XXI-10 CTC \(un.org\)](https://www.un.org/xxi-10-ctc)).

³⁸ Ibid, article 7(h).

³⁹ See *ibid*, Part IV.

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related responses will need to be sustainable and inclusive in order to address the climate emergency and build more resilient societies. The request for an advisory opinion from the Tribunal shows the importance and relevance of the institutions established by the Convention in addressing challenges such as climate change.⁴⁰

Mr President, honourable members of the Tribunal, we could not be more eagerly looking forward to receiving your advisory opinion on this matter of planetary urgency.

Thank you very much for your attention.

THE PRESIDENT: Thank you, Ms Bruti Liberati.

I now invite the representative of Viet Nam, Ms Hanh, to make her statement. You have the floor, Madam.

⁴⁰ Oceans and the law of the sea – Report of the Secretary-General, A/78/339, para. 93.

STATEMENT OF MS HANH

VIET NAM

[ITLOS/PV.23/C31/14/Rev.1, p. 40–46]

Mr President, distinguished members of the Tribunal, it is a great honour for me to appear before the Tribunal today representing the Socialist Republic of Viet Nam.

Viet Nam's statement consists of four parts:

- (i) Viet Nam's overall perspectives related to climate change and marine environment;
- (ii) the jurisdiction of the Tribunal;
- (iii) UNCLOS provisions, which, in our view, specifically address obligations of State with regard to anthropogenic greenhouse gas emissions; and
- (iv) the principle of common but differentiated responsibilities in the consideration and determination of the respective obligations of States Parties to UNCLOS in the protection and preservation of the marine environment from deleterious impacts caused by greenhouse gas emissions.

Like a large majority of States affirmed in their written submissions to the Tribunal in this procedure and as elaborated by previous speakers, climate change caused by anthropogenic greenhouse gases emissions is one of the most pressing challenges for the international community today. It is an existential threat to many low-lying nations and small island countries. It is also affecting coastal areas in many developing countries. However, anthropogenic emissions of greenhouse gases continue to rise beyond the capacity of reabsorption and rebalancing of the Earth.

Monsieur le Président, Mesdames et Messieurs les juges, le Viet Nam est l'un des États côtiers en développement les plus vulnérables aux effets négatifs des changements climatiques, et en particulier à l'élévation du niveau de la mer. Selon notre rapport national sur les changements climatiques pour l'année 2022, notre environnement et notre écosystème marins sont déjà gravement affectés par les changements climatiques.

Le Viet Nam ne ménage pas ses efforts pour s'adapter à ces effets négatifs et pour les réduire. Le Viet Nam figure parmi les pays qui ont pris des engagements « zéro émission » nets. Les législations et les politiques adoptées par le Viet Nam au cours de la dernière décennie soulignent la nécessité d'agir contre les changements climatiques, et mettent également en évidence le lien entre les changements climatiques et la gouvernance des océans. Tel est par exemple le cas de la loi de 2012 sur les espaces maritimes du Viet Nam, de la loi de 2015 sur l'environnement et les ressources des espaces côtiers et insulaires et du Code maritime de 2015. L'année dernière, mon pays a adopté sa stratégie nationale sur les changements climatiques à l'horizon 2050.

Il ne fait aucun doute que la Convention des Nations Unies sur le droit de la mer, en tant que cadre juridique pour toutes les activités maritimes, est loin d'être indifférente aux problèmes de santé vitaux qui affectent aujourd'hui les mers et les océans. La clarification des obligations qui pèsent sur les États en vertu de la Convention est impérative dans la perspective d'un renforcement des efforts de la communauté internationale en vue de réduire l'impact négatif des changements climatiques résultant de l'émission par l'homme de gaz à effet de serre. La présente procédure donne l'opportunité au Tribunal de contribuer à cette cause si essentielle.

Mr President, members of the Tribunal, Viet Nam shares the view of most States which submitted written statements that the Tribunal has jurisdiction in this case and there are no compelling reasons for the Tribunal to decline to exercise such jurisdiction.

As observed by the Tribunal in its Advisory Opinion on the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (or Case 21), “[a]rticle 21 of the Statute of this Tribunal and the ‘other agreement’ conferring jurisdiction on the Tribunal are

interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.”

Article 138 of the Rules of the Tribunal sets out three prerequisites for the Tribunal to exercise such advisory opinion.

First, there shall be an international agreement related to the purposes of the Convention that specifically provides for the submission to the Tribunal of a request for an advisory opinion. In this case, the COSIS Agreement is manifestly an international agreement related to the purpose of UNCLOS, especially Part XII of UNCLOS concerning the protection and preservation of the marine environment.

Second, with regard to the transmission of the request by an authorized body, the request in this case has been transmitted by COSIS upon its decision pursuant to article 2(2) of the COSIS Agreement.

Third, relating to the nature of the request submitted, the two questions submitted by COSIS are clearly legal questions aimed at clarifying the legal obligations of States under UNCLOS related to marine environment protection and preservation.

Under article 138 Rules of the Tribunal, the Tribunal “may give an advisory opinion”, meaning that the Tribunal has a discretionary power to render an opinion. But in Case 21, the Tribunal observed that “a request for an advisory opinion should not in principle be refused except for ‘compelling reasons’.”¹ Like a large majority of States which took part in these proceedings, Viet Nam does not see any compelling reason for the Tribunal to refuse the request for an advisory opinion.

Mr President, members of the Tribunal, let me turn now to the substance of the questions submitted by COSIS, namely, how UNCLOS regulates anthropogenic greenhouse gas emissions. The second part of my presentation examines if anthropogenic greenhouse gas emissions fall under the scope of the term “pollution” under article 1(1) of UNCLOS.

Mr President, Viet Nam is of the opinion that the current understanding of anthropogenic greenhouse gas emissions corresponds to the three elements of pollution provided in the definition of that term in article 1(1)(4), namely, (i) the indirect and direct introduction of substances or energy into the marine environment by man; (ii) resulting or being likely to result in deleterious effects; and (iii) such deleterious effects must be something 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.

Anthropogenic greenhouse gas emissions indeed directly and indirectly introduce substances and energy into the sea and ocean water column, which is the basic element of “marine environment”. The ocean has directly absorbed greenhouse gases such as carbon dioxide, methane and nitro oxide induced by human activities, causing the increase of carbon dioxide level in the water.² Also, the increasing heat trapped by greenhouse gases goes into the oceans, which causes the rise of ocean temperature.³

Furthermore, in application of the general rule of interpretation enshrined in article 31(1) of the 1969 Vienna Convention on the Law of Treaties, requiring that the provisions of a treaty be interpreted “in accordance with the ordinary meaning to be given to the[ir] terms”, the notion of “marine environment” includes the air column above the sea and ocean water column.

One can, for instance, refer in that sense to the International Seabed Authority Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area, according to

¹ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14

² <https://www.iaea.org/bulletin/how-carbon-emissions-acidify-our-ocean>

³ <https://www.unep.org/news-and-stories/story/greenhouse-gases-are-depriving-our-oceans-oxygen>

which “[m]arine environment includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans *and the airspace above those waters* [...]”.⁴

Interpreting the terms “marine environment” in the context of UNCLOS and in light of its object and purpose leads to the same conclusion. Indeed, the pollution of the marine environment from or through the atmosphere is explicitly mentioned and regulated by article 212 of UNCLOS. Also, article 194(1) refers to “the release of ... harmful ... substances ... from or through the atmosphere”.

Because of the ordinary meaning of the term “release”, the “releasing of substances through the atmosphere” takes place at the moment the substances concerned leave their source and get into the air, whether such substances do later get into the sea water column or not. Wherever the place of emission is, the marine environment is forced to receive “substances” through the process of anthropogenic greenhouse gas emissions.

The fact that anthropogenic greenhouse gas emissions result in deleterious effects for the marine environment is also clearly established. The warming of the atmosphere, oceans and land as a result of human activities has been scientifically demonstrated by the United Nations Intergovernmental Panel on Climate Change (or “IPCC”), the World Meteorological Organization and the United Nations Environment Program, amongst others.⁵

The last element in the definition of “pollution” under UNCLOS refers to the seriousness of deleterious effects of the introduction of substance or energy in the marine environment. “Harm” must be caused to living resources or marine life, or “hindrance” must be occasioned to “marine activities, including fishing or other legitimate uses of the sea”.

This last element is present in relation to marine environment due to the extremely adverse effects of climate change caused by anthropogenic greenhouse gas emissions, which have accumulated over the years. According to the 2023 report of the IPCC, “human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming”.⁶ The report also mentions the damages and harms resulting from global warming and climate change such as “the hundreds of local losses of species”, “the increasing occurrence of climate-related food-borne and water-borne diseases”, the adverse impact on “food production from fisheries and shellfish aquaculture”, “severe water scarcity”, and “loss of livelihoods and culture”.⁷

Mr President, the third part of my presentation will be dedicated to the demonstration that anthropogenic greenhouse gas emissions fall under article 194(3)(a) of UNCLOS and, as a consequence, States are under due diligence obligations to prevent, reduce and control such emissions.

Viet Nam agrees with a large majority of States that anthropogenic greenhouse gas emissions come within the scope of article 194(3)(a), namely, (i) the release of toxic, harmful or noxious substances, especially those which are persistent; (ii) from land-based sources, from or through the atmosphere or by dumping.

Various scientific and legal sources have demonstrated beyond doubt the harmful and noxious character of the now out-of-balance greenhouse gases presence in the atmosphere.

⁴ International Seabed Authority Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area, Annex to the Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area and related matters, 22 July 2013, Doc. ISBA/19/C/17; emphasis added.

⁵ <https://www.un.org/en/global-issues/climate-change>.

See also: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

⁶ https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

⁷ *Ibid.*

Anthropogenic greenhouse gases in the atmosphere are now harmful because of the combined effect of their persistence in nature, their accumulation and concentration as a result of centuries of industrialization and the present pace of emissions which increasingly exceeds the re-adsorbance capacity of the Earth.⁸

As a consequence, Viet Nam submits that UNCLOS, especially Part XII, imposes obligations on States to take all measures in accordance with the Convention that are necessary to prevent, reduce and control anthropogenic greenhouse gas emissions. Viet Nam emphasizes the obligation of States to use the best practicable means at their disposal and in accordance with their capabilities to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by anthropogenic greenhouse gas emissions to other States and their environment and to minimize anthropogenic greenhouse gas emissions to the fullest extent.

It is well established by various UNCLOS dispute settlement bodies that article 194 of UNCLOS sets forth obligations not only in relation to activities directly undertaken by States and their organs, but also in relation to activities that take place within their jurisdiction and control; they have to ensure that all of these do not harm the marine environment.⁹ This “due diligence” obligation is an obligation of conduct, which requires States not only to adopt appropriate rules and measures but also to demonstrate a “certain level of vigilance in their enforcement and the exercise of administrative control” to deal with all sources of pollution of the marine environment.¹⁰

Viet Nam joins many States in expressing a strong belief that due diligence obligations have a wide scope of application in this area. In this regard, Viet Nam expects the Tribunal to examine a specific aspect of due diligence obligations relating to the transfer of those technologies which contribute to minimize anthropogenic greenhouse gas emissions. Many countries which contribute the least to climate change but suffer the most from it, including Viet Nam, have made strong commitments to reduce anthropogenic greenhouse gas emissions.

Green technologies are crucial to the realization of these commitments and yet, under the argument that technologies are mainly developed and owned by private actors, very few measures, if any, were adopted by developed States to encourage or facilitate the transfer of such technologies to other States, particularly States with limited resources. As a result, technologies for the reduction of anthropogenic greenhouse gas emissions will be sold at market prices, in accordance with mutually agreed terms between the buyers and the sellers, even if the development of such technologies were sponsored and financed by the government. Consequently, in many instances, access to technologies reducing anthropogenic greenhouse gas emissions is out of reach of countries which contribute the least to climate change but suffer the most from it.

In Viet Nam’s opinion, due diligence obligations under Part XII, particularly article 194 of UNCLOS require governments, especially governments of developed countries, to adopt measures to encourage corporations under their jurisdiction to transfer technologies reducing and minimizing anthropogenic greenhouse gas emissions to countries with limited resources, including small islands States, least developed countries and countries most vulnerable to climate change. The omission to take such measures vis-à-vis industries under one’s control or

⁸ <https://www.un.org/esa/sustdev/natlinfo/indicators/indisd/english/chapt9e.htm>; <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-toxic-impacts-some-climate-change-solutions>

⁹ *South China Sea Arbitration (Philippines v. China)*, Final Award, 12 July 2016 PCA Case No 2013-19, para. 944. Similar conclusions can be drawn from the Tribunal’s analysis in Advisory Opinion of 2 April 2015, requested by the Sub-regional Fisheries Commission, Case No 21, para. 124-128, citing the Seabed Disputes Chamber in its Advisory Opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

¹⁰ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, *ITLOS Reports 2015*, para. 131; quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 79, para. 197.

jurisdiction, to make appropriate technologies more accessible and affordable to relevant countries, is, in Viet Nam’s view, equivalent to non-compliance with the due diligence obligation under UNCLOS.

Accordingly, States are under due diligence obligations, corresponding to their historical contribution to the harm caused by the accumulation and concentration of anthropogenic greenhouse gas emissions as a result of centuries of industrialization and the present pace of emissions, to ensure that activities under their jurisdiction or control are conducted so as to minimize to the fullest extent anthropogenic greenhouse gas emissions and not to cause damage by anthropogenic greenhouse gas emissions to other States and their environment, or to marine areas beyond national jurisdiction.

Mr President, I now arrive at the last part of my presentation, concerning the principle of common but differentiated responsibilities (CBDR). It is Viet Nam’s position that this principle should imperatively be taken into account in the consideration and determination of the respective obligations of States Parties to UNCLOS in the protection and preservation of the marine environment from deleterious impacts caused by anthropogenic greenhouse gas emissions.

According to generally accepted definitions, the principle of common but differentiated responsibilities “entails that while pursuing a common goal [...], States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake.”¹¹

In accordance with article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, in the process of interpretation of any treaty, “[t]here shall be taken into account, together with the context”, “any relevant rules of international law applicable in the relations between the parties.” In Viet Nam’s view, the principle of CBDR is a relevant rule of international law applicable in the relations between the parties to UNCLOS. The principle satisfies the requirements set out in article 31(3)(c), namely, (1) it is a rule of international law; and (2) it is relevant and applicable in the relations between the parties to UNCLOS.

First, the principle of CBDR is a rule of international law. Indeed, the principle of common but differentiated responsibilities is reflected in several treaties. It is enshrined in article 3(2) of the United Nations Framework Convention on Climate Change (UNFCCC), article 10 of the Kyoto Protocol, the Preamble and article 2(2) of the Paris Agreement, to name just a few. It has been noted in that respect that “[w]ithin the climate change regime, the concept of common but differentiated responsibilities qualifies as a legally binding principle given its explicit inclusion in [the relevant] instruments.”¹²

Second, it is applicable in the relations between the Parties. At the time of the present proceedings, the UNFCCC, the Kyoto Protocol and the Paris Agreement have achieved *quasi* universal participation. The vast majority of the Parties to UNCLOS are also parties to these instruments. Therefore, the CBDR principle is applicable in the relations between almost all States Parties to UNCLOS.

Third, the CBDR principle is a relevant rule of international law. This principle underpins all treaties dealing with anthropogenic greenhouse gas emissions and therefore must be considered “relevant” in the determination of the obligations of States in the protection and preservation of the environment, including the marine environment, from the deleterious impacts caused by anthropogenic greenhouse gas emissions.

Mr President, members of the Tribunal, that brings me to the end of my presentation today. Let me sum up the main points of Viet Nam’s argumentation.

¹¹ E. Hey and S. Paulini, “Common but Differentiated Responsibilities”, MPEPIL (<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568>).

¹² *Ibid.*

First, it is the view of Viet Nam that the Tribunal has jurisdiction to give the advisory opinion requested by COSIS and there are no compelling reasons for the Tribunal to decline the exercise of such jurisdiction.

Second, anthropogenic greenhouse gas emissions meet the criteria to be a source of pollution to the marine environment due to their nature and deleterious effects on the marine environment. Viet Nam, as a low-lying coastal State, is fully conscious of this.

Third, due diligence obligations to prevent, reduce and control pollution of the marine environment under Part XII of UNCLOS apply to anthropogenic greenhouse gas emissions.

Fourth, obligations of States Parties to UNCLOS in the protection and preservation of the marine environment from deleterious impacts caused by anthropogenic greenhouse gas emissions must be determined in light of the principle of common but differentiated responsibilities.

Mr President, members of the Tribunal, with these conclusions, I complete the oral statement of Viet Nam. I thank you for your kind attention.

THE PRESIDENT: Thank you, Ms Hanh.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3 p.m. when we will hear an oral statement from the Pacific Community. The sitting is now closed.

(Lunch adjournment)

PUBLIC SITTING HELD ON 20 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCIOLLO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

INTERGOVERNMENTAL ORGANIZATIONS

Pacific Community (SPC)

Ms Rhonda Robinson, Director, SPC Geoscience, Energy and Maritime Division

Ms Kathy Jetñil-Kijiner, Climate Envoy

Ms Johanna Gusman, Regional Adviser, SPC Human Rights and Social Development Division

Ms Geraldine Giraudeau, Consultant, FAR Avocats

Mr Cameron Diver, Consultant, FAR Avocats

Mr Daniel Müller, Associate Counsel, FAR Avocats

Mr Rohan Nanthakumar, Special Counsel – Pasifika Program, Environmental Defenders Office

AUDIENCE PUBLIQUE TENUE LE 20 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDO, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILOLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ORGANISATIONS INTERGOUVERNEMENTALES

Communauté du Pacifique (CPS)

Mme Rhonda Robinson, directrice de la division des géosciences, de l'énergie et des affaires maritimes de la CPS

Mme Kathy Jetñil-Kijiner, émissaire pour le climat

Mme Johanna Gusman, conseillère régionale de la division des droits de l'homme et du développement social de la CPS

Mme Geraldine Giraudeau, consultante du cabinet FAR Avocats

M. Cameron Diver, consultant du cabinet FAR Avocats

M. Daniel Müller, avocat associé du cabinet FAR Avocats

M. Rohan Nanthakumar, conseil spécial – programme Pasifika, Environmental Defenders Office

THE PRESIDENT: Good afternoon. The Tribunal will continue its hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. This afternoon we will hear an oral statement from the Pacific Community.

I now invite the representative of the Pacific Community, Ms Robinson, to make her statement. You have the floor, Madam.

STATEMENT OF MS ROBINSON
PACIFIC COMMUNITY
[ITLOS/PV.23/C31/15/Rev.1, p. 1–9]

Honourable President and members of the Tribunal, it is a privilege to appear before you on behalf of the Pacific Community, also known as SPC, and present on the extraordinary need for all UNCLOS States Parties to prevent, reduce and control pollution of the marine environment as well as to protect and preserve it in the face of climate change impacts, namely: (1) ocean warming; (2) sea-level rise; and (3) ocean acidification.

I wish to congratulate the COSIS for bringing this urgent topic before the Tribunal. I also want to thank Ms Kathy Jetnil-Kijiner, Climate Envoy of the Republic of Marshall Islands (RMI), a Member State of SPC, for joining me in making this statement. As a low-lying atoll nation with specific expertise in addressing these issues, the Marshall Islands are well positioned to present to the Tribunal an atoll model produced by SPC to illustrate how sea-level rise impacts one of its islands.

My name is Rhonda Robinson, and I am the Director of SPC's Geoscience, Energy and Maritime Division based in Suva, Fiji. I lead one of SPC's largest divisions that supports Pacific countries and territories with scientific and technical solutions to address our region's greatest challenge, climate change. My experience with oceans and climate change is heavily informed from a Pacific experience, from whence I was born, have worked and lived my whole life to date, and intend to do so for its remainder.

This statement supports the COSIS request for an advisory opinion. There are no compelling reasons for you to decline to exercise your jurisdiction to provide an advisory opinion. We agree with COSIS that its request concerns a legal question that falls within its mandate. We also agree with COSIS that UNCLOS obligations and other international obligations should be interpreted and applied compatibly and harmoniously.

At the outset, I wish to provide some background on the SPC and our ability to furnish information on the questions submitted by COSIS to the Tribunal.

SPC is one of the Pacific region's scientific and technical intergovernmental organizations. We work alongside and with our Pacific Island Country and Territory Members to understand and develop effective solutions to the challenges they face. In this case, the science of understanding the impacts of climate change with specific focus on ocean warming, sea-level rise, and ocean acidification and the adverse impacts these have on our coastal communities is core to the capabilities of SPC. We do not represent the voice of any one sovereign State, but instead are the collective science capability for and alongside our region.

Our mandate and work programme addresses the many facets of climate change and its impacts on our region, including but not limited to, marine ecosystems, including fisheries,¹

¹ Note that, under the United Nations Convention on the Law of the Sea (UNCLOS), fishing is singled out among the legitimate uses of the sea that are negatively affected by pollution ("*pollution of the marine environment means 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*

coastal hazards and human rights protections.² We have expertise in global and regional analyses of the impacts of climate change on the marine environment. Additionally, SPC is the regional lead for the implementation of many climate change mitigation and adaptation programmes, including on sea-level rise as well as loss and damage. We also sustainably manage Pacific maritime zones, ecosystems and resources from “ridge to reef” for current and future generations.³

SPC is grateful for the Tribunal’s invitation to participate in these proceedings. By doing so, you have paved the way for those who are the most affected by the deleterious impacts of climate change on the marine environment to provide their input on how best to protect and preserve it.

The key takeaway from SPC’s oral statement is simply this: We hope to assist the Tribunal by providing a *regional perspective* on the best available science on ocean warming, sea-level rise and ocean acidification; *and what it really means for our people and our communities*. We will demonstrate, with supporting science and modelling, the existential reality the Pacific is facing now and will continue to face with increasing frequency and intensity into the future.

We embrace the views of many participants in these advisory proceedings that anthropogenic greenhouse gas emissions qualify as “pollution of the marine environment” within the meaning of UNCLOS.⁴

The best available science, alongside existing obligations under international environmental and human rights law,⁵ is necessary to interpret States’ obligations under UNCLOS. The best available science shows us greenhouse gas is already causing damage, increasing our ocean temperatures, increasing sea-level rise and increasing ocean acidification. This best available science confirms the urgency for States to keep warming below 1.5°C to 2°C by rapidly curbing fossil-fuel greenhouse gas emissions.⁶

This reality requires concrete action from the international community. Scientists, including SPC’s own, have long sounded the warning bell on the tremendous implications that climate change will exert on our society, and Pacific leaders have heard this call.

The 2021 Pacific Island Forum Leaders Ocean Statement commits urgent action to reduce and prevent the irreversible impacts of climate change on our ocean, reiterating that climate change is the single greatest threat to the livelihoods, security and well-being of peoples of the Blue Pacific.⁷ It calls on Pacific Rim countries to expeditiously implement relevant

sea, impairment of quality for use of sea water and reduction of amenities”), UNCLOS, 10 December 1982, 1833 United Nations Treaties Series (U.N.T.S.) 397 (entered into force 1 November 1994) at Article 1(1)(4).

² For The Pacific Community (SPC) mandate, *see* Article IV, §§ 6-10, of the Canberra Agreement establishing the South Pacific Commission (U.N.T.S., vol. 97, p. 227).

³ For the full range of SPC’s implementation for mitigation and adaptation programming, *see* Pacific Community Strategic Plan 2022-2031 (available at: <https://www.spc.int/strategic-plan>).

⁴ UNCLOS, *supra* note 1.

⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force on 27 January 1980) at Article 31(3)(c).

⁶ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2022 (also available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf). *See also*, International Energy Agency (IEA), *Fossil Fuel Consumption Subsidies 2022*, Paris 2023 (available at: <http://www.iea.org/reports/fossil-fuels-consumption-subsidies-2022>). Noting the immediate need to halt subsidies towards fossil fuel supply, new unabated coal plants, new oil and gas fields and new coal mines.

⁷ *See Pacific Islands Forum Leaders Ocean Statement 2021* (available at: <http://www.forumsec.org/2021/03/22/pacific-islands-forum-leaders-ocean-statement-2020-21>), reaffirming commitments to Vemöore Declaration: Commitments to Nature Conservation Action in the Pacific Islands region, 2021 – 2025; 2019 Kainaki II Declaration for Urgent Climate Change Action Now; 2018 Boe Declaration for Regional Security; 2016 Pohnpei Ocean Statement: A Course to Sustainability; and 2014 Palau Declaration on

measures to prevent and effectively manage marine pollution in accordance with international law, including meeting or exceeding nationally determined contributions, formulating mid-century low emissions development strategies in 2020 and may include commitment and strategies to achieve net zero carbon by 2050.⁸

This “radical ambition” shown in the Pacific must be matched, especially given the pressing climate change science related to ocean warming, sea-level rise and ocean acidification.

Let me first begin with ocean warming. As outlined in SPC’s written statement, ocean warming caused by climate change is a threat that significantly affects pelagic and coastal fisheries, coral reef systems and other coastal changes. Additionally, as has been mentioned many times during this hearing, the capacity of the Pacific Ocean – the world’s largest ocean – to absorb carbon dioxide and excess heat is immense. Without healthy oceans this vital function is jeopardized.⁹

Pacific countries and territories manage over 10 per cent of the world’s ocean and 20 per cent of the global marine jurisdictions under our Exclusive Economic Zones (EEZs),¹⁰ demonstrating the existential threat we face whilst also underlying the region’s responsibilities to protect the ocean for future generations.

For the past 30 years, the rate of ocean warming has more than doubled. This is attributed to human-caused climate drivers. By 2100, the ocean will take up to two to four times more heat than between 1970 and the present if global warming is limited to 2°C, and up to five to seven times more at higher emissions.¹¹ Warm-water coral reefs are forced to endure extreme temperatures, with marine heatwaves already resulting in large-scale coral bleaching at disturbingly increasing frequency.¹²

Globally, marine heatwaves have doubled and become longer-lasting, more intense, more extensive and are projected to worsen. Worldwide, almost all warm-water coral reefs are projected to suffer significant losses even if global warming is limited to 1.5°C.¹³

The Ocean: Life and Future and regional policy instruments: 2010 Framework for Pacific Oceanscape; 2002 Pacific Islands Regional Ocean Framework for Integrated Strategic Action Policy; the Pacific Islands Framework for Nature Conservation and Protected Areas, 2021 – 2025; Regional Action Plan: Marine Litter; Cleaner Pacific 2025 Strategy; Framework for Pacific Regionalism; Framework for Resilient Development in the Pacific; and Regional Roadmap for Sustainable Pacific Fisheries.

⁸ *Id.* at 4. See also 2050 Strategy for the Blue Pacific Continent / Pacific Islands Forum Secretariat. Suva, Fiji: Pacific Islands Forum Secretariat, 2022, at 10.

⁹ See, e.g., UN Climate Action, *The ocean – the world’s greatest ally against climate change* (available at <http://www.un.org/en/climatechange/science/climate-issues/ocean>).

¹⁰ Powers M, Begg Z, Smith G and Miles E (2019). Lessons from the Pacific Ocean Portal: Building Pacific Island Capacity to Interpret, Apply, and Communicate Ocean Information. *Front. Mar. Sci.* 6:476. doi: 10.3389/fmars.2019.00476. See also, The Pacific Community (SPC) Geoscience, Energy and Maritime Division’s Oceans & Maritime programme data (available at <http://gem.spc.int/key-work/oceans-maritime-programme>). For example, the surface of the EEZ for Tuvalu is 27,000 times its land area.

¹¹ IPCC, 2019: *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, 755 pp. <https://doi.org/10.1017/9781009157964>

¹² See NOAA Coral Reef Watch Dataset, Pacific Environment Data Portal, Secretariat of the Pacific Regional Environmental Programme (SPREP), released 21 July 2021 (modified 11 February 2022) (available at: <http://pacific-data.sprep.org/dataset/noaa-coral-reef-watch>).

¹³ Hoegh-Guldberg, O., D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K.L. Ebi, F. Engelbrecht, J. Guiot, Y. Hijikata, S. Mehrotra, A. Payne, S.I. Seneviratne, A. Thomas, R. Warren, and G. Zhou, 2018: *Impacts of 1.5°C Global Warming on Natural and Human Systems*. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R.

Perhaps one of the most well-documented adverse effects of ocean warming is on fish and fisheries. The scarcity of natural resources and limited private sector development in the Pacific makes the tuna industry vital to island economies. With the islands spread over almost 20 million square kilometres of ocean, our oceans are our largest natural resource contributing to Pacific economies through revenues from fishing licenses,¹⁴ amongst other things.

If emissions continue to rise throughout the twenty-first century (highest baseline emissions scenario), we will see by 2050 a redistribution of tuna. As they shift east, the local decline in tuna fish means they will move from coastal States' EEZs to the high seas or international waters. This results in an annual loss of revenue from fishing access fees that is upwards of USD \$90 million.¹⁵ It is also worth noting that approximately 55 per cent of the world's tuna landings come from the Western and Central Pacific waters.¹⁶

Therefore, the economic impact on Pacific communities is unsustainable. Almost half (47 per cent) of Pacific households list “fishing” as either a primary or secondary source of income.¹⁷ Additionally, Pacific Island national fish consumption is between three to four times the global average.¹⁸ If lower-emission scenarios can be achieved, it provides sustainable pathways for tuna-dependent Pacific Islands economies.

Shifting to coastal fisheries, the decline in warm-water coral reefs is projected to significantly increase risks on seafood security and pose threats to nutritional health on the communities that rely on them as food sources.¹⁹ Given the limited agricultural abilities of atoll island States (that is, poor soil, limited and livestock diversity), the right to food cannot be met without sustainable fisheries that are reliant on a healthy marine environment.²⁰ Food is at the heart of Pacific identities, cultures and economies.

Another major concern with ocean warming is its direct effects on sea-level rise. *Sea-level rise constitutes an existential threat to our region.* As is elaborated in our written statement and will be further developed by my colleague from the Marshall Islands, the rate of global mean sea-level rise has doubled in the last century and is expected to accelerate between

Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.], Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 175-312. <https://doi.org/10.1017/9781009157940.005>.

¹⁴ J. D. Bell et al., “Pathways to sustaining tuna-dependent Pacific Island economies during climate change”, *Nature Sustainability*, Vol. 4, 2021, p. 900-910 (‘could reduce total annual fishing access fees earned by the ten Pacific SIDS by an average of US\$90 million (range = –US\$40 million to –US\$140 million) per year compared with the average annual revenue.’) (available at: <https://www.nature.com/articles/s41893-021-00745-z>).

¹⁵ *Id.* at 901. Additionally, recent review work across SPC's 22 member countries and territories has highlighted that the volume of fishery production between 2007 and 2021 increased by 20.3 per cent (*Id.*), denoting further importance of fisheries as significant income generation in the Pacific.

¹⁶ S. R. Hare et al., The western and central Pacific tuna fishery: 2021 overview and status of stocks. Tuna Fisheries Assessment Report no. 22, Pacific Community, Noumea, 2022 (available at: <https://purl.org/spc/digilib/doc/8izba>).

¹⁷ H. Seidel and P. N. Lal, Economic value of the Pacific Ocean to the Pacific Island Countries and Territories, IUCN, Gland, 2010 (available at: https://www.iucn.org/sites/default/files/import/downloads/economic_value_of_the_pacific_ocean_to_the_pacific_island_countries_and_territories_p.pdf).

¹⁸ South Pacific Regional Environment Programme (SPREP), Pacific Fisheries: General Overview, Economic Opportunity (available at: <https://library.sprep.org/sites/default/files/pacific-fisheries-general-overview.pdf>)

¹⁹ The new song for coastal fisheries – pathways for change: The Noumea strategy (a regional strategy that was approved by the ninth SPC Heads of Fisheries Meeting, held in Noumea, New Caledonia in March 2015, and the 93rd Official Forum Fisheries Committee (FFC) Meeting, held in Funafuti, Tuvalu, in May 2015. It was endorsed by the 11th Ministerial FFC Meeting, held in Funafuti, Tuvalu, in July 2015) states that fish is the main source of animal protein for Pacific Island nations; (‘Amongst rural populations, 50–90 per cent of the animal-sourced protein consumed comes from fish.’) *Id.* at 1. Supporting arguments can be found in SPC's Fisheries, Aquaculture and Marine Ecosystems Division Policy Brief on Gender and human rights in coastal fisheries and aquaculture law (available at: [SPC Policy Brief #36: Gender and human rights in coastal fisheries and aquaculture law - SPC Policy Brief #36 \(windows.net\)](https://www.spc.int/sites/default/files/2022-03/SPC_Policy_Brief_#36_Gender_and_human_rights_in_coastal_fisheries_and_aquaculture_law_-_SPC_Policy_Brief_#36_(windows.net).pdf)).

²⁰ *Id.* at 3.

four and ten times by 2100.²¹ This is having enormous impacts on the marine environment and our communities and will continue to with increasing frequency and intensity.

Coastal communities in the Pacific have been significantly affected by the range of ocean-related climate impacts, where most of the population live on low-lying coastal lands.²² The impacts of sea-level rise have forced many communities to abandon their ancestral lands and relocate to safer areas, often resulting in the loss of traditional food sources, cultural heritage, identity, practices, traditional knowledge, social cohesion, as well as economic stability and security.²³ The displacement of these communities poses significant human rights challenges.²⁴ We consider that an appropriate response to this threat can only be achieved if the experience of those who are the most impacted is prioritized over those who are less immediately and urgently impacted.²⁵

Sea-level rise caused by climate change is both a direct harm as well as a threat multiplier to our region.²⁶ We acknowledge that action to address the threat of sea-level rise must come from the international community collectively. Echoing our friends from the African Union,²⁷ collective State action to reduce the quantity of continued greenhouse gas emissions within their jurisdiction and control will likewise control the rate of increase of marine pollution and, in turn, better protect and preserve the marine environment.

Finally, regarding ocean acidification, in line with the most recent IPCC Report, SPC contends that ocean acidification is set to increase in this century at rates dependent on the future of GHG emissions. There is scientific consensus that the ocean has taken up between

²¹ IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva, Switzerland, 2014 (also available at: https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf). *See also*, the following relevant information from SPC written submission: The combined effect of mean and extreme sea levels will result in events which are rare in the historical context (once every 100 years) occurring yearly at some locations by the middle of this century under all emission scenarios. For Pacific Islands, the mean sea level rise is compounded by the vertical submergence of the islands themselves, along with changes in weather systems such as increased tropical cyclone intensities and large swell events. Already, across the region, the number of days with coastal inundation have increased by more than 500 per cent due to sea level rise.

²² *See, e.g.*, the Pacific coral atoll nations of Tokelau, Tuvalu, Kiribati, and Marshall Islands. With the ocean area exceeding arable land area, there is a great need to focus efforts to sustain our ocean resources, particularly for atoll nations.

²³ *See, e.g.*, Pearson, J., Jackson, G., McNamara, K.E., n.d. Climate-driven losses to Indigenous and local knowledge and cultural heritage. *Anthr. Rev. See also, Perkiss, S., Moerman, L., 2018. A dispute in the making: A critical examination of displacement, climate change and the Pacific Islands. Account. Audit. Account. J. 31, 166–192. https://doi.org/10.1108/AAAJ-06-2016-2582.* Establishing that changes in habitats and rising sea levels will lead to the displacement of fishing communities, either by flooding of homes, or changing ocean conditions rendering fishing grounds unusable or unrecognisable. Both would cause a loss of traditional knowledge and cultural identity relating to fishing practices used and historical, emotional, and family ties to traditional fishing grounds and sea areas.

²⁴ *See generally*, Perkiss, S., Moerman, L., 2018. A dispute in the making: A critical examination of displacement, climate change and the Pacific Islands. *Account. Audit. Account. J. 31, 166–192. https://doi.org/10.1108/AAAJ-06-2016-2582.* SPC believes that consultation with such overburdened communities is necessary via a people-centred approach.

²⁵ This is in line with the well-established principle in international environmental law of common but differentiated responsibilities and respective capabilities considering different national circumstances and is fundamental to the concept of equity. *See* Christina Voigt et al., *Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5:2 *Transnational Environmental Law* 285 (2016) at 303.

²⁶ Additionally, through our work, we know that this type of environmental stress has distinct impacts on women and social groups with intersecting identities that can further exacerbate inequalities, poverty, and how communities cope with such realities. Compounding this, the growing pressure on food security often disproportionately falls on women.

²⁷ Written Statement by The African Union, paras 215, 219; *see, generally*, paras. 211-221.

20 to 30 per cent of total anthropogenic carbon dioxide emissions since the 1980s.²⁸ Continued carbon uptake by the ocean by 2100 is virtually certain to exacerbate ocean acidification.²⁹ Ocean acidification has the potential to adversely affect food production, including shellfish, aquaculture and fisheries, as well as negatively impact coral reef ecosystems. The capacity of oceans to absorb carbon dioxide will also be diminished under higher warming scenarios.³⁰

Despite these warnings, the impacts of ocean acidification caused by increased carbon dioxide and greenhouse gas emissions are not properly reflected in global climate change responses to protect and preserve the marine environment, including curbing the harms specifically enumerated within UNCLOS. This risks the well-functioning of marine ecosystems and increases risks to the coastal communities that live in and surround them. Furthermore, the lack of concrete strategies to address ocean acidification by international instruments makes UNCLOS provisions and the work of the Tribunal more significant.

The Pacific has responded to what the science is telling us. Despite the Pacific’s best efforts to adapt with the limited resources we have, communities continue to suffer loss and damage and fear for the future of our children to enjoy the marine environment in the same way as their ancestors. Regardless, Pacific Islands remain resolute and are amongst the most ambitious to lead by example. Our youth are defiant against being written off as the orphans of climate change. They are pushing for greater accountability from those in power, including on international tribunals such as this, because they recognize that without laws that rise to the level of the threat their generation faces, any prospect of a clean and healthy marine environment will be lost.

Pacific leaders have worked hard to develop several regional instruments recognizing climate change as an existential crisis for the region and adopting approaches and policies to combat it. For example, in 2021, the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise represents our region’s good faith interpretation of UNCLOS, noting that the relationship between climate change-related sea-level rise and maritime zones was not foreseen or considered by the drafters of UNCLOS.³¹

Last year, the 2050 Strategy for a Blue Pacific Continent was endorsed by Pacific Island Forum Leaders. This strategy reinforces implementation of agreed measures that proactively, collectively and in a culturally appropriate manner address climate change and various current and future impacts, including, relevantly, sea-level rise and ocean acidification.³²

These initiatives are significant. But they alone are not enough to ensure the protection and preservation of the marine environment. We need *all States* to do their part, and the clarification provided by the Tribunal via this advisory opinion will be of central importance in this regard.

I want to bring it back to the communities and the people themselves. In the Pacific, there is a distinctive connection between “people” and the “environment”, such that one cannot simply detach from the other. They are an ecosystem; they are one and the same.³³ The Pacific

²⁸ *Supra* note 11 at 5.2.2.3. (*Explaining* that open ocean surface pH has declined by a very likely range of 0.017-0.027 pH units per decade since the late 1980s, with the decline in surface ocean pH very likely to have already emerged from background natural variability for more than 95 per cent of the ocean surface area.).

²⁹ *Id.*

³⁰ *Id.* (*Discussing* that open ocean surface pH is projected to decrease by around 0.3 pH by 2081-2100, relative to 2006-2015. To put this in perspective, a drop in pH of 0.3 to 0.4 represents more than a 150 per cent increase in the acidity levels of the ocean.).

³¹ See Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea Level Rise, 2021 (available at: <http://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones>).

³² See the Pacific Island Forum 2050 Strategy for the Blue Pacific Continent (available at: <https://www.forumsec.org/wp-content/uploads/2022/08/PIFS-2050-Strategy-Blue-Pacific-Continent-WEB-5Aug2022.pdf>) at 25.

³³ See, e.g., in Samoan: *fanua*; in Fijian: *vanua*.

relationship with the marine environment as stewards of ecological systems and associated traditional knowledge, custom and subsistence-living have sustained our people for hundreds of thousands of years. Advisory proceedings like this give voice to some of the most climate change-susceptible communities in our low-lying atoll nations, articulating the threat they are experiencing on the frontlines to the impacts of climate change.³⁴

These impacts impose significant hardship on the people who interact with *and rely on* the coastal and marine environment daily for their basic needs. As has been recognized by the International Court of Justice, “the environment [...] represents the living space, the quality of life and the very health of human beings, including generations unborn.”³⁵ This is already manifesting across the Pacific. These observations are consistent with using a human-rights based approach to help communities most adversely affected.³⁶

Thus, the scope and content of obligations to prevent, reduce and control pollution of the marine environment, and to protect and preserve it, must be considered harmoniously with the rights of people and communities to enjoy their rights, including to a *clean and healthy marine environment*.

The present opportunity. The Tribunal has the greatest mandate to address legal questions concerning the marine environment because the interpretation and application of UNCLOS in this regard is *paramount* to regulating all ocean space, its uses, its resources and their ripple effect on Pacific people.

In conclusion, as you prepare this advisory opinion, take note of the science, lived experience and knowledge specific to the historic custodians and ongoing stewards of our global marine environment. Learn from the thousands of years of indigenous care for our ocean environment and biodiversity and how we are using our collaborative cultural approaches to lead on climate issues via regional law and policy. Take heed of the urgency with which the international community must act, not just for Pacific peoples but for Indigenous custodians globally and humanity collectively. Use your authority to provide an advisory opinion that explains how UNCLOS *truly* is protective of the marine environment.

I will now preserve the remainder of the SPC’s time to our Member State and representative from the Republic of the Marshall Islands, who will continue to elaborate on the issue of sea-level rise and its impact on coastal communities of the Marshall Islands. I kindly request that you invite my colleague Ms Jetñil-Kijiner to make her statement. *Vinaka vakalevu* and thank you.

THE PRESIDENT: Thank you, Ms Robinson.

I now give the floor to Ms Jetñil-Kijiner to make her statement. You have the floor, Madam.

³⁴ Commonly voiced concerns include food and water security, coastal erosion, and the disproportionate impact on women, girls, and children.

³⁵ International Court of Justice (ICJ), *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at page 241, paragraph 29.

³⁶ *See, e.g.*, Pedro Arrojo Agudo (Special Rapporteur on the human rights to safe drinking water and sanitation), Special thematic report on climate change and the human rights to water and sanitation (Part I: Outlining the impacts of climate change on the human rights to water and sanitation around the world, Part II: The impacts of climate change on the human rights to water and sanitation of groups and population in situations of vulnerability, Part III: A rights-based approach to adaptation, mitigation, finance, and cooperation), Jan. and Mar. 2022. *See also*, generally, Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd).

STATEMENT OF MS JETÑIL-KIJINER
PACIFIC COMMUNITY
[ITLOS/PV.23/C31/15/Rev.1, p. 9–13]

Honourable President and members of the Tribunal, my name is Kathy Jetnil-Kijiner and I serve as Climate Envoy for the Republic of the Marshall Islands Government. The Marshall Islands are located here, in the Northern Pacific Region.

The questions before the Tribunal concern prevention of marine pollution and protection of the marine environment, including from the deleterious impacts of sea-level rise. I would like to focus your attention on the integrated impact of sea-level rise and inundation on my community. The severity of these impacts cannot be overstated. I wish to use this time to elaborate on what the science means to the Marshall Islands, to my community and to me personally.

We are at a point in time where it is still possible to change the reality that faces our Pacific peoples by immediately reducing greenhouse gas emissions that pollute the marine environment. Models like the one I will share with you today demonstrate the reality and prediction based on the best available science, reiterating the importance of States' obligations to prevent marine pollution and to protect and preserve the marine environment, and that they must act on these urgently. If we do not act with sufficient urgency and ambition within this decade – within these next seven years – our people will suffer for thousands of years.¹

This atoll or coral island that you are seeing is the atoll of Majuro, a type of coral island in the form of a ring known as the barrier reef, with a very low altitude and housing a lagoon.² The Marshall Islands is an atoll nation that is only two meters above the sea level with no mountains and no higher grounds. This is my home. It is the capital of the Marshall Islands, one of 64 islands spread across approximately 1.9 million kilometres squared of ocean space.³

Our main population lives on this island you see and most live in the narrow areas of Delap, Uliga and Djarrit. This is where I live. However, I will focus on the widest part of our island known as Laura. Keep that in mind when I take you through the realities we are facing now and what the science shows us into the future.

This is an issue of time and temperature: we need the time to adapt, and we need the temperature to slow its upward trend to reduce the loss of my home.⁴

This is the area of Laura, the widest part of the atoll of Majuro.

The freshwater lens shows the extent of groundwater in this area. In atoll and low-lying islands, freshwater lens is a thin layer of water under the island sitting on top of the salt water. The amount of freshwater, or the thickness of the lens, depends on many factors such as rainwater, how the water is managed and how it is being extracted for community use. In the case of Majuro, this lens supports more than 23,182 people living in Majuro. This area is home

¹ See IPCC AR6 WGII, *Summary for Policy Makers* D.5 ('Societal choices and actions implemented in the next decade determine the extent to which medium and long-term pathways will deliver higher or lower climate resilient development (high confidence)'); and *Summary for Policy Makers* D.5.3 ('[a]ny further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence)') at 35.

² See generally, the Geoscience, Energy, and Maritime Division's modelling website for atoll specific data (available at: <https://opm.gem.spc.int/prep/home>).

³ Access to this full data set can be found on SPC's modelling website (available at: <https://opm.gem.spc.int/prep/home>). This dashboard was developed under the Pacific Resilience Programme II Project. The portal provides home for gridded and geospatial data produced by the project. See also, the Majuro atoll map from SPC modelling (available at: <https://landscapeknowledge.net/majuro-atoll-map/>). We have also linked via QR code on the presentation page.

⁴ See Verbatim Record, Oral Statement by Hon. Kausea Natano for Tuvalu, ITLOS/PV.23/C31/1, page 14 at 29-30.

to approximately 2,500 of those people.⁵ This water is piped to treatment plants for community access and is the largest and only freshwater lens on the island.

The freshwater lens area is important, as it supports our food and water security. You can see the yellow circles are how the system is monitored to check for salinity levels. This is done to ensure the lens is managed effectively to reduce the risk of overextraction of the thin layer of freshwater.

What happens when we use world-class science to model both hazard and disaster risk before any sea-level rise impact and then compare this with incremental human-induced sea-level rise? As you can see in this slide here is a thin blue line around the edge of the area of Laura. Around the edge of the atoll are homes, infrastructures, such as schools and hospitals, and you can also see this area, in the middle, is where there is significant farming area which provides food security for the communities in this area.

This model is made up of high-resolution LiDAR elevation data, a remote sensing method that uses light from a pulsed laser to measure ranges of variable distances to the Earth and is used to examine its surfaces. LiDAR data is combined with the inundation risk based on SPC modelling to predict the implications and risk of extreme sea-flooding events, without the addition of sea-level rise. This model and the science that has gone into it is more than three decades of scientific work in the Laura area.

This modelling shows an inundation event or a storm surge.⁶ You can see even without sea-level rise, the surrounding areas are still vulnerable to a relatively small wave inundation event. For example, the red buildings shown here denote the school, hospital and church. In scientific terms, this kind of event would be expected to happen every 10 years based on pre-sea-level rise impacts that we are already witnessing at home.⁷

If we use the same science in a scenario – that's the marling – without the addition of sea-level rise projections, this slide shows what a disaster event caused by wave inundation would look like. This shows an event that would be expected to occur every 100 years. Clearly, this is a significant event for our communities, even without the addition of any sea-level rise.

So, what happens if we add small amounts of sea-level rise? As I stated before, this is a time and temperature issue because without the time to better prepare and without action to slow the oncoming impact of human-induced sea-level rise, these disaster events become extreme sea-level rise events for our people.

In this slide, what you are now seeing is modelling that shows 25 centimetres of sea-level rise. The modelling is then developed to see how an event that would be expected to occur every 10 years behaves. As you can see, adding only 25 centimetres takes what was a minor wave inundation event and turns it into an extreme sea-level rise event.

Based on the science, the addition of 25 centimeters of sea-level rise is expected to occur between 2050 and 2060.⁸

⁵ Economic Policy Planning and Statistics Office of the Republic of the Marshall Islands, Population and Housing Census 2021 (PHC 2021), version 01 of the licensed datasets (March2023), provided by the Pacific Data Hub – Microdata Library (available at: <https://microdata.pacificdata.org/index.php/home>) Furthermore, the population of the RMI is 53,158 persons (2011 Census), with Majuro and Kwajalein (largely Ebeye) currently accounting for three-quarters of the country's population.

⁶ *Supra* note 11.

⁷ *Id.*

⁸ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2022 (also available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf). Projection scenarios used in this presentation are based on the Shared Socioeconomic Pathways (SSPs) from the latest IPCC report. SSPs include changes in human behaviour and policy and are considered more representative of potential climate futures.

To give you contrast, the picture on the left is the modelling of what a wave inundation event would have looked like before we had any impact at all of climate-induced sea-level rise; this would be expected to occur every 10 years. As you can see, there is coastal impact but it's minor. On the right is the same wave inundation modelling if you model it with 25 centimetres of sea-level rise – a tiny increase smaller than the size of a standard ruler takes what was a standard wave inundation event and makes it an extreme event for our people. This shows the reality that events that are normally occurring are intensified and become more extreme and more frequent.

This is why anthropogenic impacts and the need to slow the pace at which the sea is rising by rapidly decarbonizing our globe will give us more time to prepare for the oncoming extreme events we will expect to see in the coming decades for our future generations.

Moving further into what these scenarios could become for our communities. This model you see in front of you is what my country will face at 50 centimetres of sea-level rise, which is expected to occur if we continue with the current trajectory within this century.⁹ Again, this is about time and temperature, as this scenario shows that adding just 50 centimetres of sea-level rise generates an extreme event every 10 years. You will also note that what is expected to happen every 10 years is as serious as what was expected to happen every one in 100 years *without the addition of sea-level rise projections*.

What was a minor event without any sea-level rise is now a major event with salt water in our food area and seeping into our freshwater lens. This event you see means salt water is our food crops. Salt water is in our freshwater. Communities are displaced and affected by waves and homes are inundated with salt water. This scenario is tipping point for our people, and we know this.

This is the point we, as a country, know that we must look at extreme adaptation measures to protect our home or make unprecedented choices such as relocation of our capital to other islands – a decision we are being forced to make due to the existential impact of this external threat of climate induced sea-level rise.

The Marshalls is already planning for a 50-centimetre sea-level rise scenario in 70-90 years – when my 9-year-old daughter is an adult – which means we are already planning for this reality. Through our National Adaptation Plan, we are looking at extreme adaptation measures, which includes elevating parts of our islands, as well as internal relocation, from different islands to another.

The final scenario I want to show you is modelled to 1 metre of sea-level rise. What you see on your screen shows that every 10 years our home will be completely inundated by extreme sea-level rise threats if sea-level rise reached 1 metre. The science has yet to determine how long it takes for our food crops to recover from the salt. We do not know how long it takes for our freshwater to regenerate after being polluted with salt water. But we do know that if we continue the current course of greenhouse gas emissions, that this puts our livelihoods and people at risk. This reality requires the slowing down of the current trajectory we are on as a global community.

What does this mean for me, my children, and my grandchildren? This image is an example of what extreme events look like. We only have one road on our island home. This is that road after an extreme inundation event in 2019. What the model shows is that events like this will happen with increased frequency and intensity as sea-level rise continues.

In community consultations across every island, community members have made observations of sea-level rise, as well as additional factors such as drought and high

⁹ International Organisation for Migration, Jo-Jikum, Marshall Islands Conservation Society, The University of Melbourne and Women United Together Marshall Islands, 2023. *My heritage is here: Report on Consultations with Communities in the Marshall in Support of the Development of the National Adaptation Plan*.

temperatures of heat.¹⁰ As you can see, sea-level rise has been witnessed at the community level; so, sea-level rise impacts not only for the specific site of Laura, but also for our entire country. And this does violence to our innate connection to the marine environment on which our culture and livelihoods rely.

That is why we need the global community to act. Not just for us but for our entire planet, as we may be one of the first witnessing these impacts, but we won't be the last.

All States are obliged to prevent marine pollution and protect the marine environment under UNCLOS. Those obligations are significant for the future of the Marshall Islands, my community, my family.

Your advisory opinion will provide much needed clarity about the scope and extent of those obligations, and this can guide all States Parties to ensure that the extreme scenarios in the model I have shown you do NOT become the reality for Pacific peoples.

Vinaka vakalevu. Thank you.

THE PRESIDENT: Thank you, Ms Jetūil-Kijiner.

This brings us to the end of this afternoon's sitting. The Tribunal will sit again tomorrow morning at 10 a.m., when it will hear oral statements made on behalf of Comoros, the Democratic Republic of The Congo and the International Union for Conservation of Nature and Natural Resources. The sitting is now closed.

(Sitting closed)

¹⁰ *Supra* note 45.

PUBLIC SITTING HELD ON 21 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

STATES PARTIES

Comoros

H.E. Youssouf Mondoha Assoumani, Ambassador of the Union of Comoros to the Federal Republic of Ethiopia and Permanent Representative to the African Union, Head of delegation

Katherine Connolly, Senior Managing Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor of the Supreme Court of New South Wales

Professor Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels; Professor at Maastricht University, Department of International and European Law; Member of the Brussels Bar – A list

Iain Sandford, Partner, Sidley Austin LLP, Geneva; Barrister and Solicitor of the High Court of Australia, the Supreme Court of the Australian Capital Territory and the High Court of New Zealand

Adetola Adebessin, Trainee Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor of the Supreme Court of Nigeria, Counsel

Nicolas J.S. Lockhart, Partner, Sidley Austin LLP, Geneva; Solicitor (Scotland), Counsel

Deepak Raju, Senior Managing Associate, Sidley Austin LLP, Geneva; Solicitor (England and Wales), Advocate (Maharashtra and Goa, India), Counsel

Rebecca Walker, Trainee Associate, Sidley Austin LLP, Geneva, Counsel

Pauline de Bilbao, PhD Student, Université Jean Moulin Lyon 3, Counsel

Olivier Nouwagnon Afogo, Student, Université Jean Moulin Lyon 3, Counsel

Democratic Republic of the Congo

Mr Ivon Mingashang, Professor of International Law, Law Faculty, University of Kinshasa; member of the International Law Commission; member, Kinshasa/Gombe Bar

Mr Jean-Paul Segihobe Bigira, Professor of International Law, Department of Public International Law and International Relations, Law Faculty, University of Kinshasa; Member of Parliament; member, Kinshasa/Gombe Bar

Mr Nicolas Angelet, Professor of International Law, Université libre de Bruxelles; member, Brussels Bar

Mr Sylvain Lumu Mbaya, Professor of International Law, Law Faculty, University of Kinshasa; Judge at the Constitutional Court of the DRC

Mr Martin Mulumba Tshitoko, Professor, Law Faculty, University of Kinshasa; Chief Adviser to the Head of State for Legal and Administrative Affairs; member, Kinshasa-Matete Bar

- Mr François Habiyaremye Muhashy Kayagwe, Professor, University of Goma; researcher at the Royal Belgian Institute of Natural Sciences; specialist in applied natural sciences and ecodevelopment; full member of the Congolese Academy of Sciences (ACCOS)
- Mr Ezéchiél Amani Cirimwami, Professor of International Law, Law Faculty, University of Kinshasa; researcher, Max Planck Institute Luxemburg for Procedural Law
- Mr Blaise Ndombe, Magistrate and Legal Assistant to the Chief of Staff to the President of the Republic, Head of State
- Mr Honoré Mitshiabo Tshitenge, Deputy Chief of Staff to the Minister of State, Minister of Justice and Keeper of the Seals; member, Kinshasa/Gombe Bar
- Mr Jean-Paul Mwanza Kambongo, Head of Studies, Law Faculty, University of Kinshasa; researcher, Centre for Studies in International Dispute Settlement in Africa (CERDIA); member, Kinshasa/Gombe Bar
- Mr Glodie Kinsemi Malambu, Assistant, Centre for Research in the Humanities (CRESH); member, Kongo-Central Bar
- Ms Grâce Ngoy Ilunga, Assistant, Centre for Research in the Humanities (CRESH); member of the Kinshasa/Matete Bar
- Ms Marta Duch Giménez, Assistant, Université catholique de Louvain; member, Brussels Bar

INTERGOVERNMENTAL ORGANIZATIONS

International Union for Conservation of Nature (IUCN)

- Ms Christina Voigt, Chair, IUCN World Commission on Environmental Law (WCEL); Co-Chair, Paris Agreement Implementation and Compliance Committee; Professor, Department of Public and International Law, University of Oslo
- Ms Cymie R. Payne, Chair, IUCN-WCEL Ocean Law Specialist Group; Associate Professor, Rutgers University, New Jersey
- Ms Tara Davenport, Assistant Professor, Faculty of Law, National University of Singapore (NUS); Co-Head, Oceans Law and Policy Programme, Centre for International Law, Singapore

AUDIENCE PUBLIQUE TENUE LE 21 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ÉTATS PARTIES

Comores

S.E. Youssouf Mondoha Assoumani, Ambassadeur de l'Union des Comores auprès de la République fédérale démocratique d'Éthiopie et Représentant permanent auprès de l'Union africaine, Chef de délégation

Katherine Connolly, collaboratrice gestionnaire principale, cabinet Sidley Austin LLP, Genève ; *barrister* et *solicitor* à la Cour suprême de la Nouvelle-Galles du Sud

Professor Dominic Coppens, collaborateur gestionnaire principal, cabinet Sidley Austin LLP, Bruxelles ; professeur à l'Université de Maastricht au département de droit international et européen ; membre du barreau de Bruxelles (liste A)

Iain Sandford, associé, cabinet Sidley Austin LLP, Genève ; *barrister* et *solicitor* à la Haute Cour d'Australie, à la Cour suprême du Territoire de la capitale australienne et à la Haute Cour de Nouvelle Zélande

Adetola Adebesehin, collaborateur stagiaire, Sidley Austin LLP, Genève ; *barrister* et *solicitor* à la Cour suprême du Nigéria, conseil

Nicolas J.S. Lockhart, partenaire, Sidley Austin LLP, Genève ; *solicitor* (Écosse), conseil

Deepak Raju, collaborateur principal, Sidley Austin LLP, Genève ; *solicitor* (Angleterre et Pays de Galles), avocat (Maharashtra et Goa, Inde) ; conseil

Rebecca Walker, collaborateur stagiaire, Sidley Austin LLP, Genève ; conseil

Pauline de Bilbao, doctorante, Université Jean Moulin Lyon 3 ; conseil

Olivier Nouwagnon Afogo, étudiant, Université Jean Moulin Lyon 3 ; conseil

République démocratique du Congo

M. Ivon Mingashang, professeur de droit international à la faculté de droit de l'Université de Kinshasa ; membre de la Commission du droit international ; avocat au barreau de Kinshasa/Gombe

M. Jean-Paul Segihobe Bigira, professeur de droit international au département de droit international public et relations internationales de la faculté de droit de l'Université de Kinshasa ; député national de la RDC ; avocat au barreau de Kinshasa/Gombe

M. Nicolas Angelet, professeur de droit international à l'Université libre de Bruxelles ; avocat au barreau de Bruxelles

M. Sylvain Lumu Mbaya, professeur de droit international à la faculté de droit de l'Université de Kinshasa ; juge à la Cour constitutionnelle de la RDC

- M. Martin Mulumba Tshitoko, professeur à la faculté de droit de l'Université de Kinshasa ; conseiller principal du Chef de l'État en charge des questions juridiques et administratives ; avocat au barreau de Kinshasa-Matete
- M. François Habiyaemye Muhashy Kayagwe, professeur à l'Université de Goma ; chercheur à l'Institut royal des sciences naturelles de Belgique ; spécialiste des sciences naturelles appliquées et de l'éco-développement ; membre titulaire de l'Académie congolaise des sciences (ACCOS)
- M. Ezéchiél Amani Cirimwami, professeur de droit international à la faculté de droit de l'Université de Kinshasa ; chercheur à l'Institut Max Planck de droit procédural de Luxembourg
- M. Blaise Ndombe, magistrat et assistant juridique du directeur de cabinet du Président de la République et Chef de l'État
- M. Honoré Mitshiabo Tshitenge, directeur de cabinet adjoint du Ministre d'État, Ministre de la justice et Garde des sceaux ; avocat au barreau de Kinshasa/Gombe
- M. Jean-Paul Mwanza Kambongo, chef de travaux à la faculté de droit de l'Université de Kinshasa ; chercheur au Centre d'études en règlement des différends internationaux en Afrique (CERDIA) ; avocat au barreau de Kinshasa/Gombe
- M. Glodie Kinsemi Malambu, assistant au Centre de recherche en sciences humaines (CRESH) ; avocat au barreau du Kongo-Central
- Mme Grâce Ngoy Ilunga, assistante au Centre de recherche en sciences humaines (CRESH) ; avocate au barreau de Kinshasa/Matete
- Mme Marta Duch Giménez, assistante à l'Université catholique de Louvain ; avocate au barreau de Bruxelles

ORGANISATIONS INTERGOUVERNEMENTALES

Union internationale pour la conservation de la nature (UICN)

- Mme Christina Voigt, présidente de la Commission mondiale du droit de l'environnement (CMDE) de l'UICN ; coprésidente du Comité chargé de la mise en œuvre et du respect des dispositions de l'Accord de Paris ; professeure au département du droit public et international de l'Université d'Oslo
- Mme Cymie R. Payne, directrice du groupe spécialisé dans le droit de la mer du CMDE de l'UICN ; professeure associée à la Rutgers University du New Jersey
- Mme Tara Davenport, maîtresse de conférences à la Faculté de droit de l'Université nationale de Singapour ; codirectrice du programme de droit de la mer et de politique des océans au Centre du droit international de Singapour

THE PRESIDENT: Good morning. Today the Tribunal will continue the hearing in the *Request for an Advisory Opinion Submitted by the Commission of Small Island States and International Law*.

This morning we will hear oral statements from the Union of Comoros, the Democratic Republic of Congo and the International Union for the Conservation of Nature and Natural Resources.

I now invite the representative of Comoros, Mr Assoumani, to make his statement. You have the floor, Sir.

EXPOSÉ DE M. ASSOUMANI
COMORES

[TIDM/PV.23/A31/16/Rev.1, p. 1–5]

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, j'ai l'honneur de comparaître devant vous en qualité de représentant de l'Union des Comores dans le cadre de cette instance. Les Comores assurent la présidence de l'Union africaine. Je commencerai donc par noter que les Comores souscrivent à la position de l'Union africaine telle qu'exprimée dans ses observations écrites.

L'instance dont vous êtes saisis revêt une importance fondamentale pour les Comores. En juin de cette année, les Comores se sont jointes à dix autres États insulaires et côtiers africains pour adopter la déclaration de Moroni pour l'action océanique et climatique en Afrique¹ et, il y a tout juste deux semaines, notre dirigeant africain était parmi les dirigeants africains qui ont adopté la Déclaration de Nairobi sur le changement climatique et l'appel à l'action².

La Déclaration de Moroni a souligné que les États insulaires et côtiers africains, comme les Comores, « affrontent de manière extrême l'impact des crises et de la perte de biodiversité, du changement climatique et de la dégradation des zones côtières, y compris les impacts sur l'océan ». Elle a affirmé la nécessité de « préserver l'écosystème marin et côtier sensible et interconnecté ». Pour relever les défis extrêmes, la déclaration de Moroni a lancé un processus, connu sous le nom de « Processus de Moroni pour l'action sur les océans et le climat en Afrique et les spécificités des États insulaires d'Afrique ».

En poursuivant le processus de Moroni, les Comores sont conscientes des obligations de tous les États Parties à la Convention des Nations Unies sur le droit de la mer concernant la protection et la préservation du milieu marin. Ces obligations sont essentielles pour faire face à la crise du changement climatique, à ses impacts sur l'océan, et pour sauvegarder les écosystèmes marins et côtiers sensibles, y compris pour les États insulaires africains. Les Comores, ainsi que l'Union africaine et d'autres États africains participant à cette procédure, et, en effet, pratiquement tous les autres États et organisations participants, reconnaissent que des obligations spécifiques découlent de la partie XII de la Convention lorsqu'elles sont confrontées au défi du changement climatique.

Les Comores accueillent favorablement la demande formulée devant le Tribunal par COSIS portant sur l'articulation et les obligations spécifiques. Les Comores exhortent

¹ Déclaration de Moroni pour une action en faveur de l'océan et du climat en Afrique (14 juin 2023), disponible ici : <https://www.commissionoceanindien.org/wp-content/uploads/2023/06/Declaration-fr-1.pdf> (français) et https://www.iucn.org/sites/default/files/2023-06/moroni-declaration-great-blue-wall_june-2023_0.pdf (anglais).

² Déclaration de Nairobi sur le changement climatique et l'appel à l'action (6 septembre 2023), disponible ici : https://www.afdb.org/sites/default/files/2023/09/08/french_declaration_union_africaine-sommet_africain_sur_le_climat.pdf (français) et https://au.int/sites/default/files/decisions/43124-Nairobi_Declaration_06092023.pdf (anglais).

respectueusement le Tribunal à se saisir de cette occasion pour aider à diriger les efforts mondiaux, d'une manière qui tienne compte des spécificités des petits États insulaires, en particulier ceux d'Afrique.

Afin d'aider le Tribunal dans cette tâche importante, les Comores présenteront une série de développements sur les questions pertinentes.

Les Comores – État africain, petit État insulaire et État en voie de développement – entretiennent des relations historiques, culturelles et économiques très étroites avec la mer. Je poursuivrai donc cette déclaration dans un instant en expliquant l'impact dévastateur du changement climatique sur les Comores.

Je demanderai également ensuite au Tribunal de donner la parole à M. Iain Sandford, qui abordera certaines des problématiques juridiques pertinentes au stade où le Tribunal devra considérer l'étendue de ses missions. M. Sandford abordera la pertinence d'autres règles de droit international, en particulier celles du régime climatique, pour répondre aux questions relatives aux obligations spécifiques de la Convention sur le droit de la mer en matière d'impacts climatiques.

Ensuite, je demanderai au Tribunal de donner la parole à M. Dominic Coppens, qui répondra à la première question posée par COSIS, puis à Mme Katherine Connolly, qui répondra à la deuxième question posée par COSIS.

Enfin, avec la permission du Tribunal, je retournerai à la tribune pour décrire l'action entreprise par les Comores pour faire face à l'impact dévastateur du changement climatique tout en poursuivant de manière ambitieuse les objectifs de développement durable. Ensuite, je conclurai la déclaration des Comores.

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, les Comores sont un petit État insulaire en voie de développement qui entretient depuis longtemps des relations historiques, culturelles et économiques étroites avec la mer.

Notre peuple a des liens historiques et culturels significatifs avec l'océan Indien, et les îles ont traditionnellement joué un rôle clé dans la riche histoire du commerce et des échanges dans l'océan Indien. Les secteurs liés aux ressources naturelles, à savoir l'agriculture, la pêche, la sylviculture, représentent près de la moitié de l'activité économique mesurée aux Comores.

Avec un revenu national brut annuel par habitant de 1 610 dollars américains³, notre pays est confronté à d'importants défis en matière de développement. Le changement climatique, cependant, risque d'empêcher nos objectifs de développement ambitieux, y compris les efforts visant à développer une économie bleue basée sur l'utilisation durable des ressources marines et les fruits du milieu marin.

En effet, l'Union des Comores est confrontée à certaines des conséquences les plus profondes du changement climatique résultant des émissions excessives de dioxyde de carbone et d'autres gaz à effet de serre dans le monde. La vulnérabilité des Comores aux effets directs du changement climatique résulte de leur situation géographique et de leurs caractéristiques archipélagiques.

Les Comores sont un archipel de quatre îles volcaniques situées dans l'océan Indien, avec une superficie cumulée au moins de 2 500 kilomètres carrés. Le changement climatique a un impact sur notre pays d'au moins deux façons.

Premièrement, le changement climatique expose les Comores à une augmentation des variations des précipitations annuelles, à une hausse des températures, à des changements dans les saisons, ainsi qu'à une augmentation de la fréquence et de la gravité des risques climatiques, notamment les cyclones tropicaux. Deuxièmement, les Comores sont également vulnérables à l'élévation du niveau de la mer, qui entraîne l'intrusion d'eau salée et l'érosion côtière.

³ Données ouvertes de la Banque Mondiale, disponibles ici : <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=KM>.

En ce qui concerne le *premier* de ces impacts, le Programme des Nations Unies pour le développement prévoit que d'ici 2090, les Comores pourraient connaître une baisse de 47 % des précipitations de saison sèche par rapport au niveau d'aujourd'hui⁴. Les conditions météorologiques extrêmes devraient être plus fréquentes et plus intenses, notamment les cyclones tropicaux, les sécheresses et les inondations⁵.

Jusqu'à 80 % des habitants des Comores sont de petits agriculteurs qui dépendent des cultures pluviales⁶. Les changements de température et de pluviométrie, ainsi que les saisons sèches prolongées, les inondations et l'érosion qui en résultent, ont un impact sur la production alimentaire et la gestion des ressources en eau. Le changement climatique nuit considérablement à l'agriculture et au potentiel économique aux Comores.

En ce qui concerne le *deuxième* impact, l'élévation du niveau de la mer constitue déjà une grave menace pour les Comores. Ne serait-ce qu'il y a trois jours, un tsunami extraordinaire sous-marin a fait bouger toute la région côtière. Cela montre encore à nouveau les effets du changement climatique.

Les Comores estiment que dans les 20 prochaines années, plus de 90 % des plages sur la Grande Comore, c'est-à-dire la grande île, pourraient disparaître⁷, et la poursuite de l'élévation du niveau de la mer et l'intrusion d'eau salée devraient entraîner la perte de 734 hectares de zones côtières de faible altitude sur les îles⁸.

Avec 65 % de la population qui devrait vivre dans les zones côtières et les terres basses d'ici 2050⁹, notre pays est extrêmement vulnérable à la poursuite de l'élévation du niveau de la mer. L'élévation du niveau de la mer s'accompagne d'une augmentation des ondes de tempête, des cyclones et des dommages causés par les inondations dues aux tremblements de terre, ce qui expose les populations côtières à un risque important de déplacement.

Les infrastructures et les actifs fixés associés sont, et continueront d'être, endommagés par ces augmentations. Les projections estiment à 400 millions de dollars américains le coût de la destruction des infrastructures côtières directement causée par le changement climatique¹⁰.

Monsieur le Président, Mesdames et Messieurs les membres du Tribunal, l'impact du changement climatique est sévère et les Comores sont, malheureusement, « en première ligne » de la crise climatique.

La délégation des Comores se tourne maintenant vers les enjeux juridiques dont le Tribunal devra se saisir.

⁴ Programme des Nations Unies pour le développement – Projet d'adaptation aux changements climatiques (assurer des ressources en eau durables et résilientes pour les Comores). Disponible ici : <https://www.adaptation-undp.org/projects/Comoros-water-GCF> (en anglais).

⁵ S'adapter aux changements climatiques aux Comores, disponible ici : <https://stateofgreen.com/en/solutions/adapting-to-climate-change-in-the-comoros/#:~:text=By%202090%2C%20the%20dry%20season,dependent%20on%20rain%2Dfed%20crops> (en anglais).

⁶ Programme des Nations Unies pour l'environnement – Les Comores, Adaptation basée sur les écosystèmes (2017 - 2022), disponible ici :

<https://wedocs.unep.org/bitstream/handle/20.500.11822/28424/ComorosEba.pdf?sequence=5> (en anglais). Voir également, Global Center on Adaptation, « This Vanilla Bourbon Producer is Fighting Hunger and Driving Climate Adaptation in the Comoros », 21 mars 2023, disponible ici : <https://gca.org/this-vanilla-bourbon-producer-is-fighting-hunger-and-driving-climate-adaptation-in-the-comoros/#:~:text=This%20means%20that%20Comorians%2C%2070,this%20Small%20Island%20Developing%20State> (en anglais).

⁷ Union des Comores, Programme d'action national d'adaptation aux changements climatiques (PANA), disponible ici : https://www.preventionweb.net/files/21866_15604panacomores1.pdf.

⁸ Ibid, p. 31.

⁹ Union des Comores, CCNUCC, Communication nationale initiale, décembre 2002, disponible ici : <https://unfccc.int/sites/default/files/resource/comnc1.pdf>.

¹⁰ Union des Comores, CCNUCC, Communication nationale initiale, décembre 2002, disponible ici : <https://unfccc.int/sites/default/files/resource/comnc1.pdf>.

Les Comores exhortent le Tribunal à s'emparer de l'opportunité de répondre aux questions soulevées par COSIS. Pour les raisons exposées par l'Union africaine dans ses observations écrites, les Comores sont en accord avec la position que le Tribunal jouit d'une compétence consultative¹¹. Les Comores considèrent aussi qu'il n'y a aucune justification probante qui permettrait au Tribunal de décliner d'exercer cette compétence au cas présent. Au contraire, il y a des éléments probants pour que le Tribunal se déclare compétent. La menace existentielle que pose le changement climatique au milieu marin et aux petits États insulaires, tels que les Comores, exige du Tribunal qu'il exerce sa compétence et qu'il clarifie les obligations spécifiques qu'ont les États Parties à la Convention sur le droit de la mer, et ce, afin de pallier cette menace sans précédent.

Je vous remercie de votre attention, Monsieur le Président, et vous demande la permission de céder la parole d'abord, comme je l'avais dit au début, à M. Sandford, puis à M. Coppens et à Mme Connolly pour qu'ils présentent les parties juridiques restantes de la déclaration des Comores.

THE PRESIDENT: Thank you, Mr Assoumani.

I now invite Mr Sandford to make his statement. You have the floor, Sir.

¹¹ Exposé écrit de l'Union africaine, par. 65-86.

STATEMENT OF MR SANDFORD
 COMOROS
 [ITLOS/PV.23/C31/16/Rev.1, p. 4–7]

Mr President, distinguished members of the Tribunal, the rules of international law concerning the marine environment in the Convention are not the only rules of international law bearing upon the global challenge of climate change. It is appropriate, therefore, to offer a few comments on the relationship between the UNCLOS and the international climate change regime.

These proceedings focus upon the questions presented to the Tribunal by COSIS.

Those questions ask the Tribunal to identify “the specific obligations of States Parties to the [UNCLOS]” in connection with certain matters concerning the impact of climate change on the marine environment. In answering these questions, Comoros considers that such specific obligations are to be identified within the four corners of the UNCLOS. In other words, the UNCLOS is the applicable law in the present proceedings.

Nevertheless, the UNCLOS does not exist in a vacuum; it is part of a broader framework of international law, which includes rules that bear upon how States must respond to climate change impacts.

As work of the International Law Commission explains, in international law, there is a “strong presumption against normative conflict” between regimes.¹ In practical terms, this means that it is incumbent upon treaty interpreters to read treaty provisions harmoniously with other international norms, where possible. Indeed, the provisions of the UNCLOS express openness to other rules of international law, accommodating them through provisions including articles 197, 207, 212, 213, 237, and 293. In interpreting the UNCLOS to identify specific obligations in respect of climate change, the Tribunal must be conscious of the relationship between the UNCLOS and other areas of international law.

Of particular relevance in the present proceedings is the international climate regime, which consists primarily of the UN Framework Convention on Climate Change and the Paris Agreement. Although the international climate regime is not the applicable law in these proceedings, its rules are nevertheless important considerations in the Tribunal’s interpretation of the UNCLOS.

Specifically, this regime must be “taken into account” by the Tribunal when interpreting the relevant UNCLOS provisions. This is because the regime constitutes “relevant rules of international law applicable in the relations between the parties” in the sense of article 31(3)(c) of the Vienna Convention on the Law of Treaties. The rules of the international climate regime are evidently “relevant” in these proceedings, which concern climate change impacts and the marine environment. Moreover, the parties to the treaties of the climate regime are virtually all parties to the UNCLOS.

An interpretive approach that gives effect to the principle of systemic integration reflected in article 31(3)(c) is particularly important in the present proceedings because many of the specific obligations under the UNCLOS that arise in respect of climate change are *collective* obligations.

Later in this statement, when addressing the two questions before the Tribunal, Comoros will argue, as has the African Union,² that the burden of fulfilling these collective obligations needs to be apportioned appropriately among States Parties. The rules of the climate regime inform the interpretation of the UNCLOS provisions in this regard.

¹ International Law Commission, “Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law”, Report of the Study Group of the International Law Commission (UN Doc. A/CN.4/L.682), 13 April 2006 (“ILC Fragmentation Report”), para. 37.

² African Union’s written statement, paras. 232-234, 256.

Specifically, a central tenet of the international climate regime is recognition of the common, i.e., collective, but *differentiated* responsibilities of States with respect to climate change, and recognition that the respective capabilities of States to address climate change through mitigation or adaptation measures varies. This concept is often referred to through the term “common but differentiated responsibilities and respective capabilities”, or “CBDR-RC”.

In elaborating the specific obligations of States Parties under Part XII of the UNCLOS in respect of climate change, the Tribunal must take account of this central tenet of the international climate regime. Specifically, collective obligations are apportioned to States taking CBDR into account. Comoros will discuss exactly how this is relevant, when discussing the interpretation of articles 192 and 194 of the UNCLOS later in this statement.

Of course, taking the international climate regime into account in the interpretation of the obligations under the UNCLOS does not require a reading that subsumes or replaces UNCLOS obligations with those of the international climate regime. In other words, compliance with the rules of the climate regime does not exhaust the obligations of States Parties under the UNCLOS.

Comoros notes that some of the participants’ written statements effectively take the position that the climate regime does exhaust the UNCLOS obligations.³ They suggest that the international climate regime should be viewed as *lex specialis* in respect of climate change, effectively displacing the more general obligations under the UNCLOS concerning protection and preservation of the marine environment.⁴

Although Comoros affirms its commitment to the requirements of the international climate regime, Comoros does not agree that its rules displace or exhaust States’ UNCLOS obligations. The *lex specialis* rule applies where competing norms are in conflict, and where one norm is more specific than the other.⁵ However, there is no conflict or incompatibility between the UNCLOS and the international climate regime.

The climate regime is focused on atmospheric emissions and an atmospheric temperature goal, and does not deal specifically with the marine environment. By contrast, the UNCLOS has a number of provisions in Part XII that address protection and preservation of the marine environment, through both general obligations and more detailed requirements in relation to particular environmental challenges like marine pollution. In this way, the respective rules of the international climate regime and the UNCLOS overlap. However, the climate change regime does not displace the obligations of States Parties under the UNCLOS.

As the Tribunal heard in the oral statement of COSIS earlier in this hearing, the relationship between the UNCLOS and the climate regime is one of “complementarity and mutual supportiveness”.⁶

This complementary and supportive relationship is confirmed by the express text of the UNCLOS. Paragraph 1 of article 207 and paragraph 1 of article 212 require UNCLOS Parties to take into account external “international rules”, such as those of the international climate regime, for the protection and preservation of the marine environment.

At the same time, when compliance with those “international rules” does not discharge the relevant UNCLOS obligations in their entirety, paragraph 2 of article 207 and paragraph 2 of article 212 expressly contemplate that UNCLOS Parties shall take “other action as may be necessary”, i.e., action that goes beyond what is contemplated by the other international rules.

³ See for example, India’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 16-17, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf last accessed 18 September 2023.

⁴ Ibid.

⁵ ILC Fragmentation Report, p. 19.

⁶ ITLOS public sitting held on Monday, 11 September 2023, at 3 p.m., Hamburg. Verbatim Record, p. 30. 35–37.

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Mr President, the position that the law of the sea co-exists and operates harmoniously with other branches of international law is orthodox and should not be controversial. A treaty interpreter should not be quick to presume that non-UNCLOS rules conflict with or displace the UNCLOS.

Mr President, distinguished members, thank you for your attention. Mr President, I ask you to request my colleague, Dr Coppens, to take the floor to present the views of Comoros on the first question posed in the COSIS request.

THE PRESIDENT: Thank you, Mr Sandford.

I now invite Mr Coppens to make its statement. You have the floor, Sir.

STATEMENT OF MR COPPENS
COMOROS
[ITLOS/PV.23/C31/16/Rev.1, p. 7–11]

Mr President, distinguished members of the Tribunal, Comoros will now consider the first question.

Now, in this question the Tribunal is invited to identify the specific obligations of States Parties to the Convention to “prevent, reduce and control pollution of the marine environment” in relation to the deleterious effects resulting from climate change.

The formulation of this question reflects that of article 194(1) of the Convention and, thus, the Tribunal should interpret this provision in the specific context of climate change. Now within this context, what “specific obligations” fall to States?

There is broad consensus between the participants that the prerequisites for the application of article 194 are met and that the obligations flowing from that are applicable to the instant proceedings, and Comoros shares this point of view.

By emitting greenhouse gases, humans indirectly introduce carbon dioxide, in other words a substance, and heat, that’s energy, into the marine environment, which causes adverse effects. This corresponds to the definition of pollution of the marine environment within the meaning of article 1(1)(4) of the Convention. So the obligations contained in article 194 are applicable.

Looking now at the obligations provided under article 194, Comoros notes that this provision uses three verbs, all of which invoke the need to take action and describe what States Parties must do in terms of marine pollution: prevent, reduce and control.

Comoros shares the opinion of the African Union¹ and other participants,² that these three verbs impose distinct and cumulative obligations on States Parties. Mr President, deciding otherwise would deny the letter of article 194 and be contrary to the rules of treaty interpretation.

These obligations apply within the context of climate change in at least three ways.

First, States Parties have the collective obligation to take all measures necessary to reduce emissions significantly and urgently.

Second, States Parties must collectively and immediately reduce emissions to levels compatible with the Paris goal in terms of temperature, namely, 1.5°C, and must go even further, by continuing to reduce emissions.

Third, when apportioning these collective obligations between different States, developed States must shoulder the major part of the responsibilities for emission reduction.

Mr President, the first of these obligations is evident. As we have already explained, anthropogenic emissions of greenhouse gases have led to marine pollution, so prevention, reduction and control of this pollution cannot be achieved without a significant and urgent reduction of emissions. As such, States Parties collectively have the specific obligation to take all measures necessary to significantly and urgently reduce their emissions.

So the question is to what extent must they collectively reduce their emissions?

Participants presented different points of view on this core question. Some participants maintain that States Parties are in compliance with their obligations under article 194 if they reduce their emissions to levels compatible with the temperature goal of the Paris Agreement. Comoros shares this opinion that there is an obligation to achieve the 1.5°C Paris goal. However, that in itself would not suffice to extinguish this obligation.

¹ Written statement of the African Union, paras. 165, 222.

² The written statement of the Democratic Republic of the Congo notes that “these obligations are differentiated and also entail the adoption of distinct measures,” para. 192.

As Comoros explained earlier, the international climate change regime coexists and functions in harmony with the Convention. Nevertheless, this regime does not replace, and has never been intended to replace, the obligations flowing from the Convention regarding pollution of the marine environment.

Within the framework of the Paris Agreement, parties collectively agree to hold the global temperature increase to well below 2°C and to pursue efforts to limit temperature increase to 1.5°C. The objective of 1.5°C reflects the consensus that harm would be significantly more serious at 2°C than at 1.5°C, and at the same time the level of marine pollution would also be significantly much worse at 2°C than at 1.5°C.

If States meet the 1.5°C goal, that will lead to a certain level of “control” over marine pollution, consistent with article 194. Thus, article 194 obliges States Parties to comply with this collective obligation. The Paris Agreement also represents an “internationally agreed standard” which States Parties to the Convention must take into account when they take measures to prevent, reduce and control pollution under article 207(1) and article 212(1).

However, merely taking into account the obligations of the Paris Agreement and its 1.5°C goal does not exhaust obligations under article 194. Indeed, article 194 requires States Parties not only to control marine pollution, but also that they prevent and reduce this pollution. Furthermore, article 207(2) and article 212(2) expressly provide that even if internationally agreed standards exist, States Parties must “take other measures as may be necessary to prevent, reduce and control” this pollution.

Now as the African Union has explained,³ if the Paris temperature goal is met, States Parties will still continue to emit large quantities of greenhouse gases at levels which will continue to cause significant harm to the marine environment. The accumulated pollution of the marine environment will continue to worsen day by day.

Even today, as we appear before you, with temperature increases well below the 1.5°C, the world’s oceans and countries such as Comoros are subject to significant damage, such as the destruction of the coastline. And, as UNEP warns, on the basis of IPCC models, “the risks and projected adverse impacts from climate change will escalate with every increment of global warming”.⁴

To allow marine pollution and the resulting significant harm to continue, and even to increase daily, does not meet the obligation to “prevent” and to “reduce” marine pollution. Accordingly, Comoros echoes the standpoint of the African Union, which is of the opinion that States Parties must collectively take all measures necessary to reduce emissions to levels which no longer cause harm to the marine environment.

In examining what measures are “necessary” to meet the due diligence obligation under article 194, Comoros recall that “due diligence” is a “variable concept” which may “change over time” and “in relation to the risks involved”.⁵ Consequently, “measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.”⁶

Mr President, distinguished members of the Tribunal, in taking the floor today – with the current state of scientific and technological knowledge – we know that, as African leaders said early this month, “climate change is the single greatest challenge facing humanity and the single biggest threat to all life on Earth.”⁷ Comoros requests the Tribunal, in defining the

³ Written statement of the African Union, paras. 222-231.

⁴ Written statement of UNEP, para. 30.

⁵ ITLOS, Advisory Opinion of 1 February 2011, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case No. 17, para. 117.

⁶ *Ibidem*.

⁷ Nairobi Declaration, 6 September 2023, para. 7.

required level of due diligence, to take into account the seriousness and urgency of the situation and to express the obligations of States Parties in appropriate terms.

In the coming decades, our children and grandchildren will read the Tribunal’s judgment – a judgment which will for them be of the highest significance. They will look upon the knowledge we have today at our disposal and they will likely expect to read that, in 2023, it wasn’t considered significantly “diligent” for States Parties to continue to emit the levels which threaten the very existence of Small Island Developing States.

Confronted with the single biggest threat to humanity, States Parties must – for present and future generations – “do the utmost”⁸ to reduce emissions to levels which no longer cause harm to the marine environment.

This brings Comoros to the question of how this obligation should be apportioned amongst different States Parties. Article 194 expressly recognizes that obligations are shared between States Parties “in accordance with their capabilities”. Thus in these express terms, the obligation is both differentiated and asymmetric.

This interpretation is confirmed by the principle of common but differentiated responsibilities and respective capabilities, which is anchored in the very foundations of international environmental law.⁹ As Comoros has already explained, the obligations flowing from the Convention must be interpreted in the light of the climate change regime, and the rules of this regime must be taken into account in conformity with articles 207(1) and 212(1).

As the UN Framework Convention of Climate Change stipulates, parties have to protect the climate system “in accordance with their common but differentiated responsibilities and respective capabilities.”¹⁰ Comoros is a Small Developing Island State. The contribution of Small Island Developing States to historical cumulative emissions is virtually zero. Indeed, Comoros’s own contribution represents less than 0.0003 per cent of cumulative emissions.¹¹ It is therefore evident that, on the one hand, Comoros has a *responsibility* which is fundamentally different from that of other countries in combating emissions-based marine pollution, and, on the other hand, Comoros has significantly different capabilities compared to other countries to combat this pollution.

The differentiated and asymmetric nature of the obligation provided in article 194 is lastly confirmed by the nature of due diligence of this obligation. Within the framework a due diligence obligation, the level of such due diligence required of a State is determined according to the “means at its disposal.”¹² It is obvious that the means at the disposal of a Small Island Developing State, such as Comoros, are very different to the means at the disposal of other countries.

Mr President, in practice, that means that there is a specific obligation for developed States Parties to take on the greater part of the responsibility for emissions reductions. It is regrettable that the NDCs notified within the framework of the Paris Agreement, taken as a whole, are far from enabling the Paris goal of 1.5°C to be attained and are, thus, well below the level which would allow the pollution of the marine environment to be prevented or reduced. In order to respect and comply with the obligations flowing from article 194(1), developed

⁸ ITLOS, Advisory Opinion of 1 February 2011, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, para. 110.

⁹ Philippe Cullet, “Differentiation” in Lavanya Rajamani, Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed. (Oxford University Press, 2021), p. 325

¹⁰ Article 3(1) of the United Nations Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992.

¹¹ Our World in Data: “CO₂ and Greenhouse Gas Emissions”. Available at: <https://ourworldindata.org/co2-emissions>

¹² ICJ, Judgment of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010, p. 14, para. 101.

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States must take all measures necessary to immediately achieve significant and collective reductions of emissions at levels which would no longer cause harm to the marine environment.

I thank you for your attention. Mr President, I would now request that you call to the podium Ms Katherine Connolly. Thank you.

THE PRESIDENT: Thank you, Mr Coppins.

I now invite Ms Connolly to make her statement. You have the floor, Madam.

STATEMENT OF MS CONNOLLY

COMOROS

[ITLOS/PV.23/C31/16/Rev.1, p. 11–15]

Mr President, members of the Tribunal, Comoros now turns to the second of the two questions presented to the Tribunal. This question concerns the specific obligations relevant for climate change that flow from the general obligation to protect and preserve the marine environment under article 192 of UNCLOS.

The obligation in article 192 applies in a broader set of circumstances than the obligation in article 194. Article 192 requires UNCLOS Parties to protect and preserve the marine environment against all types of harm. Article 194 sets out obligations of the parties with respect to a particular form of harm, namely, pollution of the marine environment.

Comoros agrees with the African Union on the meaning of the terms “protect” and “preserve” in Article 192.¹ In using those two verbs, Article 192 requires UNCLOS Parties to safeguard the marine environment from ongoing and future harm, and to maintain and improve its existing state.

Climate change is already causing significant harm to the marine environment through the absorption of carbon dioxide, leading to acidification and the absorption of heat, leading to higher sea temperatures, deoxygenation and sea-level rise. The intensification of these same phenomena threaten to severely degrade the marine environment over time. Article 192 requires States to act to address these present and future threats to the marine environment.

In particular, Comoros echoes the African Union’s observations about the heightened level of due diligence that must be employed by UNCLOS Parties in discharging the due diligence aspects of their obligations under article 192. As African leaders have recently noted, “climate change is the single greatest challenge facing humanity and the single biggest threat to all life on Earth.”²

For the marine environment, and for humanity itself, to have any chance against this unprecedented threat, States must act with the highest level of diligence to meet their obligations under article 192. As such, Comoros urges the Tribunal to express these obligations in terms that convey the sense of urgency that humanity as a whole, and small island States like Comoros in particular, currently face.

Turning to the content of the specific obligations in article 192, Comoros notes that protecting and preserving the marine environment requires urgent mitigation and adaptation actions. UNCLOS parties are obliged under article 192 to take such actions. In this respect, Comoros agrees with the African Union’s identification of specific mitigation and adaptation obligations in its written statement.³

While both mitigation and adaptation are important in the protection and preservation of the marine environment, and are thus part of the obligation in article 192, Comoros will focus, in this section, on adaptation obligations. Given that the effects of climate change are already being felt on the marine environment and pose an existential threat to Comoros and its people, Comoros wishes to emphasize the need for urgent adaptation measures.

The international community has long recognized that such measures require effective cooperation. Indeed, the importance and necessity of cooperative engagement in addressing threats to the marine environment is a cornerstone principle of the UNCLOS, reflected in numerous provisions of the Convention and related legal instruments. Two specific aspects of the obligation bear emphasis.

¹ African Union’s written statement, paras. 250-252.

² Nairobi Declaration, para. 7.

³ African Union’s written statement, paras. 260-335.

First, effective cooperation requires institutions to develop and coordinate adaptation actions at the national, regional and global level. It is only through such coordinated action that blind spots in research and suboptimal regulation can be avoided. While States have already made concerted efforts within the cooperative framework of the UNFCCC, it may be necessary for the UNCLOS States Parties to augment that framework to ensure that climate change impacts on the marine environment are adequately addressed.

The UNFCCC and the Paris Agreement are focused on stabilizing anthropogenic GHG emissions in the atmosphere. Mr President, neither instrument establishes any specific objectives or targets relating to the marine environment, as regards either mitigation or adaptation.

In Comoros' view, therefore, the specific obligation to protect and preserve the marine environment requires States to collectively consider whether existing frameworks should be reviewed to address the marine environment specifically and in more detail.

Second, the developed UNCLOS States Parties bear an obligation to deliver on their commitments under the international climate change regime regarding financial assistance, technology transfer and capacity-building. These commitments are part and parcel of the obligation to cooperate, and necessitated by the fact that the resources required to identify and adopt effective adaptation measures are heavily concentrated in developed States. It cannot be forgotten, in this regard, that developing States, including African States, have made minimal contribution to the climate crisis but face a disproportionate adaptation burden.

To this end, Comoros echoes the calls, in the African Leaders' Nairobi Declaration, for, among others, the following measures: the creation of a measurable Global Goal on Adaptation; prioritizing and mainstreaming adaptation into development policy-making and planning; and building effective inter-regional partnerships to meet the needs for financial and technical support on climate change adaptation.⁴

Most adaptation measures will occur within the territory of individual States. As such, it is the territorial State that is best placed to assess its adaptation needs and plan adaptation measures. As an island State facing urgent adaptation needs, Comoros has been proactive in identifying its own priorities. Let me offer a few of the most important examples.

First, some 70 to 80 per cent of Comoros' workforce is engaged in agriculture.⁵ This sector faces some of the most severe climate change impacts, in the form of coastal flooding, erosion and increased salinity of groundwater. For its agricultural sector to survive, Comoros requires urgent scientific research into alternative agricultural production systems, such as salt-resistant seeds. These efforts need urgent support through measures such as building sea walls, or transfer of technology capable of providing early warnings of extreme weather events.

Second, due to frequent climate disasters as well as sea-level rise, water scarcity and increased salinity of groundwater adversely affect access to drinking water.⁶ A possible solution lies in developing a climate-resilient water resource management for drinking water supply. It could take the form of setting up desalination plants and rainwater harvesting systems. Both solutions require technical expertise and increased investment.

Third, climate change has caused severe damage to Comoros' fisheries sector and to marine biodiversity. Coral reefs have already suffered more than 60 per cent bleaching due to rising sea temperatures.⁷ Comoros needs scientific resources to study the surrounding marine

⁴ Nairobi Declaration, paras. 20, 32 and 33.

⁵ Union of Comoros, National Action Programme of Adaptation to climate change (NAPA) Report, p. 19. Available here: <https://unfccc.int/resource/docs/napa/com01e.pdf>

⁶ Union of Comoros, UNFCCC - Initial National Communication On Climate Change, December 2002, pp. 7-8. Available at: https://unfccc.int/sites/default/files/resource/Comoros%20INC_Exec.%20Summary_English.pdf

⁷ *Ibid.*, p. 7.

environment to identify potential marine protected areas, and better understand what technology is required to maintain marine habitats.

These focus areas for Comoros are also focus areas for other developing and least developed nations. They intersect with specific obligations detailed in the African Union’s written statement concerning protection and preservation of the marine environment. Obligations concerning the development of technology, climate-resilient infrastructure and policies for resilient ecosystems form the *sine qua non* of any State’s efforts to enhance resilience of the marine environment as well as the human environment.

Mr President, the Tribunal should legally recognize these specific obligations as necessary to discharge States’ obligation to preserve and protect the marine environment under 192 of the UNCLOS.

While Comoros, as a coastal State, has identified these adaptation priorities for areas under its jurisdiction, it will struggle to realize them effectively without urgent assistance from other nations. These adaptation measures require financing estimated at a minimum of EUR 399 million.⁸ That is a significant sum for a small island developing nation. That burden should not rest solely on a State which has contributed 0.0003 per cent to global greenhouse gas emissions but bears a disproportionate share of the existential threat posed by climate change.⁹

In this context Comoros reiterates the particular importance of the specific obligation, described in the African Union’s written statement,¹⁰ that developed countries make good on their commitment under the international climate regime to provide financial assistance, technology transfers and capacity-building to developing countries, including in respect of adaptation.

This obligation is firmly rooted in the UNCLOS. Article 197 of the UNCLOS requires UNCLOS parties to cooperate in formulating “international rules” for the protection and preservation of the marine environment. Implicit in that provision is an obligation to abide by such “international rules” once cooperatively formulated. In the context of climate change, the climate regime represents “international rules” by which UNCLOS parties must abide under article 197, and must take into account under articles 207(1) and 212(1). One of the key pillars of the international climate change regime is the principle of CBDR-RC, pursuant to which developed States have undertaken commitments to support and finance the adaptation needs of developing States.

Thank you, Mr President. That concludes my presentation. I ask that you give the floor again to the Ambassador who will complete the statement of Comoros.

THE PRESIDENT: Thank you, Ms Connolly.

I now invite Mr Assoumani to continue his statement. You have the floor, Sir.

⁸ Nationally Determined Contribution of the Union of the Comoros (updated NDC): Rapport de synthèse 2021-2030, p. 13. Available at:

https://unfccc.int/sites/default/files/NDC/2022-06/CDN_r%C3%A9vis%C3%A9_Comores_vf.pdf (“Comoros’ NDC”).

⁹ Our World in Data: “CO₂ and Greenhouse Gas Emissions”. Available at: <https://ourworldindata.org/co2-emissions>

¹⁰ African Union’s written statement, paras. 269-275.

EXPOSÉ DE M. ASSOUMANI (suite)
 COMORES
 [TIDM/PV.23/A31/16/Rev.1, p. 16–18]

Monsieur le Président, Mesdames Messieurs les membres du Tribunal, j'ai remarqué plus tôt que, en tant que petit État insulaire africain en voie de développement, les Comores se retrouvent sur les premières lignes de la crise climatique. Pourtant, les Comores ne détiennent pratiquement aucune responsabilité pour les émissions qui sont à l'origine de ces défis. Les Comores sont l'un des plus petits contributeurs actuels aux émissions de gaz à effet de serre, et leur contribution historique aux émissions est négligeable¹.

Malgré leur responsabilité négligeable pour le réchauffement climatique, leurs besoins en matière de développement et les aspirations légitimes de leur population, les Comores ont adopté des mesures ambitieuses pour la lutte contre les effets néfastes de la crise climatique croissante.

Les Comores se sont engagées à des contributions déterminées au niveau national dans le cadre de l'Accord de Paris, selon lesquelles elles réduiront leur niveau d'émission de 23 % d'ici 2030². Elles ont mis en œuvre un large éventail de politiques visant à atteindre cet objectif visé dans le cadre de leurs contributions déterminées au niveau national de l'Accord de Paris, à savoir une réduction des émissions de 23 % et une augmentation de l'absorption de dioxyde de carbone de 47 % d'ici 2030 afin d'atteindre ces objectifs ambitieux.

Cela comprend une politique, une stratégie et un plan d'action sur le changement climatique dont l'objectif global est de faire face aux défis posés par le changement climatique, y compris la mise en œuvre d'une série de mesures d'adaptation par la prise en compte systémique des dimensions climatiques et des processus de planification afin d'empêcher le processus qui augmente la vulnérabilité.

Afin d'atteindre leurs objectifs climatiques, les Comores ont aussi mis en place un Comité national sur le changement climatique, qui est chargé de surveiller la mise en œuvre des efforts nationaux pour l'atténuation et l'adaptation ainsi que d'émettre des recommandations portant sur la lutte contre la crise climatique.

De plus, en 2020, notre pays a adopté le Plan émergent des Comores³. Le milieu marin est au cœur de ce plan. À travers ce plan, le Gouvernement de l'Union des Comores vise à atteindre un développement important, durable et équitable en prenant des mesures visant notamment à valoriser, conserver, restaurer et faire converger la biodiversité, et à protéger le milieu marin, ainsi qu'à assurer une gestion durable à l'échelle nationale.

Les Comores travaillent aussi avec des organisations internationales et des partenaires de développement afin de mettre en œuvre des mesures d'atténuation et d'adaptation pour réduire les effets du réchauffement de la planète. Par exemple, en 2022, le Gouvernement de l'Union des Comores a lancé une grande campagne de reboisement pour protéger les bassins versants et mettre en œuvre sa CDN. La campagne intitulée « Un Comorien, un arbre » vise à planter 613 000 nouveaux arbres sur 571 hectares de terres à travers le pays.

Cependant, malgré des efforts nationaux importants, il est difficile de rassembler les ressources nécessaires pour développer durablement l'économie des Comores, tout en prenant des mesures d'atténuation et d'adaptation pour faire face à la crise climatique résultant des émissions passées et présentes d'autres pays. Les Comores continuent d'éprouver des

¹ Voir H. Ritchie et M. Roser, Comoros: CO2 Country Profile, *Our World in Data*. Disponible ici : <https://ourworldindata.org/co2/country/comoros> (en anglais).

² Contribution déterminée au niveau national de l'Union des Comores (CDN actualisée) : Rapport de synthèse 2021-2030, p. 13. Disponible ici : https://unfccc.int/sites/default/files/NDC/2022-06/CDN_r%C3%A9vis%C3%A9e_Comores_vf.pdf.

³ Voir https://climate-laws.org/document/comores-emerging-plan-pce-2030_72f2.

difficultés à mobiliser des fonds pour le climat en raison de l'inégalité mondiale dans la distribution des ressources.

Les États développés parties à la Convention des Nations Unies sur le changement climatique et à l'Accord de Paris se sont engagés à financer des mesures d'atténuation et d'adaptation au changement climatique afin de préserver le milieu marin. Les États développés doivent rester fidèles à ces engagements. Tel n'a pas été le cas à ce jour. Les Comores rappellent la « grave préoccupation » formulée à nouveau l'année dernière par les parties à l'Accord de Paris, selon laquelle les pays développés ne respectent toujours pas leurs engagements financiers, et exhortent les pays développés à atteindre leurs objectifs. Comme l'ont récemment affirmé les dirigeants africains dans la déclaration de la dernière réunion qui a eu lieu à Nairobi, l'architecture financière internationale doit être repensée pour assurer une égalité entre les nations et pour promouvoir l'utilisation durable des ressources naturelles de l'Afrique, incluant ses ressources marines, tout en avançant vers un développement bas-carbone du continent et en contribuant à la décarbonisation au niveau mondial.

Pour clore cette déclaration, permettez-moi finalement de noter que je suis conscient de la présence de l'Union africaine et de certains autres États africains. Je conclus donc l'exposé des Comores en faisant écho à l'appel lancé par l'Union africaine au Tribunal pour qu'il accorde une attention particulière à la perspective africaine lorsqu'il traitera des questions qui lui sont soumises.

Au nom des Comores, de la Présidence de l'Union africaine et de ma délégation, je remercie le Tribunal pour son aimable attention.

THE PRESIDENT: Thank you, Mr Assoumani.

I now invite the representative of the Democratic Republic of Congo, Mr Mingashang, to make his statement. You have the floor, Sir.

EXPOSÉ DE M. MINGASHANG
RÉPUBLIQUE DÉMOCRATIQUE DU CONGO
[TIDM/PV.23/A31/16/Rev.1, p. 18–20]

Monsieur le Président, Mesdames et Messieurs les juges, je me sens particulièrement investi par un sentiment d'honneur et de responsabilité en me présentant devant vous ce matin. Je viens, avec l'ensemble de notre délégation, exprimer les vues de la République démocratique du Congo sur les questions fondamentales de droit international qui sont soulevées devant votre auguste Tribunal.

Il importe néanmoins de préciser, d'ores et déjà, que la RDC intervient à ce stade de procédures orales, à un moment où beaucoup de choses aussi pertinentes que percutantes, les unes que les autres, ont déjà été admirablement dites par les respectables membres de délégations qui l'ont précédée.

L'exercice auquel va donc se livrer notre délégation s'avère à tout le moins délicat. D'une part, sa tâche paraît *a priori* suffisamment allégée en ce qui concerne son devoir de démonstration. Mais, en même temps, elle se trouve paradoxalement renforcée par l'exigence de clarté et de conviction dans ses affirmations, si l'on doit éviter de tomber dans les redites.

C'est pour cette double raison que l'exposé des observations orales de la RDC sera articulé de manière particulièrement schématique. Il comportera quatre temps :

Le professeur Sylvain Lumu Mbaya prendra la parole tout juste après moi pour établir la compétence de votre Tribunal et la recevabilité de la demande d'avis qui lui a été soumise par la Commission des petits États insulaires pour le changement climatique et le droit international.

Il sera suivi par Me Jean-Paul Segihobe Bigira, qui va justifier la pertinence de l'approche interprétative systémique des dispositions pertinentes de la Convention des Nations Unies sur le droit de la mer en tant qu'elle constitue, à notre avis, une grille de lecture qui s'avère susceptible de déboucher sur une intelligibilité fonctionnelle des règles du droit international en matière des obligations des États dans le domaine de changements climatiques. Maître Nicolas Angelet prendra la parole pour traiter de certaines questions substantielles que la RDC juge essentielles, afin d'assurer le respect effectif de la Convention dans ses dispositions pertinentes applicables aux changements climatiques.

Enfin, Me Ivon Mingashang, donc moi-même, reviendra pour plaider sur la responsabilité commune mais différenciée en matière de lutte contre les changements climatiques et, du coup, présenter les remarques conclusives de la RDC.

Monsieur le Président, avant d'en arriver là, permettez-moi tout de même de circonscrire brièvement la posture morale ainsi que les motivations qui justifient l'implication de la RDC dans cette procédure.

Les considérations qui amènent la RDC devant cette instance sont de trois ordres : l'*engagement* en faveur de la cause climatique ; la *conviction morale* dictée par les enjeux d'ordre existentiel implicites à ce combat porté par la Commission des Petits États insulaires ; et l'*intérêt* en tant qu'État confronté aux désastres écologiques tragico-dramatiques causés par le phénomène de dérèglement climatique.

Le vendredi 8 septembre 2023, soit le dernier week-end avant l'ouverture des audiences, le Président de la République, M. Félix Antoine Tshisekedi Tshilombo, a officiellement annoncé à l'intention de l'opinion nationale, au cours de sa communication inaugurale du Conseil des ministres, l'ouverture de cette procédure orale.

Profitant de cette occasion, le Chef de l'État congolais a réitéré la détermination de la RDC « d'assumer, aux côtés d'autres pays partenaires notamment des bassins du Congo et de l'Amazonie engagés dans ce combat, son statut de "pays solution" en la matière, et de

capitaliser toutes les démarches et actions qui tendent au rétablissement d'une justice climatique ».

Tout ceci dans l'intérêt des générations présentes et futures.

Un tel engagement est fondé sur l'urgence qui s'impose à tous de ne pas faire l'autruche alors que des périls réels, imminents et irréversibles, menacent imperturbablement la survie de l'humanité et l'effondrement de notre civilisation commune.

Par conséquent, la RDC recommande vivement à tous les habitants de la planète la sagesse africaine qui dit que « lorsque la case du voisin brûle, il serait dangereusement naïf de rester indifférent chez soi en attendant que l'incendie atteigne sa porte ». Parce que justement, dans le cas d'espèce, les petits États insulaires ne constituent pas une case voisine, mais plutôt une des composantes de cet édifice d'ensemble qu'est l'Humanité.

Vous aurez compris, Monsieur le Président, que l'intérêt de la RDC est fondé sur la convergence entre sa situation économique-géographique et celle des petits États insulaires. En effet, nous supportons une charge disproportionnée et écrasante des effets néfastes des émissions de gaz à effet de serre, bien que notre contribution à ces émissions soit indiscutablement de très loin négligeable.

Cela étant dit, Monsieur le Président, je vous prie d'accorder la parole au professeur Sylvain Lumu Mbaya pour entamer le premier point de notre exposé. Je vous remercie.

THE PRESIDENT: Thank you, Mr Mingashang.

I now invite Mr Lumu Mbaya to make his statement. You have the floor, Sir.

EXPOSÉ DE M. LUMU MBAYA
 RÉPUBLIQUE DÉMOCRATIQUE DU CONGO
 [TIDM/PV.23/A31/16/Rev.1, p. 20–22]

Monsieur le Président, Mesdames et Messieurs les juges, c'est pour moi un honneur particulier de prendre la parole devant vous pour la toute première fois, dans le cadre de la présente procédure concernant la *Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international*, que j'appellerai dorénavant COSIS. Comme cela vient d'être dit, beaucoup de choses ont été développées dans l'exposé écrit de la République démocratique du Congo. Je viens ici insister sur l'une des questions de droit qui demeure critique à la suite de l'intervention de nombreux autres États. C'est la question de la compétence du Tribunal et des modalités de son exercice.

En vertu de l'article 21 de son Statut, le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumises conformément à la Convention et toutes les fois que cela est expressément prévu dans tout autre accord lui conférant cette compétence.

Suivant l'article 138 1) de son Règlement, le Tribunal peut donner un avis consultatif sur « une question juridique » dans la mesure où un accord international « se rapportant aux buts de la Convention » le prévoit expressément.

Il en résulte que le Tribunal peut se voir accorder une compétence consultative concernant les dispositions de droit matériel qui figurent dans un accord international autre que la Convention sur le droit de la mer. La seule condition est que cet autre accord se rapporte aux buts de la Convention. Or, si le Tribunal peut rendre un avis consultatif sur *un autre traité*, à combien plus forte raison sur la Convention même.

Ceci trouve confirmation dans l'article 21 du Statut, dont la formulation est englobante : le Tribunal est compétent pour « toutes les demandes », « toutes les fois » que cela est prévu dans « tout autre accord ».

De nombreux États et organisations ont d'ailleurs fermement appuyé la demande de la COSIS, en raison de son importance vitale – au sens propre du terme – compte tenu de la nature et des effets des changements climatiques, et du rôle joué par le milieu marin. Ceci justifie que le Tribunal exerce sa compétence de manière pleine et entière.

Néanmoins, certains États ont émis des restrictions, des nuances ou des appels à la prudence, que ce soit sur la portée de la compétence du Tribunal ou sur les modalités de son exercice dans le cas d'espèce.

Quelques-uns d'entre eux, non-membres de la COSIS, ont appelé à la prudence sous l'angle du consentement, ou même du défaut de celui-ci. La Nouvelle-Zélande met en exergue le fait que la réponse du Tribunal pourra avoir un impact important sur les États Parties à la Convention qui ne sont pas membres de la Commission. Le Royaume-Uni, qui estime que le consentement des États est fondamental pour la compétence des cours et tribunaux internationaux, fait observer que la demande de la COSIS serait portée, selon lui, par un très petit nombre d'États, et que lui-même et une série d'autres États n'ont pas consenti à un aspect quelconque de celle-ci, qui vise pourtant les obligations de tous les États Parties à la Convention.

Monsieur le Président, Mesdames et Messieurs les juges, la République démocratique du Congo ne partage pas ce raisonnement.

C'est pour cela qu'elle vous prie de constater, lorsque vous allez vous retirer pour juger de votre compétence, qu'un avis consultatif peut toujours être demandé par un nombre limité d'États seulement, parties à une convention internationale, alors même que la demande concerne par définition tous les États parties. Ainsi, selon l'article 159 10) de la Convention, un quart des membres de l'Assemblée de l'Autorité internationale des fonds marins peut demander un avis consultatif, et ce alors même que la demande suspend le vote au sein de

l'Assemblée. Il n'en va pas autrement des avis consultatifs qui peuvent être demandés par le Conseil de sécurité ou l'Assemblée générale des Nations Unies.

C'est le caractère consultatif de la procédure et le caractère non obligatoire des avis qui justifient qu'un avis puisse être rendu sans le consentement de tous les États parties au traité concerné. La Cour internationale de Justice a pu rendre un avis consultatif sur les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, alors qu'Israël n'acceptait pas sa compétence et qu'elle ne pourrait pas être saisie d'un différend avec Israël sur cette même question.

Cette conclusion s'impose d'autant plus en l'espèce que la demande d'avis ne se rapporte pas à un différend existant, alors qu'il ne peut aucunement être allégué ici que le Tribunal serait invité à trancher un différend sous couvert de cette demande d'avis consultatif par la COSIS.

En revanche, il est manifestement établi que les questions soumises au Tribunal, c'est-à-dire les rapports entre la Convention et les changements climatiques, intéressent au plus haut point l'ensemble des États Parties à la Convention sur le droit de la mer. Il est donc entièrement fondé que le Tribunal se prononce sur les questions qui lui sont soumises au bénéfice de la totalité des États Parties.

D'autres réserves ou appels à la prudence ont été émis au regard de la formulation des questions qui vous sont soumises. La France, par exemple, au motif que la très grande majorité des États Parties à la Convention n'ont pas été associés à la rédaction des questions, fait valoir que le Tribunal doit faire preuve d'une prudence particulière dans l'exercice de sa compétence consultative.

Monsieur le Président, la RDC ne partage pas non plus cette analyse. Les questions posées par la COSIS ne font pas partie de ce que l'on pourrait appeler en droit procédural anglais des « *leading questions* », des questions tendancieuses ou suggestives. Elles sont au contraire entièrement neutres, en ce qu'elles paraphrasent les articles 192 et 194 de la Convention. Elles sont aussi, de ce fait, très larges et susceptibles d'englober tous les intérêts et points de vue pouvant exister au sujet de la partie XII de la Convention en rapport avec les changements climatiques.

Une autre réserve, encore, est formulée par l'Indonésie, qui fait valoir que l'avis consultatif du Tribunal « ne ser[virai]t qu'à guider la Commission, en tant qu'organe requérant, dans la conduite de ses activités » et ne serait pas applicable en dehors de ce cadre ; « la compétence consultative du Tribunal ne doit pas avoir d'incidence sur l'application de la Convention », soutient-elle. Le Brésil, tout en contestant la compétence du Tribunal à titre principal, a formulé une réserve similaire, à titre subsidiaire, en faisant observer que la compétence consultative du Tribunal serait limitée matériellement à la lumière du champ d'activités de l'organisation.

Monsieur le Président, la République démocratique du Congo ne partage pas cette position pour les raisons suivantes.

D'abord, une telle restriction ne ressort pas des textes applicables. Comme nous l'avons déjà relevé, l'article 21 du Statut du Tribunal vise « toutes les demandes », « toutes les fois » que cela est prévu dans « tout autre accord ». Il s'agit là, bien évidemment, de termes non restrictifs par excellence. De même, l'article 138 du Règlement postule que l'accord prévoyant la compétence consultative peut porter sur « une question juridique » sans restriction, pour autant que la compétence consultative soit prévue par un accord se rapportant aux buts de la Convention. Ce texte est différent de l'article 131 1) du Règlement, qui vise expressément les demandes d'avis consultatif sur les questions juridiques qui se posent « dans le cadre de l'activité de l'Assemblée ou du Conseil de l'Autorité [internationale des fonds marins] ». Une telle restriction n'est pas envisageable dans le cas d'espèce.

Ensuite, et en tout état de cause, la restriction des activités de la Commission ne saurait restreindre le champ d'application de votre avis. L'article 2 de l'Accord pour la création de la COSIS autorise celle-ci à demander des avis consultatifs au Tribunal international « sur toute question juridique relevant de la Convention ». L'activité de la COSIS se rapporte donc à cette dernière tout entière.

Ceci se justifie entièrement compte tenu du caractère global des changements climatiques et de leurs effets, auxquels fait référence le même article 2 de l'Accord en considérant « l'importance fondamentale des océans en tant que puits et réservoirs de gaz à effet de serre et du rapport direct entre le milieu marin et les effets néfastes des changements climatiques sur les petits États insulaires ».

Monsieur le Président, Mesdames et Messieurs les juges, le Tribunal est donc compétent, et il est justifié et nécessaire qu'il exerce sa compétence de manière pleine et entière dans la présente procédure.

C'est par ces mots que je conclus mon propos. Je vous remercie de votre attention et vous prie, très respectueusement, d'accorder la parole à mon très estimé collègue, le professeur Jean-Paul Segihobe Bigira.

THE PRESIDENT: Thank you, Mr Mbaya.

I now invite Mr Segihobe Bigira to make his statement. You have the floor, Sir.

EXPOSÉ DE M. SEGIHOBE BIGIRA
RÉPUBLIQUE DÉMOCRATIQUE DU CONGO
[TIDM/PV.23/A31/16/Rev.1, p. 23–25]

Monsieur le Président, Mesdames et Messieurs les juges, j'ai l'honneur de me trouver devant vous, au nom de la RDC, pour vous dire que la Convention de Montego Bay est un instrument vivant qu'il faut interpréter à la lumière des temps actuels. Cette Constitution des océans, loin d'être l'expression d'une norme figée, appelle de vous, comme son gardien, de dire l'oracle qui révèle l'implicite et l'impensé.

Je voudrais le faire en deux moments : dans un premier temps, je montrerai le bien-fondé de l'interprétation systémique et, dans un second, je dirai, dans une sorte d'interaction avec les observations de certains États, ce que pense la RDC par rapport à l'avis que votre Tribunal est appelé à donner.

Dans un premier moment, pour répondre aux questions qui vous ont été posées, la RDC pense que l'interprétation systémique reste pertinente. Elle permet de dégager, entre le conservatisme et la temporalité juridique écologique du moment, des obligations concrètes.

En s'articulant à la fois de manière synchronique et diachronique, l'interprétation systémique facilite notamment que la Convention sur le droit de la mer soit comprise au regard d'autres règles pertinentes du droit international contemporain.

En prenant appui sur le contexte d'énonciation et celui de l'application de la Convention de Montego Bay, à l'ère où les changements du climat révèlent régulièrement la vulnérabilité de la terre, l'interprétation systémique permet de dégager et de comprendre la pensée immanente de la Constitution des océans en ces temps où les divergences d'intérêts ont accentué le risque de fragmentation, chacun tirant parti du désaccord sur les mesures urgentes à prendre.

La RDC considère que l'interprétation systémique permettra de trouver des réponses concrètes au paradoxe devant lequel nous sommes, à savoir cette bipolarité qui oppose les acteurs et les victimes des changements climatiques. D'un côté, il y a les pays industrialisés, riches, responsables en grande partie du dérèglement climatique et, de l'autre, les pays en développement, parmi lesquels les petits États insulaires, qui subissent en grande partie les conséquences des actions des premiers.

En recourant à l'interprétation systémique, le Tribunal aura l'occasion de faire une mise en rapport entre le passé des négociations de la Convention et le présent de son écriture, une mise en rapport entre le présent des changements climatiques et le futur des conséquences, certaines et irréversibles, sur les océans, sur la vie sur terre, principalement dans les petits États insulaires et ceux en développement.

À cet égard, l'article 293 1) de la Convention consacre bien un pouvoir – j'allais même dire, un devoir – d'intégration d'autres règles du droit international compatibles avec la Convention. Il en résulte que, comme l'indiquent d'ailleurs aussi la France, la Norvège, les Pays-Bas ou l'Italie, la Convention-cadre sur les changements climatiques et l'Accord de Paris sont pertinents pour répondre aux questions posées à votre Tribunal.

La RDC a exposé dans ses observations écrites qu'il en va de même du droit international des droits humains. Comme le Chili l'a souligné devant vous la semaine dernière, la RDC pense que les changements climatiques mettent en danger les droits fondamentaux des peuples. Outre le droit à l'autodétermination qui est en péril par l'action de certains États dont les conséquences sur les océans menacent l'existence des petits États insulaires, les dérèglements du climat portent atteinte à plusieurs droits de l'homme, dont le droit à la vie, le droit à la santé, le droit à un environnement sain.

Monsieur le Président, dans un deuxième moment, je voudrais apporter des précisions qu'appellent certaines observations des parties à la présente procédure.

Premièrement, certains États ont insisté que le Tribunal doit se limiter à répondre aux questions selon la *lex lata* et non la *lex ferenda*. Ceci est incontestable, mais ne signifie pas qu'il faut consacrer une interprétation restrictive de la Convention qui ne trouverait aucune base dans les règles d'interprétation du droit des traités. De *lege lata*, les États Parties à la Convention ont des obligations importantes en rapport avec les changements climatiques. Clarifier ces obligations, ce n'est pas juguler les États. C'est les aider à relever les immenses défis posés par les changements du climat.

Deuxièmement, pour revenir à l'interaction entre la Convention de Montego Bay et d'autres règles du droit international, l'Union européenne fait valoir que « les obligations qui s'imposent aux États [en vertu de la Convention sur le droit de la mer] ne sont pas plus strictes que celles imposées par l'Accord de Paris ».

Singapour dit que la Convention-cadre sur les changements climatiques fournit la *lex specialis* en matière d'émissions de gaz à effet de serre. L'Australie considère aussi qu'il devrait être suffisant de se conformer aux obligations dégagées par la Convention-cadre sur les changements climatiques et l'Accord de Paris. La RDC ne partage pas ces analyses. Les accords sur le climat n'ont pas pour effet de limiter les engagements en vertu de la Convention sur le droit de la mer. La Convention-cadre sur les changements climatiques et l'Accord de Paris n'énoncent aucune norme contraignante et applicable à toutes les Parties en matière d'émissions de gaz à effet de serre.

Selon le mécanisme des contributions déterminées au niveau national (CDN), chaque État partie à l'Accord détermine lui-même sa contribution à la diminution des émissions de gaz à effet de serre. Dès lors, il ne peut pas exister de conflit entre les deux régimes. Il n'y a pas matière à qualifier la Convention-cadre sur les changements climatiques de *lex specialis*, ni à restreindre les obligations de la Convention sur le droit de la mer au regard des accords sur le climat. Ces régimes se situent sur des plans différents et sont complémentaires. Il en va d'autant plus ainsi que, comme l'observe la France, conformément à l'article 237 de la Convention, les États parties doivent s'acquitter de leurs obligations en vertu de l'Accord de Paris « d'une manière compatible avec les principes et objectifs généraux de la Convention sur le droit de la mer ». Il ne peut donc être question de subordonner la Convention sur le droit de la mer aux traités sur le climat.

Ceci n'empêche aucunement que les accords sur le climat éclaircissent et concrétisent les obligations des États Parties à la Convention sur le droit de la mer. Ils le font par la reconnaissance des faits scientifiques relatifs aux changements climatiques. Ils le font par la reconnaissance de l'urgence. Consacrer la nécessité de contenir l'élévation de la température moyenne de la planète à 1,5 °C, c'est en réalité faire le minimum pour préserver le milieu marin. Ainsi, l'objectif collectif de limitation des températures de l'Accord de Paris vient en appui à la Convention sur le droit de la mer et contribue à identifier les mesures « nécessaires » pour la prévention, la réduction et la maîtrise de la pollution du milieu marin causée par les émissions de gaz à effet de serre.

La RDC précise qu'il s'agit selon l'article 194 de prendre « toutes les mesures nécessaires » et de mettre en œuvre les moyens « les plus adaptés » dont les États disposent, en fonction de leurs capacités. L'article 194 3) utilise les termes « autant que possible » et, en anglais, « *to the fullest possible extent* », qui se traduit littéralement par « de la manière la plus complète possible ». Il s'agit donc pour les États Parties de faire les plus grands efforts concevables. Cela s'impose tout particulièrement pour les changements climatiques, au regard précisément de l'urgence reconnue par les traités sur le climat.

En terminant ce point, je voudrais revenir sur une analyse faite devant votre Tribunal à propos de la notion de « nécessaire » comme signifiant « indispensable ». Nous sommes bien d'accord qu'il est indispensable d'agir. Cependant, nous ne croyons pas que la notion de « nécessaire » doive, dans la présente affaire, être assimilée à « indispensable ». Dire qu'il faut

« faire l'indispensable » est plus restrictif que « faire le nécessaire ». Cela revient à dire qu'il faut faire « seulement le strict nécessaire ». Or, en l'espèce, il faut faire « tout le nécessaire » et même « tout ce qui est utile ».

Monsieur le Président, Mesdames et Messieurs les juges, je vous remercie de m'avoir prêté votre attention et vous prie respectueusement d'accorder la parole à mon collègue Nicolas Angelet.

THE PRESIDENT: Thank you, Mr Segihobe Bigira.

We have now reached almost 11:30. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 12 o'clock. Thank you.

(Pause)

THE PRESIDENT: I now invite Mr Angelet to make his statement. You have the floor, Sir.

EXPOSÉ DE M. ANGELET
RÉPUBLIQUE DÉMOCRATIQUE DU CONGO
[TIDM/PV.23/A31/16/Rev.1, p. 25–29]

Monsieur le Président, Mesdames et Messieurs les juges, c'est un honneur de comparaître devant vous aujourd'hui. Je traiterai de certaines questions que la RDC juge essentielles pour clarifier la portée de la Convention, mais aussi pour en assurer le respect effectif.

Nous rejoignons ainsi Monsieur l'avocat général de Vanuatu, qui vous a demandé, au tout premier jour des audiences, d'aller au-delà des principes abstraits.

Ceci est nécessaire, car le droit international relatif aux changements climatiques souffre d'un déficit d'effectivité, mis en évidence par les décennies de retard que nous accusons.

C'est pourquoi la RDC vous demande d'interpréter et d'appliquer la Convention de manière à consacrer des obligations qui ne soient pas « abstraites et illusoire », mais « concrètes et effectives ».

Nous empruntons cette formule aux cours régionales des droits humains. Ce même principe s'applique toutefois aussi en droit international de l'environnement, comme le montre le *dictum* de la Cour internationale de Justice que « l'environnement n'est pas une abstraction »¹. Ce passage a été cité de très nombreuses fois devant vous, non pas tant pour sa valeur rhétorique, mais pour sa valeur juridique aux fins de l'interprétation de la Convention.

Monsieur le Président, je passe à quatre questions qui, à notre avis, peuvent contribuer à rencontrer cet objectif d'effectivité.

Ma première question est celle-ci : comment est-ce que les obligations de protection et de préservation du milieu marin et les obligations de prévention, de réduction et de maîtrise de la pollution s'appliquent en matière de changements climatiques, et qu'est-ce qui génère leur violation ?

Nous avons tendance à aborder la question climatique sous l'angle de la prévention d'événements divers. Selon certaines déclarations faites devant le Tribunal, nous devons prévenir que soient causés de nouveaux dommages au milieu marin. Nous devons prévenir les changements climatiques. Et la Convention-cadre des Nations Unies sur les changements climatiques dispose en son article 2 qu'elle a pour objectif de stabiliser les gaz à effet de serre à un niveau qui « empêche » – en anglais, « prevents » – « toute perturbation anthropique dangereuse du système climatique ».

L'accent qui est ainsi mis sur la prévention peut avoir des implications juridiques. Selon certaines sources, étrangères à la Convention, la violation d'une obligation de prévention a lieu – seulement – au moment où survient l'événement qu'il fallait prévenir. Si l'obligation consiste à prévenir un dommage, la violation n'interviendrait donc qu'au moment où le dommage s'est produit.

Or les changements climatiques causent des dommages différés et irréversibles. Si la responsabilité des États ne pouvait être engagée en vertu de la Convention qu'au moment où le dommage s'est déjà produit, la Convention n'offrirait pas de protection effective. Les États pourraient uniquement être tenus responsables au moment où il serait trop tard.

Je vous soumetts que tel n'est pas le cas selon la partie XII de la Convention.

Selon l'article 3 de la Convention-cadre sur les changements climatiques, il incombe aux Parties « de préserver le système climatique ». Les mesures de stabilisation et de réduction des gaz à effet de serre sont donc des mesures de « préservation » au sens de la Convention-cadre. Elles relèvent dès lors aussi de l'obligation de « préserver » le milieu marin au sens de l'article 192 de la Convention sur le droit de la mer.

¹ CIJ, *Illicéité de la menace ou de l'emploi d'armes nucléaires*, avis consultatif.

En outre, l'article 2 de la Convention-cadre sur les changements climatiques énonce que la Convention-cadre a pour objectif de « stabiliser [...] les concentrations de gaz à effet de serre ». Stabiliser, c'est maîtriser. Et selon l'article 4 de l'Accord de Paris, il convient « d'opérer des réductions » des émissions. Les mesures de lutte contre les changements climatiques relèvent donc de l'obligation de réduire et maîtriser la pollution au sens de l'article 194 1) de la Convention sur le droit de la mer.

Ceci montre que l'application de la Convention à la lutte contre les changements climatiques ne doit pas être pensée uniquement en des termes de prévention.

En outre, s'agissant de la prévention, l'article 194 2) vise certes à prévenir du « préjudice par pollution ». Nous entrons là dans les dommages. Cependant, le paragraphe 1 vise plus généralement à « prévenir [...] la pollution », et il existe un très large consensus pour dire que les émissions de gaz à effet de serre rentrent dans la définition de la pollution de l'article 1^{er}. Il s'agit donc d'une obligation de prévention à la source. Par conséquent, la responsabilité des États est susceptible d'être engagée en vertu des articles 192 et 194 de la Convention,

non seulement si leurs actions ou inactions en matière climatique causent des dommages au milieu marin,

et non seulement si leurs actions ou inactions causent une élévation de la température supérieure à 1,5 °C – non seulement donc, quand il serait trop tard,

mais aussi avant ce moment fatidique, par exemple si ces États n'ont pas pris toutes les mesures requises pour être sur la bonne trajectoire pour parvenir à respecter la limite de 1,5 °C ; et ce, alors même qu'il est encore possible de corriger la trajectoire pour atteindre l'objectif.

Mon énumération n'est nullement exhaustive ou limitative. Elle vise seulement à montrer que la partie XII de la Convention n'attend pas qu'il soit trop tard pour engager la responsabilité des États.

C'est donc à tort, à notre avis, que l'avocat général d'Australie² a fait valoir à l'encontre d'une application de l'article 194 de la Convention aux changements climatiques, que ces changements résultent de l'impact cumulatif d'émissions de différentes périodes et origines, ce qui suscite d'importants problèmes de causalité. Ces questions peuvent être pertinentes pour la réparation. Elles ne le sont pas pour le contentieux de la cessation, ni pour l'applicabilité de la Convention aux changements climatiques. Aucun État, j'ajouterais, ne peut se cacher derrière les problèmes de causalité, qui sont nombreux, pour se défaire de sa responsabilité individuelle en vertu de la Convention.

Monsieur le Président, Mesdames et Messieurs les juges, j'en viens à mon deuxième point.

Je vous prie de dire qu'aucun État ne peut se soustraire à ses obligations individuelles en vertu de la Convention au motif que les changements climatiques et leurs effets sont globaux et que l'État n'aurait pas pu les prévenir à lui seul. À cet égard, la Cour internationale de Justice a, dans l'affaire de l'*Application de la Convention sur le génocide*, jugé ceci : « Peu importe [...] que l'Etat dont la responsabilité est recherchée allègue, voire qu'il démontre, que s'il avait mis en œuvre les moyens dont il pouvait raisonnablement disposer, ceux-ci n'auraient pas suffi à empêcher » le fait à prévenir. En effet, « on ne saurait exclure que les efforts conjugués de plusieurs Etats, dont chacun se serait conformé à son obligation de prévention, auraient pu atteindre le résultat [...] que les efforts d'un seul d'entre eux n'auraient pas suffi à obtenir »³. Cette règle vaut également pour les obligations de la Convention, qu'elles soient de moyen ou de résultat.

² Audience du 13 septembre au matin, Australie, p. 6-7.

³ CIJ, *Application de la Convention sur la prévention et la répression du crime de génocide*, op. cit., p. 221, par. 430.

Il en résulte que, contrairement à ce qu'a avancé l'avocat général d'Australie, l'applicabilité de la Convention ne peut pas être contestée au motif que les changements climatiques peuvent uniquement être résolus par la voie des négociations et de l'action collective. Aucun État ne peut se cacher derrière la nécessité d'une action collective pour se défaire de sa responsabilité individuelle en vertu de la Convention.

Monsieur le Président, je passe à mon troisième point, sur lequel je serai bref.

La RDC vous prie de dire que, dans les circonstances de l'espèce, les États ont l'obligation internationale d'adopter des plans de mise en conformité. Ces plans doivent détailler, sur la base de méthodes scientifiques reconnues, le processus que les États vont suivre pour se conformer de manière vérifiable à leurs obligations internationales.

Le cas échéant, Monsieur le Président, Mesdames et Messieurs les juges, aidez les États à élaborer ces plans en donnant des exemples de mesures à prendre, comme la Cour internationale l'a fait dans l'affaire des *Usines de pâte à papier*. Ainsi que Mme Galvão Teles vous l'a demandé au nom du Portugal la semaine passée : « Donnez-nous les meilleurs outils juridiques possibles. »

J'en viens ainsi à mon quatrième et dernier point.

Au début des audiences, nous avons vu le courage des personnes et communautés affectées par les changements climatiques, dans la personne notamment de Mme Naima Te Maile Fifita.

C'est pour ces personnes et ces communautés que l'article 235 de la Convention consacre l'obligation de créer et d'assurer des recours efficaces donnant lieu à une réparation adéquate et effective.

La RDC a montré dans ses observations écrites que cette obligation – qui est une obligation primaire – se concrétise, d'une part, selon les critères du droit à un procès équitable en droit international des droits de l'homme et, d'autre part, au regard des particularités des changements climatiques. Je relève deux points seulement.

Premièrement, dès lors que le changement climatique est un phénomène global, les mécanismes de recours doivent être accessibles à des victimes étrangères qui subissent un préjudice à l'étranger. Une coopération judiciaire ou administrative internationale est requise pour assurer l'effectivité des recours ; et je ne peux manquer de relever que, dans les observations écrites de nos collègues de l'Union internationale pour la conservation de la nature, il y a, à ce sujet, de très intéressantes sources également.

Deuxièmement, dès lors que les changements climatiques sont généralement irréversibles, les mécanismes de recours doivent comprendre des mesures provisoires et des mesures de cessation. À nouveau, l'effectivité des recours est une condition à l'effectivité de la partie XII de la Convention.

Monsieur le Président, Mesdames et Messieurs les juges, ceci termine mon exposé. La RDC exprime l'espoir que votre avis consultatif puisse marquer la vie du droit, mais aussi la vie des océans et des humains.

Je vous remercie et vous prie, Monsieur le Président, de rappeler à la barre mon confrère et ami, le professeur Mingashang.

THE PRESIDENT: Thank you, Mr Angelet.

I now invite Mr Mingashang to continue his statement. You have the floor, Sir.

EXPOSÉ DE M. MINGASHANG (suite)
RÉPUBLIQUE DÉMOCRATIQUE DU CONGO
[TIDM/PV.23/A31/16/Rev.1, p. 29–35]

Monsieur le Président, Mesdames et Messieurs les juges, je reviens devant vous cette fois pour clore les plaidoiries de la RDC. J'aborderai, comme annoncé, le volet relatif au principe des responsabilités communes mais différenciées et des capacités respectives des États.

L'idée de ce principe remonte à la Conférence des Nations Unies sur le commerce et le développement – en sigle, la CNUCED – créée en 1964. Il peut être considéré comme s'inscrivant dans la perspective d'un nouvel ordre international climatique. Un tel ordre serait de nature à contribuer à l'avènement d'un système économique et social qui aurait la vertu de corriger les inégalités et les injustices, afin de permettre l'élimination du fossé qui existe toujours et déjà entre les pays en voie de développement et les pays développés.

Le bien-fondé d'un tel principe est simple et clair. Étant donné que les crises environnementales majeures de notre époque sont la conséquence inévitable de l'industrialisation intensive de certains pays, il serait tout à fait injuste de soumettre les pays en développement aux mêmes mesures de redressement et de réparation que ceux qui ont été à l'origine de ce dérèglement depuis le XIX^e siècle.

Le principe en question repose ainsi sur l'idée d'une discrimination positive entre les États, laquelle tiendrait compte du lien de causalité entre la dégradation de l'environnement mondial et les modèles de production et de consommation des pays qui en ont tiré de larges avantages jusqu'à ce jour.

Le cadre de sa mise en œuvre dans le contexte de la transition écologique en cours est prévu, notamment, par le principe 7 de la Déclaration de Rio.

En vertu de l'article 3 1) de la Convention-cadre des Nations Unies sur les changements climatiques,

[i]l incombe aux Parties de préserver le système climatique dans l'intérêt des générations présentes et futures, sur la base de l'équité et en fonction de leurs responsabilités communes mais différenciées et [surtout] de leurs capacités respectives.

Pour sa part, l'Accord de Paris, qui fait référence à ce principe dans son préambule, précise également en son article 2 qu'il

sera appliqué conformément à l'équité et au principe des responsabilités communes mais différenciées et des capacités respectives, eu égard aux différentes situations nationales.

Afin de demeurer dans le cadre des obligations des États en vue de la prévention, de la réduction et de la maîtrise de la pollution du milieu marin, il y a lieu de relever que l'article 194 1) de la Convention des Nations Unies sur le droit de la mer avait déjà depuis 1982 préconisé que « États [...] mettent en œuvre à cette fin les moyens les mieux adaptés dont ils disposent, en fonction de leurs capacités [...] ». »

Nous sommes donc évidemment bien là au cœur de la partie XII de la Convention de Montego Bay.

Pour rester fidèle à l'approche schématique de l'exposé de la RDC, mon propos sera articulé en trois temps.

Je commencerai d'abord par relever les facteurs explicatifs du principe en question ; ensuite, j'indiquerai les trois axes de réflexion qui s'avèrent susceptibles de fonder en droit une interprétation orthodoxe de sa portée ; et, il me reviendra, au bout du compte, de mettre en

évidence les équivoques interprétatives éventuelles, qu'il convient de recadrer, en vue d'une compréhension utile et lucide d'un tel principe dans le contexte actuel.

Il existe éventuellement trois facteurs déterminants du régime des responsabilités communes mais différenciées.

Le premier facteur porte sur le critère relatif au degré de contribution aux émissions de gaz à effet de serre.

En effet, le coefficient d'évaluation, en l'occurrence, s'apprécie en termes de durée et de rendement. De ce point de vue, il est important de considérer que la situation des États en développement particulièrement impliqués aujourd'hui dans l'émission de gaz à effet de serre devrait être appréciée comparativement à celle des États pionniers du mouvement de l'industrialisation. Comme vous le savez, ce mouvement a été inauguré par l'homme, spécialement à partir du XIX^e siècle.

La raison est simple. C'est que les gaz à effet de serre se dégradent généralement de manière très lente, de telle sorte que les émissions anthropiques du début du siècle dernier exercent toujours et exerceront davantage, et ce pour plus longtemps encore dans la durée, un impact considérable sur l'équilibre des écosystèmes.

Par ailleurs, il est indiscutable de rappeler que les sociétés industrialisées en mal de croissance économique et avides de performances technologiques sont de celles qui ne cessent d'occasionner des stress de tous genres sur l'intégrité de l'environnement mondial.

Le deuxième facteur est la capacité de résilience qui se traduit par le critère de vulnérabilité.

Il est important de préciser dans le contexte de cette procédure que les dégâts consécutifs à la dynamique de l'industrialisation et à la course effrénée à la croissance économique entraînent des préjudices irréversibles pour tous, certes, mais beaucoup plus immédiats pour certains. À cet égard, le sort des petits États insulaires est alarmant. Il faut l'admettre sans équivoque. Il n'en demeure cependant pas moins évident que de nombreux autres États parmi les moins équipés communient à ce destin combien funeste.

En guise d'illustration, la Convention-cadre des Nations Unies sur les changements climatiques reconnaît dans son préambule que

les pays de faible élévation et autres petits pays insulaires, les pays ayant des zones côtières de faible élévation, des zones arides ou semi-arides ou des zones sujettes aux inondations, à la sécheresse et à la désertification, ainsi que les pays en développement ayant des écosystèmes montagneux fragiles, sont [parmi ceux qui sont] particulièrement vulnérables aux effets néfastes des changements climatiques.

Quant au troisième facteur, il a trait au postulat basé sur les capacités respectives des États.

Pour faire court, un tel argument devrait être concrétisé, notamment, en fonction du potentiel économique et financier d'une part, et technologique ou scientifique, d'autre part, des États concernés.

Monsieur le Président, quels sont alors les trois axes de réflexion en vue d'une interprétation orthodoxe de la portée du principe en question ?

On peut respectivement prendre en considération le seuil de contribution à la crise climatique, le niveau des préjudices qui en résultent et, enfin, la disponibilité des moyens pour y faire face.

Je dois d'emblée relever que ces différents facteurs se combinent dans un ordre de paradoxe affligeant.

Parce que les États industrialisés disposent de capacités financières et techniques supérieures à celles dont les pays en développement ne disposent pas, ou pas encore. Et de

telles capacités ont été acquises, notamment, grâce à un développement économique faisant fi des limites raisonnables de notre planète. Curieusement, ce sont eux qui souffrent relativement le moins possible des effets des changements climatiques dont ils sont les principaux auteurs et contributeurs.

A contrario, et c'est en cela que culmine l'absurdité, ce sont les États en développement en général, et les petits États insulaires en particulier, qui ont le moins possible ou presque pas encore assez contribué aux changements climatiques, qui sont parmi ceux qui subissent fréquemment les affres atroces du dérèglement atmosphérique, et *de facto*, se trouvent parfois dépourvus des moyens pour y faire face, et le plus souvent, au péril de leur survie.

Très concrètement et pour dire autrement les choses : la représentation graphique de ce paradoxe des extrêmes est constituée d'un bout à l'autre par les pays industrialisés, d'une part, et des pays en développement et les petits États insulaires, d'autre part. Mais entre ces deux bouts de la chaîne, il existe la possibilité de dégager graduellement des statuts intermédiaires par le biais d'une multitude de positions possibles.

La conséquence déplorable qui en découle est la dilution de la teneur normative de ce principe même, à cause de cette flexibilité dans la modulation des positions des uns et des autres. Par voie de conséquence, certains États pourraient y chercher prétexte dans l'intention de camoufler leurs responsabilités, pourtant avérées, par rapport à d'autres.

Voilà pourquoi, il s'avère particulièrement indispensable de clarifier ce régime, notamment dans le cadre de cette demande d'avis consultatif.

Cela permettrait, vous vous en doutez, d'éviter que la spécificité de chacun des registres éventuels sur la base duquel on pourrait, le cas échéant, se fonder pour constater la responsabilité et évaluer les capacités particulières d'un État à y faire face, n'affecte l'effectivité de la lutte contre les changements climatiques.

Cela reviendrait tout simplement à priver de son effet utile la portée de la partie XII de la Convention sur le droit de la mer, dont nous plaidons l'effectivité.

Monsieur le Président, Mesdames et Messieurs les juges, j'en viens maintenant, et ce sera mon dernier point, aux issues possibles afin de contourner les artifices intellectuels destinés à faire barrage à l'effectivité du principe de responsabilités communes mais différenciées.

Permettez-moi de suggérer à votre Tribunal au moins trois différentes manières de faire la chose à cette fin.

Premièrement, il est toujours possible de considérer que le régime des responsabilités communes mais différenciées, ainsi que des capacités respectives des États, est déjà inclus dans les obligations de diligence. Il n'y aurait dès lors pas matière à ajouter une référence expresse à la responsabilité commune. Le problème est que cela risque de ne pas permettre d'insuffler les responsabilités différenciées dans toutes les autres dispositions pertinentes de la Convention sur le droit de la mer.

En deuxième lieu, il pourrait également s'avérer possible de moduler les obligations de la Convention uniquement par rapport aux deux groupes d'États situés aux extrémités de la chaîne de responsabilités, à savoir les États développés, d'une part, et les États en développement et les petits États insulaires, d'autre part. C'est dans une certaine mesure ce que fait l'Accord de Paris, principalement en son article 4, aux paragraphes 4 et 6 combinés.

Il y a lieu de préciser, à cet égard, que l'article 7 de l'Accord de Paris, qui traite de l'adaptation, dispose en son paragraphe 2 qu'il doit être tenu compte « des besoins urgents et immédiats des pays en développement Parties qui sont particulièrement vulnérables aux effets néfastes des changements climatiques ».

En troisième lieu, enfin, le Tribunal pourrait aussi faire application du principe des responsabilités communes mais différenciées de la manière suivante :

d'une part, en énonçant les obligations à charge des États parties tout en précisant que ce bloc concerne spécifiquement « les États industrialisés Parties à la Convention » ;

d'autre part, dégager *expressis verbis* les cas de figure dans lesquels il doit être « tenu compte des besoins particuliers des pays les moins avancés, des petits États insulaires en développement et des pays en développement particulièrement vulnérables aux effets néfastes des changements climatiques » de manière à éviter d'imposer à ces derniers « une charge disproportionnée ou anormale ».

En guise de conclusion, la différenciation est dangereuse lorsqu'elle donne aux États un prétexte pour se soustraire à leurs responsabilités.

Mais elle est appropriée et même nécessaire lorsqu'elle consiste à alléger la charge des pays en développement et les plus vulnérables, de manière à inscrire la lutte contre les changements climatiques dans le contexte du développement durable et de celui de la lutte contre la pauvreté. C'est cela que recommande d'ailleurs l'article 2 1) de l'Accord de Paris.

La différenciation est une manifestation de l'équité, au nom de l'exigence de solidarité, et de pragmatisme du point de vue de la réalité des choses, dans les relations internationales contemporaines.

Elle est de ce fait indispensable pour permettre aux pays du Sud qui ont encore de grands puits et réservoirs à effets de serre, qu'ils soient maritimes ou terrestres, de les conserver et de les stabiliser.

Ceci est encore davantage particulièrement pertinent pour un pays comme la RDC, dont la forêt tropicale est peut-être le dernier poumon de la planète, mais qui ne cesse de subir la pression des changements climatiques et de payer un lourd tribut des conflits armés qui sont arbitrairement transportés sur son territoire.

Or si la forêt congolaise venait à disparaître, ce ne serait pas seulement le peuple congolais mais l'humanité tout entière qui en souffrirait, certainement.

Le principe des responsabilités communes mais différenciées et des capacités respectives existe ainsi, non pas seulement dans l'intérêt des États les plus vulnérables et les plus démunis, mais aussi et surtout davantage dans l'intérêt de la planète toute entière.

Dans cet ordre d'idées, il s'impose de « Prendre le droit au sérieux », pour rappeler le titre combien interpellateur d'un ancien juge, Ronald Dworkin, en l'occurrence, le droit international applicable aux obligations des États en vue de la réponse à cette demande d'avis consultatif.

Cela reviendrait carrément à sortir du piège éventuel d'un dogmatisme exégétique pour aller puiser des ressources indispensables aux fins de son interprétation dans une conception anthropologique inspirée d'une certaine métaphysique qui se dégage de l'œuvre poétique d'un célèbre penseur anglais du XVI^e siècle, John Donne, pour ne pas le citer.

En effet, et je vais me contenter de paraphraser un extrait de son poème intitulé *No Man is an Island*¹, dont les enseignements empreints de sagesse et de sensibilité humaine s'avèrent

¹ *No Man is an Island*:

« No man is an island entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as any manor of thy friends or of thine own were; any man's death diminishes me, because I am involved in mankind.

And therefore never send to know for whom the bell tolls; it tolls for thee. »

[John Donne, MEDITATION XVII : Devotions upon Emergent Occasions]

parfaitement transposables à la situation alarmante dans laquelle se trouve le monde contemporain :

Aucun pays n'est une île ou un tout complet en soi ;
Tout pays est un fragment d'un continent, mieux, une partie de l'ensemble ;
Si donc la furie la mer emportait une motte de terre, c'est le monde entier qui en serait amoindri, comme lorsque les flots emportent un promontoire ;
Ainsi donc, lorsqu'une île ou l'un de ces petits États insulaires viendrait à être englouti par les eaux, c'est toute la planète Terre qui en sortirait mutilée.

Dès lors, eu égard au contexte exceptionnel dans lequel se trouve la planète aujourd'hui à cause de la crise écologique, ne demandez jamais pour qui sonne le glas, car il sonne indistinctement pour nous tous, les habitants de la planète terre. Il sonne pour vous, Mesdames et Messieurs les juges, il sonne pour vous, Monsieur le Président.

Je vous remercie de votre aimable attention.

THE PRESIDENT: Thank you, Mr Mingashang.

I now give the floor to the representative of the International Union for Conservation of Nature and Natural Resources, Ms Voigt, to make her statement. You have the floor, Madam.

STATEMENT OF MS VOIGT
INTERNATIONAL UNION FOR CONSERVATION OF NATURE
[ITLOS/PV.23/C31/16/Rev.1, p. 32]

Mr President, distinguished members of the Tribunal, it is a great honour to appear before you on behalf of the International Union for Conservation of Nature, or 'IUCN'. We sincerely thank the Tribunal for the opportunity to contribute again to its important proceedings, this time on an advisory opinion on the obligations of States under UNCLOS with respect to climate change and ocean acidification.

In our statement, IUCN seeks to provide the Tribunal with its legal analysis of these obligations, supported by sound science. We will also respond to the questions put to IUCN by the Tribunal. References are provided in our written transcript.

We request to divide our time between Ms Payne, Ms Davenport and myself. Ms Payne will begin by addressing the distinction between obligations of result and those of due diligence under the Convention. Ms Davenport will address the question of when and how external law informs the interpretation of the Convention.

Finally, I will focus on the role and function of the United Nations climate treaties in this respect.

I would now kindly request the Tribunal to give the floor to Ms Payne.

THE PRESIDENT: Thank you, Ms Voigt.

I now invite Ms Payne to make her statement. You have the floor, Madam.

STATEMENT OF MS PAYNE
INTERNATIONAL UNION FOR CONSERVATION OF NATURE
[ITLOS/PV.23/C31/16/Rev.1, p. 32-36]

Mr President, distinguished members of the Tribunal, good morning. It is a privilege to appear before you on behalf of IUCN. I thank the Tribunal for the opportunity to contribute to these proceedings.

In our written statement, IUCN has acknowledged this Tribunal's jurisdiction for this matter.

There is wide agreement that article 192 imposes a duty on States Parties to protect and preserve the marine environment.¹ IUCN concurs with other submissions in this case reflecting general agreement that because greenhouse gases are pollutants as defined in article 1(1)(4) and are therefore within the scope of the Convention, States' duties under both articles 192 and 194 encompass climate change and ocean acidification. Therefore, States must take steps to mitigate greenhouse gas pollution and to support ocean resilience as a measure to adapt to observed and predicted warming, deoxygenation, and acidification.²

We note that the urgency to take these steps increases with every year, as too little mitigation locks in trajectories with more profound negative consequences. It clearly follows from the scientific evidence that the marine environment cannot be effectively protected and preserved without addressing pollution by greenhouse gas emissions. IUCN underscored, in its written statement, that States need to close the gap between the actions dictated by the best available science and steps that they have taken so far to address these dire problems. We identified treaties that are relevant to the interpretation of these obligations under the Convention, including the UN Framework Convention on Climate Change and the Paris Agreement.

My task this morning is to respond to the question from the Bench that was directed to IUCN and reads as follows:

In light of paragraph 74 et seq. of your written statement, could you please clarify further which specific obligations mentioned by you insofar as they are relevant to the Request for an Advisory Opinion are, in your view, obligations of conduct and which ones are obligations of result, and why?³

States' duties of protection and preservation of the marine environment through mitigation of climate change and addressing its adverse effects can take the form of obligations of result or obligations of conduct depending on the provision in question and the circumstances. We submit that at least two factors can be used to analyse whether an obligation should be understood as one of result or conduct; there may be others. First, does the obligation entail inherently governmental functions?⁴ Second, what aspects of the obligation can be objectively determined to have been satisfied or breached? While the categories of obligations may not always be sharply defined, for some obligations the State does have the duty to achieve a specific result, while for others it must apply its best efforts.

¹ *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 941.

² IUCN written statement, paras 209-220; IPCC, *Climate Change 2023: Synthesis Report of the IPCC Sixth Assessment Report* (2023); IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019); IPCC, *Global Warming of 1.5°C* (2018); D. Laffoley and J.M. Baxter, (eds.), *Ocean deoxygenation: Everyone's problem - Causes, impacts, consequences and solutions* (IUCN, 2019); D. Laffoley and J.M. Baxter (eds), *Explaining Ocean Warming: Causes, Scale, Effects and Consequences* (IUCN, 2016).

³ Questions by Individual Judges.

⁴ See ILC, *Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/49 (2001), article 5.

First, I will discuss how these two factors apply to the obligations described as “obligations of result” in the Convention and in the Seabed Advisory Opinion.⁵ Then I will examine how they apply to States’ obligations with regard to greenhouse gas emissions.

My first example, the requirement for States to assess the potential effects of certain activities on the marine environment and to communicate reports of the results, is a well-accepted obligation of result that is found in the Convention, articles 204, 205 and 206. Commentators have identified other obligations of result found in the Convention, such as article 62(2), the duty of a coastal State to “determine its capacity to harvest the living resources of the exclusive economic zone”.⁶

Quoting from the Seabed Advisory Opinion: “Under the Convention and related instruments, sponsoring States also have obligations with which they have to comply independently of their obligation to ensure a certain behaviour by the sponsored contractor.” That is, the State has obligations that it must perform, and it also has obligations with regard to the sponsored contractor. In this sense, we understand the Seabed Advisory Opinion to indicate that the former obligations are generally obligations of result, and the obligations with regard to the contractor are obligations of conduct.⁷

One obligation of result in that opinion included the duty to perform environmental impact assessment, which follows because preparing an environmental impact assessment is a government responsibility. It is also readily apparent whether an assessment has been conducted or not.

With respect to the State’s governance role in “the exercise of control over activities in the Area”,⁸ the sponsoring State is the international actor working in concert with the authority to oversee compliance by contractors it sponsors, an inherently governmental function. The result that is required of the State is that it takes measures within its legal system and that the measures must be “reasonably appropriate”.⁹ The requirement is not that the State always succeeds in preventing accidents or noncompliance by non-State actors.

The Chamber also identified the obligation to apply a precautionary approach and the obligation to apply best environmental practices as binding on sponsoring States through both the Mining Code and customary international law.¹⁰ These State obligations would apply to the State’s own decisions and acts, and those of its organs and agents.

The Seabed Advisory Opinion thus illustrates the kind of obligations that can be “of result” in the context of protecting and preserving the marine environment from the deleterious effects of greenhouse gas emissions. The following are indicative of obligations of result:

Under article 194(1) of the Convention, States must individually take *all* measures consistent with the Convention. Greenhouse gas emissions from State operations and state-owned property, are within the State’s control, and its management of them is an inherently governmental function. Therefore, using “the best practicable means at their disposal and in accordance with their capabilities” States must prevent, reduce and control greenhouse gas emissions from State properties and operations. If a State takes *no* measures in this respect, it will be in breach of article 194(1). It is submitted that the need to make those findings does not convert this obligation of result into an obligation of conduct.

⁵ *Responsibilities and Obligations of States with Respect to Activities in the Area*, Case No. 17, Advisory Opinion, 2011 *ITLOS Rep.* 10 (1 February).

⁶ See Irimi Papanicolopulu, “Due Diligence in the Law of the Sea,” in *Due Diligence in the International Legal Order* (Heike Krieger, Anne Peters, and Leonhard Kreuzer, eds, Oxford University Press, 2020).

⁷ Seabed Advisory Opinion, para 121.

⁸ Seabed Advisory Opinion, para 122.

⁹ Seabed Advisory Opinion, para 124; UNCLOS, article 139.

¹⁰ Seabed Advisory Opinion, paras 125-140.

Cooperation on a global basis, on a regional basis, directly or through a competent international organization, as described in article 197, is a State function and an obligation of result. States may not reach agreement, but they must strive to do so in good faith. The adoption of the BBNJ Agreement on 19 June 2023 is an example of successful cooperation that should lead to implementation of environmental impact assessments and establishment of marine protected areas in areas beyond national jurisdiction, two mitigation and adaptation strategies to protect and preserve the marine environment. We understand that more than 60 States signed the BBNJ Agreement yesterday at the United Nations in New York, the next step in fruitful cooperation to achieve the objectives of Part XII. The Paris Agreement is another example that my colleagues, Professor Davenport and Professor Voigt, will discuss.

Environmental monitoring, impact assessment and communicating the assessment reports are all obligations of result required with respect to activities that may cause substantial greenhouse gas emissions or significant ocean warming, deoxygenation and acidification. The BBNJ Agreement, which may be considered to embody best environmental practices for EIA, provides that environmental assessments of all covered activities must include a cumulative impact analysis that includes the “consequences of climate change, ocean acidification and related impacts”.¹¹ This requirement responds to the risk that in dynamic and complex ocean systems, where multiple factors act together, negative feedback loops can accelerate change and provoke system changes. In this regard, the *South China Sea* arbitral tribunal explained that “[w]hile the terms ‘reasonable’ and ‘as far as practicable’ contain an element of discretion for the State concerned, the obligation to communicate reports of the results is absolute.”¹² That is, States have some discretion in how the assessment is performed, but the article 206 obligation to perform one, and the article 205 obligation to publish it are obligations of result.

It is submitted that States have obligations of result to adopt laws and regulations to prevent, reduce and control pollution of the marine environment and enforce them within the framework of its legal system, where an international legal obligation requires government control over non-State entities.¹³ Fulfilling these governmental functions is uniquely the role of the State, and “a violation of this obligation entails ‘liability’”, in the words of the *Seabed Advisory Opinion*.¹⁴

Where a State’s obligations concern the activities of non-state actors that are not attributable to the State under international law, the standard of care is due diligence.¹⁵ The State still has important obligations of conduct in its regulation of private actors, even though international law recognizes that the State cannot be expected to exercise total control over

¹¹ BBNJ Agreement, A/CONF.232/2023/4* (19 June 2023), Art 1.6, 27, 30, 31, 33.

¹² *South China Sea Arbitration (Philippines v. China)* PCA Case No. 2013-19, Award, 12 July 2016, para. 948.

¹³ UNCLOS, Part XII, Section V; *Seabed Advisory Opinion*, paras 75, 119 (“The purpose of requiring the sponsorship of applicants for contracts ... is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems.”).

¹⁴ *Seabed Advisory Opinion*, para. 109.

¹⁵ *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*, para 146 “as the violation of such laws and regulations by vessels is not per se attributable to the flag State. The liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.”

their acts.¹⁶ The State “may be responsible for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects”.¹⁷

When the State’s obligation is one of due diligence, it must “deploy adequate means ... exercise best possible efforts ... do the utmost, to obtain this result.”¹⁸ In other words, a State must use its best efforts to address the conduct of non-state actors, including through legislation and regulation, in light of the risk at stake and based on the precautionary principle, informed by best available science, and it must adopt effective compliance measures.

My colleagues will further address the measures that States are required to implement under the Convention in light of relevant international law, in particular the Paris Agreement.

Thank you, Mr President and members of the Tribunal, for your kind attention.

Mr President, I respectfully request that you call upon my colleague, Ms Davenport.

THE PRESIDENT: Thank you, Ms Payne.

I now invite Ms Davenport to make her statement. You have the floor, Madam.

¹⁶ *Alabama Claims of the United States of America against Great Britain*, Arbitral Award of 14 September 1872, (2011) 29 *RIAA* 125–34; 145 *CTS* 99; Treaty between the United States and Great Britain, 1871 (Washington Treaty) (Determining whether Great Britain breached a treaty of neutrality by failing to exercise due diligence in preventing private actors from selling ships).

¹⁷ ILC, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49 (2001), Commentary to chapter II, 39, para 4; *see* Seabed Advisory Opinion, para. 131 (“This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.”); N. Craik, T. Davenport, & R. Mackenzie, “Allocation of Liability for Environmental Harm in Areas beyond National Jurisdiction,” in *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023) pp. 95-132.

¹⁸ Seabed Advisory Opinion, para. 110.

STATEMENT OF MS DAVENPORT
INTERNATIONAL UNION FOR CONSERVATION OF NATURE
[ITLOS/PV.23/C31/16/Rev.1, p. 37-41]

Good afternoon, Mr President and distinguished members of the Tribunal. It is truly an honour and privilege to appear before you today.

My task today is to address the Tribunal on how the obligations under Part XII of the Convention are necessarily informed by external instruments with a focus on the UNFCCC and the Paris Agreement, given its pertinence to the questions posed by COSIS. I will make two points in support of this.

First, the Convention, as the cornerstone of the international regime on marine environmental protection, was clearly intended to adapt to changing circumstances and advances in scientific knowledge.¹ Second, external instruments play a vital role in ensuring the continuing durability of the Convention as a living instrument. These arguments are supported by both the provisions in the Convention, as well as the rules of treaty interpretation.

With regard to my first point, the Convention stands at the apex of marine environmental protection, as evidenced by the Convention itself.² The preamble reflects the intention of the parties to “settle all issues relating to the law of the sea” and to “establish a legal order of the seas and oceans” that, amongst other things, promotes the protection and preservation of the marine environment. The Convention is the only global treaty that comprehensively addresses all matters related to the protection of the marine environment.³ Moreover, article 237(2) provides that obligations assumed by States Parties under other marine environmental treaties “should be carried out in a manner consistent with the general principles and objectives” of the Convention.⁴

The Convention, as a living treaty and bedrock for marine environmental protection, must be interpreted to address the most pressing environmental development since its adoption, namely, the grave and potentially catastrophic impact that emissions of greenhouse gases have on the marine environment. First, the Convention uses general terms deliberately intended by the negotiators to have meaning or content capable of evolving over time. The Convention thus falls squarely within the concept of “evolutionary treaties” characterized by the ICJ in the *Dispute regarding Navigational Rights and Related Rights* as treaties that use generic terms; have been in force for a long time or are of a continuing duration; and where the parties “must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”⁵

Second, Part XII relies on rules and standards developed by competent international organizations or diplomatic conferences to implement Convention obligations in relation to specific sources of pollution. This ensures that the Convention “adapts to new knowledge and changing circumstances” as it links obligations under the Convention to rules and standards

¹ Alan Boyle, “Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change”, in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), 40 - 62; Alan Boyle, “Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime”, in Elise Johansen et al, *The Law of the Sea and Climate Change* (Cambridge University Press, 2021), 81 - 103, p. 83; Tomas Heidar, “Introduction: How Does the Law of the Sea Adapt to New Knowledge and Changing Circumstances”, in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill 2020), 1-12, pp. 1-2.

² Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea, Fourth Edition* (Melland Schill Studies in International Law, 2022), pp. 603 - 604; D. Czybulka, article 192, in A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (Hart, 2017), 1277 - 1287, p. 1278.

³ Churchill et al, 640.

⁴ Ibid.

⁵ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009, p. 33. para. 65.

that are continually being promulgated to address new threats to the environment.⁶ Third, article 237(1) envisages the adoption of subsequent marine environmental protection agreements “which may be concluded in furtherance of the general principles” of the Convention to implement Convention obligations.

This leads to my second point on the critical role that the UNFCCC and the Paris Agreement play in informing the content of obligations under Part XII and particularly articles 192, 194, 207, and 212.

First, the rules, principles and norms under these treaties inform the article 192 obligation to protect and preserve the marine environment, as well as article 194 obligations to take all necessary measures to prevent, reduce and control pollution from *any* source, including the “release of toxic, harmful or noxious substances, especially those which are persistent” from land-based sources or from or through the atmosphere.⁷

The UNFCCC and the Paris Agreement are binding legal treaties which clearly constitute “other rules of international law not incompatible” with the Convention under article 293. The global climate treaties are in no way incompatible with the Convention. In fact, the UNFCCC defines the global climate system as including the hydrosphere and recognizes the interactions between the climate system and marine ecosystems, as well as the possible adverse effects of sea-level rise on islands and coastal areas.⁸ It also sets the overarching goal of promoting the enhancement of sinks and reservoirs of all greenhouse gases, which include ocean and marine ecosystems.⁹ Similarly, the preamble of the Paris Agreement affirms the importance of ensuring the integrity of all ecosystems, including the oceans. 5(1) encourages Parties to take actions to conserve and enhance carbon sinks and reservoirs, which include the oceans.¹⁰

The global climate treaties also constitute “relevant rules of international law applicable in relations between the parties” which shall be taken into account in interpreting a treaty under article 31(3)(c) of the Vienna Convention on the Law of Treaties. 31(3)(c) expresses the principle of “systemic integration”¹¹ and ensures, as observed by the ICJ, that treaties do not operate in isolation but are “interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation”.¹² The global climate treaties have received nearly universal acceptance, with 198 parties to the UNFCCC and 195 parties to the Paris Agreement, and represent the consensus of States on how to address the multifaceted issue of climate change. Importantly, all the parties to the Convention are parties to both the UNFCCC and the Paris Agreement, and these treaties are clearly applicable in the relations between States Parties to the Convention.

The Tribunal has relied on other treaties and instruments in determining the meaning of terms and obligations in the Convention and subsidiary instruments. For example, in the *M/V Saiga* case, this Tribunal referred to three international conventions in determining the meaning of “genuine link” in article 91 of the Convention.¹³ Similarly, in assessing what

⁶ Heidar, Introduction, p. 6.

⁷ Alan Boyle, *Protecting the Marine Environment from Climate Change*, p. 89.

⁸ UN Framework Convention on Climate Change, preamble.

⁹ UN Framework Convention on Climate Change, art 2 and art 4 (1) (d).

¹⁰ Paris Agreement, preamble, para. 13; art 5 (1).

¹¹ International Law Commission (ILC), “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission Finalized Martin Koskenniemi,” UN Doc A/CN.4/L.682 (13 April 2006).

¹² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion) [1971] *ICJ Rep* 16, para. 31.

¹³ *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, *ITLOS Reports 1999*, p. 10, paras. 83 - 86. These are: the United Nations Convention on Conditions for Registration of Ships; UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982

constitutes a precautionary approach, the Seabed Disputes Chamber referred to Principle 15 of the Rio Declaration and “to a growing number of international treaties and other instruments which reflect the formulation of Principle 15”.¹⁴

In the *South China Sea* arbitration, the arbitral tribunal found that article 192 imposes an obligation on States Parties, the content of which is informed by other provisions of Part XII and *other applicable rules of international law*, including “the corpus of international law relating to the environment.”¹⁵ Notably, it said that while it did not have the jurisdiction to decide on violations of the Convention on Biological Diversity, it could consider the “relevant provisions of the [CBD] for purposes of interpreting the content and standard of articles 192 and 194 of the Convention”.¹⁶ It also referred to the appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora “which it considered to be the subject of nearly universal adherence”, and thus forming part of the general corpus of international law that informs the content of article 192 and article 194(5).¹⁷

In addition, we would like to reiterate that instruments which are considered non-binding are also relevant to the interpretation of the Convention. The ICJ found that recommendations of the Whaling Commission, which take the form of resolutions, are relevant for the interpretation of the International Convention on the Regulation of Whaling because they were adopted by consensus or by a unanimous vote.¹⁸ The Seabed Disputes Chamber has also found that non-binding recommendations on environmental impact assessments issued by the Legal and Technical Commission added precision and specificity to the environmental impact assessment obligations in article 206 of the Convention.¹⁹ As Professor Voigt will explain, this is particularly relevant when considering the normative impact of decisions adopted under the auspices of the global climate treaties.

The UNFCCC and the Paris Agreement are also relevant to the obligations to prevent, reduce and control pollution from land-based and atmospheric sources under article 207, respectively. In particular, paragraph 1 of article 207 and 212 oblige States Parties to adopt laws and regulations to prevent, reduce and control land-based and atmospheric pollution “taking into account internationally agreed rules, standards and recommended practices and procedures”. Again, these treaties have received nearly universal acceptance and clearly meet the threshold of “internationally agreed rules and standards”.

Furthermore, given that all Convention States Parties are already legally bound by the UNFCCC and the Paris Agreement, the obligation to “take into account” means, at the minimum, adopting laws and regulations that give effect to the obligations under these treaties. To be clear, our argument is not that these treaties are directly applicable to States Parties to the Convention, but that by becoming parties to the Convention, States agreed that these “internationally agreed rules, standards and recommended practices and procedures” would set the relevant standards of States Parties to combat land-based and atmospheric pollution.

To conclude, we wish to reiterate that while the Convention is at the centre of marine environmental protection for the oceans, and the global climate treaties are at the centre of the international climate change regime, this in no way means that they are mutually exclusive.

relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Sea.

¹⁴ Seabed Advisory Opinion, paras.125-129.

¹⁵ *South China Sea Arbitration* (2016), para. 941.

¹⁶ *South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, para. 176.

¹⁷ *South China Sea Arbitration* (2016), para. 956.

¹⁸ *Whaling in the Antarctic* (Australia v. New Zealand Intervening), *I.C.J. Reports 2014*, ICJ, Judgment, 31 March 2014, p. 248, para. 46.

¹⁹ Seabed Advisory Opinion, para. 149.

The global climate treaties are not *lex specialis* and there is no conflict between these treaties and the Convention. Instead, they are mutually supportive and reinforcing, with the Convention serving an integrative role. The rules, principles and norms under the global climate treaties provide invaluable specificity to the obligations under the Convention and both must be applied complementarily.

This does not involve a revision or rewriting the Convention but an interpretation that is faithful to the ordinary meaning and context of the Convention, including Part XII, in light of its overarching object and purpose which we submit is to protect and preserve the marine environment. To hold otherwise, weakens the Convention's robust provisions on marine environmental protection. Moreover, an interpretation that is not informed by the global climate treaties renders the Convention frozen in time instead of the "dynamically evolving legal framework for all ocean activities" that was intended by the negotiators.²⁰

Thank you very much for your kind attention and I would now like to respectfully request the Tribunal to give the floor to my colleague Professor Christina Voigt. Thank you.

THE PRESIDENT: Thank you, Ms Davenport.

We have reached 1 o'clock. I would like to get an indication from Ms Voigt whether you wish to complete your statement at this time, or would you prefer to do it after the lunch break? Please, you may address us from the podium.

MS VOIGT: My statement is timed for exactly 20 minutes. If that is acceptable to the Tribunal, I would prefer to do it now but I am in your hands.

THE PRESIDENT: Please do.

²⁰ Catherine Redgwell, "Treaty Evolution, Adaptation and Change: Is the LOSC 'Enough' to Address Climate Change Impacts on the Marine Environment? (2019) 34 *International Journal of Marine and Coastal Law* 440–457, 445.

STATEMENT OF MS VOIGT (continued)
INTERNATIONAL UNION FOR CONSERVATION OF NATURE
[ITLOS/PV.23/C31/16/Rev.1, p. 41-47]

Thank you so much. Thank you.

In my statement, I follow on from the argument presented by Ms Davenport that the Convention must be interpreted consistently with, but not limited to, the United Nations climate treaties, especially the Paris Agreement. I will limit my statement to addressing the legal standards established in the Paris Agreement and how they are relevant to the interpretation of Part XII of the Convention.

My first point is that the goal of holding warming to 1.5°C as expressed in the Paris Agreement must guide our understanding of the obligations in Part XII of the Convention, in the context of climate change.

The Paris Agreement was adopted under the Framework Convention on Climate Change, or the UNFCCC, with the aim to strengthen the global response to the threat of climate change. It is the most recent and the most comprehensive multilateral climate treaty. It is not a protocol to the UNFCCC nor an implementing agreement.

With 195 parties, the Paris Agreement reflects in its goals contained in article 2(1), a global, almost universal, science-based, political and legal consensus on the acceptable threshold of climatic change and how to address its adverse effects. These goals set international standards with significant legal implications.¹

Where the UNFCCC in article 2 sets forth the objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system, there is now overwhelming scientific evidence and political consensus indicating that this is a level at which global average temperature increases do not surpass 1.5°C.²

This is reflected in article 2(1)(a) of the Paris Agreement as: “Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C”.³

While the Paris Agreement sets a twofold temperature goal, Parties in their successive decisions have accepted the *priority* of holding increases to 1.5°C.

In 2021 in Glasgow, all Parties by consensus “*resolved* to pursue efforts to limit the temperature increase to 1.5°C”.⁴ This is *because* they recognize “that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C.”⁵ Last year in Sharm-el Sheikh, all Parties *reiterated* this resolve.⁶

This is in line with science. At the request of the Paris Agreement Parties, the IPCC dedicated a special report to the 1.5°C threshold, published in 2018,⁷ where it found significant

¹ L. Rajamani, “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligation” (2016) 28 *Journal of Environmental Law* 337; D. Bodansky, “The Legal Character of the Paris Agreement” (2016) 25 *Review of European, Comparative and International Environmental Law* 2; B.J. Preston, “The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)” (2020) 33 *Journal of Environmental Law* 1; C. Voigt “[The Power of the Paris Agreement in International Climate Litigation](#)” (2023) 32 *Review of European, Comparative and International Environmental Law* 2, 237-249 (open access).

² IPCC, 2023: Summary for Policymakers, in: *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)].

³ Paris Agreement, article 2(1)(a).

⁴ Decision 1/CMA.3 Glasgow Climate Pact, para 21.

⁵ Decision 1/CMA.3 Glasgow Climate Pact, para 21.

⁶ Decision 1/CMA.4, Sharm el-Sheikh Implementation Plan, para 8.

⁷ IPCC, 2018: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening*

differences in impacts between keeping temperature increases within 1.5°C as compared to 2°C, such as severe coral reef losses, and increasing multiple risks to low-lying countries.⁸ Every additional increment of emissions, and every fraction of a degree of consequent warming, has significant impacts on marine environment.

Mr President, members of the Tribunal, 1.5°C is a critical threshold, with real biophysical consequences if surpassed. It would be reckless to contemplate trajectories that allow for overshooting and returning to 1.5°C in the longer term. It is particularly critical for several key ecosystems which already are in a precarious situation.⁹ The maximum threshold of 1.5°C warming must inform the interpretation of the obligations contained in Part XII of UNCLOS, as warming beyond 1.5°C would result in dangerous anthropogenic interference with the climate system, including the marine environment.

Let us remember that the ocean is part of the climate system as defined in article 1(3) of the United Nations Framework Convention on Climate Change where it says that climate system means “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions”.

My second point breaks down the 1.5°C threshold to specific timelines and collective emission pathways.

The temperature threshold cannot be viewed in isolation from article 4(1) of the Paris Agreement, which sets a *timeline* for achieving it. This timeline foresees to “reach global peaking of greenhouse gas emissions *as soon as possible*, recognizing that peaking will take longer for developing country parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gasses in the second half of this

the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA

⁸ With respect to the ocean, the report noted: “Limiting global warming to 1.5°C compared to 2°C is projected to reduce increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels (*high confidence*). Consequently, limiting global warming to 1.5°C is projected to reduce risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans, as illustrated by recent changes to Arctic sea ice and warm-water coral reef ecosystems (*high confidence*).” Headline statements, IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA.

⁹ Chapter 15 of the IPCC Working Group II AR6 report states that ‘Models are currently predicting large-scale loss of coral reefs by mid-century under even low-emission scenarios. Even achieving emission reduction targets consistent with the ambitious 1.5°C of global warming under the Paris Agreement will result in the further loss of 70-90 per cent of reef-building corals compared to today, with 99 per cent of coral reefs being lost under warming of 2°C or more above the preindustrial period.’ Mycoo, M., M. Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O. Warrick, 2022: *Small Islands*. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 2056. The IPCC Sixth Assessment Report is clear that near-term actions that limit global warming to close to 1.5°C, or remaining below 1.5°C, would substantially reduce projected losses and damages. Projected impacts are less severe with shorter duration and lower levels of overshoot of 1.5°C. IPCC, 2022: Summary for Policymakers. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 13, 19.

century”.¹⁰ This “balance between emissions and removals” is often referred to as “net-zero emissions” or sometimes as “climate neutrality”.

This timeline is consistent with the IPCC 6th Assessment Report. The only scenario that, according to the IPCC, is very likely to keep temperature increases close to 1.5°C without overshoot includes reducing global carbon dioxide emissions by 45 per cent by 2030 (that is seven years from now) and have emissions declining to net-zero around 2050, followed by net-negative emissions until the end of the century and most likely long thereafter.¹¹ The time frame set out in article 4(1) of the Paris Agreement for achieving global net zero emissions is therefore *fully supported* by the findings of the IPCC.

This understanding was endorsed by *all* parties to the Paris Agreement when they unanimously recognized in 2021 “that limiting temperature increases to 1.5°C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century, as well as deep reductions in other greenhouse gases”.¹²

This, Mr President, distinguished members of the Tribunal, is – at a minimum – what parties collectively need to do.

My third point addresses the standard of conduct for each party of the Paris Agreement.

In order to reach the temperature goal set in the Paris Agreement, each Party has a number of legal obligations. Most of these are obligations of result, but they are procedural in nature and require parties to submit specific information at certain points in time in regular intervals and to report or account in accordance with agreed rules. The core legal obligation of all Parties is to prepare, communicate and maintain successive nationally determined contributions (or NDCs).¹³

But does this mean that everything goes? Certainly not.

The Paris Agreement is often wrongly characterized as a purely “bottom-up” agreement, assuming that the level of ambition included in NDCs is entirely left to parties’ own discretion. We submit, respectfully, that this is not correct.

The Agreement incorporates several normative parameters to progressively scale up mitigation ambition in light of the temperature goal. These include that each Party’s successive NDC “will represent a progression beyond the Party’s then current NDC and reflect its highest possible ambition, reflecting common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”, as stated in article 4(3). Moreover, Parties’ NDCs must be informed by the outcome of the Global Stocktake – which is taking place this year for the first time.¹⁴ These elements are embedded within the multilaterally

¹⁰ Paris Agreement, article 4(1).

¹¹ Already the IPCC Report on 1.5°C of Global Warming (2018) noted that “In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO₂ emissions decline by about 45 per cent from 2010 levels by 2030 (40–60 per cent interquartile range), reaching net zero around 2050 (2045–2055 interquartile range)” IPCC (2018). This was confirmed by the IPCC in the sixth Assessment report, stating “Pathways that limit warming to 1.5°C (>50per cent) with no or limited overshoot reach net zero CO₂ in the early 2050s, followed by net negative CO₂ emissions.” IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, B.6.1.

¹² Decision 1/CMA.3, Glasgow Climate Pact, para 22.

¹³ Paris Agreement, article 4(2).

¹⁴ Paris Agreement, article 14 and article 4(9). The Global Stocktake (GST) takes place for the first time in 2023 and every five years thereafter. The outcome of the GST shall inform the next round of NDCs which are due in 2025 and every 5 years thereafter. Linking with the requirements of progression and highest possible ambition in article 4.3, the GST outcome is an important normative element to be considered by Parties when preparing their successive NDC. Article 14 (3) states that “3. The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action”, while

agreed, iterative five-year processes under the Paris Agreement, which are purpose-built to increase climate action over time, and many of which are only about to start as we speak.

These normative parameters circumscribe the conduct expected of parties when carrying out their legal obligation to prepare and communicate their respective NDCs. They are, in other words, “ambition drivers” of Parties’ NDCs.

We submit to the Tribunal that article 4(3) can be understood as a due diligence standard.¹⁵ It contains the substantive expectation of each party to deploy its “best efforts”, or simply do the best it can in each successive NDC.¹⁶ The operative word “will” was deliberately chosen by consensus by all parties, because it carries stronger legal weight than “should”, although it does not amount to a strict legal obligation of “shall”. Rather, it can be seen as a standard of conduct¹⁷ that each party will take all appropriate measures at its disposal.¹⁸ This was recognized in the IPCC Working Group III chapter on international cooperation, which observed that “[w]hile what represents a Party’s highest possible ambition and progression is not prescribed by the Agreement or elaborated in the Paris Rulebook ... these obligations *could be read to imply a due diligence standard.*”¹⁹

Mr President, members of the Tribunal, in light of the significant risk that climate change poses to the ocean, we submit to this Tribunal that “highest possible ambition” be understood in a way that each Party exerts its best efforts and uses all the means at its disposal to reduce, over time, all greenhouse gas emissions from activities which take place in its territory, or are under its jurisdiction or control, aligned with the 1.5°C threshold.

As the Seabed Disputes Chamber confirmed, in order to act with due diligence, a party must deploy adequate means, exercise best efforts and do the utmost.²⁰ Accordingly, parties need to exercise best efforts in their climate action, laws, plans, regulations, including in their NDC. The NDC would need to be based on a comprehensive assessment of all mitigation options in all relevant economic sectors. “Highest possible ambition” means “doing the utmost”. It also implies that the extraterritorial consequences, including on the marine environment, need to be taken into account.²¹ This includes scope 1, 2 and 3 emissions. It

article 4(9) states “9. Each Party *shall* communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement *and be informed by the outcomes of the global stocktake referred to in article 14.*” (emphasis added) The synthesis of the first Global Stocktake was released on 8 September 2023 and can be accessed here: <https://unfccc.int/documents/631600>

¹⁵ L. Rajamani, “Due Diligence in International Climate Law” in H. Krieger et al (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 169; C. Voigt and F. Ferreira “Dynamic Differentiation”: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement” (2016) 5 *Transnational Environmental Law* 2, 285-303.

¹⁶ B. Mayer “International Law Obligations Arising in relation to Nationally Determined Contributions» (2018) *Transnational Environmental Law* 7(2), 251-275; C. Voigt “[The Power of the Paris Agreement in International Climate Litigation](#)” (2023) 32 *Review of European, Comparative and International Environmental Law* 2, 237-249 (open access).

¹⁷ Rajamani considers the concept ‘a regime-specific marker of due diligence’; see L. Rajamani “Due Diligence in International Climate Law” in H. Krieger et al (eds) *Due Diligence in the International Legal Order* (Oxford University Press 2020) 169.

¹⁸ See, e.g., the first report of the International Law Association (ILA) Study Group on Due Diligence in International Law, ‘First Report (7 March 2014) <https://www.ila-hq.org/en_GB/documents/first-report-washington-dc-2014>.

¹⁹ A. Patt et al, “International Cooperation” in P.R. Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) 1451, 1466.

²⁰ Seabed Advisory Opinion, para. 110.

²¹ This issue is relevant in several climate cases pending before the ECtHR, most directly in *Duarte Agostinho and others v Portugal and 32 Other States* App No 39371/20 (ECtHR, communicated 13 November 2020, Hearing scheduled for 27 September 2023).

would, for example, hardly be justifiable for a State with significant fossil fuel exports, to claim “highest possible ambition” in its climate policy and to have acted with due diligence, if emissions caused by these exports remain entirely unaddressed.

Acting with due diligence requires Parties to deploy all adequate political, regulatory, legal, socioeconomic, financial, and institutional capacities in defining their NDC objectives. Moreover, parties are expected to align their level of ambition with their respective responsibilities and capabilities, in light of different national circumstances. This means that countries with higher responsibility and/or more capacity must go further and faster in their NDC objectives consistent with the emission pathways necessary to stay at maximum 1.5°C. Countries with less capacity may need more time, technical assistance and financial support in order to implement policies, plans and laws that reduce greenhouse gas emissions to these levels.

Now, while it is clear that parties have the obligation to prepare, communicate and maintain an NDC, they arguably do not have the obligation of result under the Paris Agreement to achieve the objectives of their NDCs.²² The second sentence of article 4(2) provides that “Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such NDCs”.²³ This has been interpreted as not establishing an obligation of result on each party to implement or achieve its NDC, but to act in good faith with the intention to do so.²⁴

This does not mean, however, that the implementation and achievement of NDCs fall entirely outside the scope of the Agreement. It is submitted that the second sentence of article 4(2) contains a legal obligation of result to pursue domestic mitigation measures. If a party takes no measure, this would be a violation of that provision, but this obligation is coupled with a due diligence standard to achieve the NDC.²⁵ The achievement does not become legally binding, but the measures adopted must be necessary, must be meaningful, timely and, indeed, effective to function as a means to this end.

Mr President, members of the Tribunal, the simple truth is that the marine environment cannot be effectively protected and preserved without addressing climate change and its adverse effects. Our core legal argument, therefore, is that Part XII needs to be read in light of the legal standards of result and of conduct contained in the Paris Agreement, which implies that States have to reduce their land-based, marine-based and atmospheric emissions at a level aligned with the collective 1.5°C threshold in a way that reflects each party's highest possible ambition, and to adopt effective national measures to this end.

This requires parties to take all necessary measures aligned with the collective pathway to rapidly, deeply and immediately reduce greenhouse gas emissions by 45 per cent in 2030 with a view to achieving global net-zero CO₂ emissions by 2050 and net-negative emissions thereafter. Reducing CO₂ emissions at this level also addresses the challenge of ocean acidification.

My fourth and final point is that parties also have obligations to take adaptation measures to protect and preserve the marine environment. The science is clear that coral reefs and other rare or fragile ecosystems are facing mass extinction at 1.5°C warming.²⁶ Therefore article 194(5), with respect to these specific ecosystems, adds a layer of additional urgency.

²² Paris Agreement, article 4 (2).

²³ Paris Agreement, article 4 (2).

²⁴ L. Rajamani “The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligation” (2016) 28 *Journal of Environmental Law* 337; D. Bodansky “The Legal Character of the Paris Agreement” (2016) 25 *Review of European, Comparative and International Environmental Law* 2.

²⁵ B. Mayer “Obligations of Conduct in the International Law on Climate Change: A Defence” (2018) 27 *Review of European, Comparative and International Environmental Law* 130, 135.

²⁶ Chapter 15 of the IPCC Working Group II AR6 report states that “Models are currently predicting large-scale loss of coral reefs by mid-century under even low-emission scenarios. Even achieving emission reduction targets consistent with the ambitious 1.5°C of global warming under the Paris Agreement will result in the further loss of

For the high seas, the main legal instrument for such adaptive measures is the BBNJ Agreement,²⁷ in particular the establishment of marine protected areas in areas especially vulnerable to climate change and ocean acidification.²⁸ Moreover, the BBNJ Agreement includes cumulative impacts analysis as an important environmental impact assessment measure to take account of climate change and ocean acidification impacts.²⁹ We therefore would like to end our statement by expressing the hope that parties speed up their national ratification processes in order for the BBNJ Agreement to rapidly enter into force.

Mr President, members of the Tribunal, I thank you for granting the time to conclude our statement. We thank you for your attention and wish you all the best for your deliberations.

THE PRESIDENT: Thank you Ms Voigt.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3 p.m. when we will hear an oral statement from the African Union. This sitting is now closed.

(Luncheon break)

70-90 per cent of reef-building corals compared to today, with 99 per cent of coral reefs being lost under warming of 2°C or more above the preindustrial period." Mycoo, M., M. Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O. Warrick, 2022: *Small Islands*. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at 2056.

²⁷ Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement), General Assembly, A/CONF.232/2023/4, 19 June 2023.

²⁸ BBNJ Agreement, Art. 17 and 19(4), and Annex I Indicative criteria for identification of areas, f.

²⁹ BBNJ Agreement, Art. 27(c). Cumulative impacts are defined as "the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts", BBNJ Agreement, Art. 1(6).

PUBLIC SITTING HELD ON 21 SEPTEMBER 2023, 3.00 P.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

INTERGOVERNMENTAL ORGANIZATIONS

African Union

Mr Tordeta Ratebaye, Ambassador, Deputy Chief of Staff, Cabinet of the Chairperson, African Union Commission

Mr Mohamed Salem Boukhari Khalil, Acting Legal Counsel, Director of Legal Affairs, African Union Commission

Mr Mamadou Hébié, Associate Professor of International Law, Grotius Centre for International Legal Studies, Leiden University; Member, Bar of the State of New York

Mr Nicolas J.S. Lockhart, Partner, Sidley Austin LLP, Geneva; Solicitor (Scotland)

Mr Deepak Raju, Senior Managing Associate, Sidley Austin LLP, Geneva; Solicitor (England and Wales); Advocate (Maharashtra and Goa, India)

Mr Adetola Adebisin, Trainee Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor, Supreme Court of Nigeria

Mr Icarus Chan, Associate, Sidley Austin LLP, New York; Member, Bar of the State of New York

Ms Katherine Connolly, Senior Managing Associate, Sidley Austin LLP, Geneva; Barrister and Solicitor, Supreme Court of New South Wales

Mr Dominic Coppens, Senior Managing Associate, Sidley Austin LLP, Brussels; Professor, Department of International and European Law, Maastricht University; Member, Brussels Bar – A list

Ms Shambhavi Pandey, Trainee Associate, Sidley Austin LLP, Geneva

Ms Stella Perantakou, Associate, Sidley Austin LLP, Geneva; Member, Athens Bar

Mr Iain Sandford, Partner, Sidley Austin LLP, Geneva; Barrister and Solicitor, High Court of New Zealand, Supreme Court of the Australian Capital Territory and High Court of Australia

Ms Pem Chhoden Tshering, Member, Bar of the State of New York; Registered Lawyer, Bar Council, Kingdom of Bhutan

Ms Rebecca Walker, Trainee Associate, Sidley Austin LLP, Geneva

Mr Ermias Kassaye, Legal Officer, Office of the Legal Counsel, African Union

Ms Meseret Fassil Assefa, Legal Associate, Office of the Legal Counsel, African Union

AUDIENCE PUBLIQUE TENUE LE 21 SEPTEMBRE 2023, 15 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCIOLO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

ORGANISATIONS INTERGOUVERNEMENTALES

Union africaine

M. Tordeta Ratebaye, Ambassadeur, directeur de cabinet adjoint, Cabinet du Président, Commission de l'Union africaine
M. Mohamed Salem Boukhari Khalil, conseiller juridique par intérim de la Commission de l'Union africaine
M. Mamadou Hébié, professeur adjoint de droit international au Centre Grotius pour les études juridiques internationales de l'Université de Leyde ; membre du barreau de l'État de New York
M. Nicolas J.S. Lockhart, associé, cabinet Sidley Austin LLP, Genève ; *solicitor* (Écosse)
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M. Adetola Adebessin, collaborateur stagiaire, cabinet Sidley Austin LLP, Genève ; *barrister* et *solicitor* à la Cour suprême du Nigéria
M. Icarus Chan, collaborateur, cabinet Sidley Austin LLP, New York ; membre du barreau de l'État de New York
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Mme Stella Perantakou, collaboratrice, cabinet Sidley Austin LLP, Genève ; membre du barreau d'Athènes
M. Iain Sandford, associé, cabinet Sidley Austin LLP, Genève ; *barrister* et *solicitor* à la Haute Cour de Nouvelle-Zélande, à la Cour suprême du Territoire de la capitale australienne et à la Haute Cour d'Australie
Mme Pem Chhoden Tshering, membre du barreau de l'État de New York ; avocate inscrite au conseil de l'ordre des avocats du Royaume du Bhoutan
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M. Ermias Kassaye, juriste au bureau du conseiller juridique de l'Union africaine
Mme Meseret Fassil Assefa, collaboratrice juridique au bureau du conseiller juridique de l'Union africaine

THE PRESIDENT: Good afternoon. We will now continue to the hearing in the *Request for an Advisory Opinion Submitted by the Commission of Small Island States and International Law*. This afternoon we will hear an oral statement from the African Union.

I now invite the representative of the African Union, Mr Tordeta Ratebaye, to make his statement. You have the floor, Sir.

STATEMENT OF MR RATEBAYE
AFRICAN UNION
[ITLOS/PV.23/C31/17/Rev.1, p. 1-3]

Mr President, members of the International Tribunal for the Law of the Sea, it is a great pleasure to be here in front of you on behalf of the Member States. I am happy to see the number of Member States that have joined us today to address the Tribunal during the hearing.

In opening this statement, I would like to recall the recent Nairobi Declaration of African Leaders on Climate Change, which acknowledges that “climate change is the single greatest challenge facing humanity and the single biggest threat to all life on earth”.¹ The Declaration also recognizes the critical importance of the oceans as does the Moroni Declaration for Ocean and Climate Action in Africa.

African leaders have called on the international community to fulfil its obligations, to keep its promises, and to support the African Continent in facing up to climate change. These advisory proceedings offer an unprecedented opportunity for the Tribunal to play a part in these efforts by identifying the obligations regarding climate change under the UN Convention on the Law of the Sea, a near-universal treaty that mandates the protection and preservation of the marine environment.

In considering the relevant provisions of UNCLOS, I would like to share with you the words of the Chair of the Commission, according to whom African States are confronted with disproportionate burdens and risks as a result of unpredictable meteorological phenomena such as prolonged droughts and devastating floods at all levels. The ensuing humanitarian crisis has adverse effects on the economy, health, education, peace and security.

Similarly, the Secretary-General of the United Nations, António Guterres, speaking at the very same Africa summit, stated the following:

An injustice burns at the heart of the climate crisis. And its flame is scorching hopes and possibilities here in Africa. This continent accounts for less than four per cent of global emissions. Yet it suffers some of the worst effects of rising global temperatures. Extreme heat, ferocious floods and tens of thousands dead from devastating droughts. The blow inflicted on development is all around with growing hunger and displacement. Shattered infrastructure. Systems stretched to the limit. All aggravated by climate chaos not of [Africa’s] making.²

What more can we say, Mr President, after these two complementary and poignant statements?

Mr President, these remarks should be at the very heart of the Tribunal’s deliberations in these proceedings. They evoke the very significant harm that climate change is already wreaking on Africa, and on other parts of the world as well. This harm extends to the marine

¹ The African Leaders Nairobi Declaration on Climate Change and Call to Action (2023) (hereafter “Nairobi Declaration”), fifth preambular paragraph.

² United Nations, “Secretary-General’s remarks at African Climate Summit”, 5 September 2023, <https://www.un.org/sg/en/content/sg/statement/2023-09-05/secretary-generals-remarks-african-climate-summit>

environment, with adverse effects highlighted by the COSIS request, such as rising ocean temperatures, rising sea levels, increased ocean acidification, and deoxygenation of the ocean. These effects are due to worsen. We must, therefore, tackle the crisis with utmost urgency and determination.

The comments of these two leaders that I have cited also acknowledge a truth that lies at the heart of climate change and its brutal consequences. That truth is profound injustice. We know all too well that Africa has made an insignificant contribution to causing climate change. The IPCC recognizes that Africa has the “lowest per capita GHG emissions of all regions”.³ Yet despite its insignificant contribution, Africa faces the worst consequences of this crisis.

In contrast to Africa’s contribution, the contributions of developed countries to climate change have been, and remain, extremely significant. Their larger contributions are a direct consequence of their greater economic output over the past decades. Additionally and as a result, they have enjoyed consistently greater economic development at the expense of the global climate system. This wealth gives the developed countries significant capacity, and, correspondingly, particular responsibility to tackle climate change.

The remarks that I have cited also have legal resonance for the questions before the Tribunal. They express the fact that greenhouse gas emissions are already causing significant environmental harm, including to the oceans. This explains why the African Union considers it important for the Tribunal to clarify the obligations flowing from UNCLOS to protect and preserve the marine environment, and to prevent, reduce and control marine pollution.

These remarks also echo a pertinent feature of international law regarding climate change, which is the concept of the principle of common but differentiated responsibilities in accordance with respective capabilities. This principle is the foundational part of the climate regime expressed in the Rio Declaration, the UNFCCC and the Paris Agreement. But what is more, this principle is also to be found in article 194 of UNCLOS, and calls upon – even obliges – States Parties to act to prevent, reduce and control marine pollution in accordance with their respective capabilities. Even though the principle cannot fully repair injustices, it is nonetheless a tool to rebalance the actions necessary to combat climate change.

In interpreting the Convention in a way that coherently aligns the different parts of international law on climate change, it is crucial that the Tribunal take account of this principle, according it proper weight. It is precisely under this principle that developed States have committed to bear a larger share of the necessary emission reductions and to mobilize significant resources, to the tune of some US\$ 100 billion per year, to meet the climate challenges of developing countries.

Mr President, unfortunately, you will see, as I have, that both of these commitments remain unfulfilled. They are still just empty promises, but how long will that last for?

Given the critical importance of these proceedings, the African Union urges the Tribunal to render an opinion that sets out concrete and actionable specific obligations. To do so, the African Union considers it useful to recall the conceptual framework generally used to address climate change.

Policymakers routinely group climate responses into mitigation efforts and adaptation efforts. “Mitigation” refers to efforts to reduce the rate of climate change primarily by reducing

³ IPCC, 2022: Africa [Trisos, C.H., I.O. Adelekan, E. Totin, A. Ayanlade, J. Efitre, A. Gemedda, K. Kalaba, C. Lennard, C. Masao, Y. Mngaya, G. Ngaruiya, D. Olago, N.P. Simpson, and S. Zakieldean]. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)], (hereafter “IPCC 2022, Africa, *Impacts, Adaptation and Vulnerability*”), p. 1294, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter09.pdf, last accessed 18 September 2023.

greenhouse gas emissions, whereas “adaptation” refers to efforts to build resilience in the face of shocks. For Africa, adaptation is a particular challenge because of the severe impacts of climate change, particular vulnerabilities, especially the exposure of our numerous coastal States to those impacts.

The African Union has identified its own specific obligations in these proceedings along the lines of mitigation and adaptation, and urges the Tribunal to consider the same approach. This would assist the international community allowing it to transform guidance into concrete actions, and the Tribunal will have worked usefully.

The African Union explained in its written statement that the Tribunal has jurisdiction in the present matter under article 21 of its Statute but also under the COSIS Agreement. We have also explained that the request by COSIS meets all of the requirements to trigger the Tribunal’s jurisdiction, including those under article 138(1) of the ITLOS Rules.

Without reiterating these arguments, Mr President, let me just emphasize once again that the Tribunal must exercise its full powers because the legal bases are in no way contested. An advisory opinion from ITLOS would contribute significantly to the global efforts in protecting the marine environment against the adverse effects of climate change. An opinion would equally be of assistance to COSIS and also to other international organizations including the African Union, allowing them to discharge their functions. What is more, guidance from the Tribunal would be extremely valuable for States Parties in their efforts to meet their obligations under the Convention to protect and preserve the marine environment.

Mr President, it is at this point that I would like to thank you for your attention. I would ask you to give the floor to my colleagues for the remainder of our statement. I would ask you to invite Mr Khalil Mohamed to address the Tribunal.

THE PRESIDENT: Thank you, Mr Tordeta Ratebaye.

I now invite Mr Salem Boukhari Khalil to make his statement. You have the floor, Sir.

STATEMENT OF MR KHALIL
AFRICAN UNION
[ITLOS/PV.23/C31/17/Rev.1, p. 4-9]

Thank you, Mr President. In this section, the African Union will first address the applicable law, then the principle of effectiveness, before turning to the relationship between UNCLOS and the climate regime.

Let me begin with the applicable law, which is a threshold issue. Under the Convention, article 293 provides that the Tribunal shall apply the Convention and “other rules of international law not incompatible” with the Convention.

In deciding on the applicable law, the Tribunal should be guided by the terms of the COSIS questions. These questions very clearly seek the Tribunal’s opinion on obligations *under* the Convention, owed by the Parties *to* the Convention. In these circumstances, the African Union submits that the applicable law is UNCLOS.

In taking this position, the African Union is not suggesting that “other rules of international law” are not important. To the contrary, “other rules” are very important, and must be taken into account in interpreting UNCLOS. But the Tribunal’s task must focus on providing an interpretation of UNCLOS, as the applicable law.

The African Union also wishes to make clear that, in advocating that UNCLOS is the applicable law, it is not suggesting that UNCLOS is “incompatible” with other rules of international law, in particular the climate regime. To the contrary, the African Union agrees with virtually all participants that the Convention is compatible with the climate regime.

One participant has suggested that the two regimes are not compatible because the climate regime was not established “specifically” to address the marine environment or further the Convention’s principles.¹ However, the two regimes are perfectly “compatible”, even though the climate regime is not established specifically to address the objectives and principles of the Convention.

Others argue, Mr President, that the climate regime is a “*sui generis*”, “specialized legal regime”, to address climate change, and describes the relationship in terms of *lex specialis*.² However, *lex specialis*, and the rule in article 237(1) of the Convention, come into play when two norms of international law conflict.³ Here, the two regimes are “compatible”, operate harmoniously and there is no conflict to resolve.

The climate regime is not the only relevant body of rules for the interpretation of UNCLOS. In interpreting Part XII of the Convention.⁴ It should be recalled that the Tribunal

¹ Indonesia’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 38, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-13-Indonesia.pdf, last accessed 18 September 2023, (hereafter “Indonesia’s written statement”).

² India’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 16-17, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf, last accessed 18 September 2023, (hereafter “India’s written statement”). *See also* India’s Oral Statement, 14 September 2023, Verbatim Record ITLOS/PV.23/C31/8, pp. 17-18; Saudi Arabia’s Oral Statement, 14 September 2023, Verbatim Record ITLOS/PV.23/C31/5, pp. 23, 27-33.

³ Report of the Study Group of the International Law Commission, finalized by Mr Martti Koskenniemi, “Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, 13 April 2006, para. 57, footnote 58, available at

https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, last accessed 18 September 2023 (hereafter “Report of the Study Group of the International Law Commission, “Fragmentation of International Law”).

⁴ See the Written Submissions of the Democratic Republic of Congo, Nauru, Mauritius.

itself,⁵ as well as Annex VII arbitral tribunals,⁶ have used human rights law principles to interpret the Convention on different occasions.

The right of peoples to *self-determination* and the principles resulting from it, constitute a peremptory norm of general international⁷ codified in different international instruments. This right includes the principle according to which “in no case may a people be deprived of its own means of subsistence.”⁸ The deleterious effects of climate change on the oceans, if nothing is done urgently deprive many peoples of this planet of their means of substance, especially coastal communities and small island States.

Mr President, I turn now to the interpretation of UNCLOS. I will address two points: the principle of effectiveness and the relationship with the climate regime.

As a first point, the Convention must be interpreted in line with the principle of effectiveness. Four points bear emphasis here:

First, the principle of effectiveness requires the Tribunal to interpret the Convention so as to make each provision fully effective, rendering none inutile.⁹

Second, the principle calls for an interpretation that makes the Convention effective not just on paper but “in the real world where people live and work and die”.¹⁰ The African Union, therefore, joins others, notably the Democratic Republic of the Congo, in urging the Tribunal to interpret the Convention in a way that is *practically* effective.¹¹

Third, the African Union joins the DRC, Sierra Leone and others in arguing that the principle of effectiveness requires that the Convention be interpreted in light of its “continuing – and thus necessarily evolving” nature, in view of developments in scientific and other factual knowledge, as well as in international law itself.¹²

⁵ ITLOS, *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p. 10, 62, para. 155; ITLOS, *M/V “Virginia G” (Panama/Guinea-Bissau)*, ITLOS Reports 2014, p. 4, 101, para. 359; ITLOS, “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, 204, para. 133.

⁶ *Arctic Sunrise* (The Netherlands v. Russian Federation), 2015, 171 *ILR* 1, 82, para. 197.

⁷ ILC, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, 31 January 2019, A/CN.4/727.

⁸ International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, Treaty Series, vol. 993, No. 14531, p. 3, common art. 1(2).

⁹ *Interpretation of Peace Treaties (second phase), Advisory Opinion*, I.C.J. Reports 1950, p. 229; Statement by H.E. Judge Ruediger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (2006), available at https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf, last accessed 19 September 2023.

¹⁰ WTO Appellate Body Report, *EC – Hormones*, para. 187.

¹¹ Democratic Republic of the Congo’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 159, available at

https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-1-RD_Congo_translation_ITLOS.pdf, last accessed 18 September 2023 (hereafter “Democratic Republic of the Congo’s written statement”); United Kingdom’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 85-87, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-27-UK.pdf, last accessed 18 September 2023 (hereafter “United Kingdom’s written statement”).

¹² Sierra Leone’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 22, available at

https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-29-Sierra_Leone.pdf, last accessed 18 September 2023; Canada’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 36, available at

Fourth, the principle of effectiveness supports the “systemic integration” of different treaty regimes,¹³ along with the “strong presumption against normative conflict” between treaty regimes.¹⁴ The Tribunal should, therefore, strive to interpret the Convention and the climate regime in a coherent and mutually supportive way.

Mr President, I will now address this last point in more detail.

Let me start by saying that the African Union joins virtually all others in urging the Tribunal to give the climate regime a prominent place in the interpretation of UNCLOS.

This approach flows from the rules of treaty interpretation. Under Article 31(3)(c) of the Vienna Convention,¹⁵ the Tribunal’s interpretation of UNCLOS provisions must “take[] into account” “any relevant rules of international law applicable in the relations between the parties”. There is very wide agreement that the climate regime constitutes such “rules”, given the almost perfect overlap in the Parties to the Convention and the climate regime.¹⁶

The requirement to take the climate regime into account, serves to foster coherence between the Convention and the climate regime, with the rule in article 31(3)(c) facilitating the “systemic integration” of different parts of international law.¹⁷ In the words of Mauritius, the Tribunal must apply “an integrated approach which maximises the effectiveness and coherence of both regimes”.¹⁸

The text of the Convention itself lends strong support to this integrated approach.

In general terms, the Convention displays considerable openness to other areas of international law. This shows that the Convention is intended to be understood, if possible, coherently and harmoniously with other areas of international law.¹⁹

In that regard, we agree with Singapore that articles 207(1) and 212(1) are main “entry points” for the climate regime.²⁰ Each provision requires UNCLOS Parties to “tak[e] into account” internationally agreed rules and standards when they take action to prevent, reduce and control marine pollution. These two provisions use the same words as article 31(3)(c) to

https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-25-Canada-rev_01.pdf, last accessed 18 September 2023; African Union’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, paras. 144-146, available at

https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-7-African_Union.pdf, last accessed 18 September 2023 (hereafter “African Union’s written statement”), citing Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7, available at <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>, last accessed 18 September 2023.

¹³ Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, Chapter V, paras. 410-480.

¹⁴ Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 37.

¹⁵ Vienna Convention on the Law of Treaties, Article 31(3)(c).

¹⁶ All of the UNCLOS States Parties are parties to both the UNFCCC and the Paris Agreement, except for Yemen, which has signed and ratified the UNFCCC but only signed the Paris Agreement.

¹⁷ Report of the Study Group of the International Law Commission, “Fragmentation of International Law”, para. 413. For a recent report on coherence between the climate change regime and another area of international law (WTO law), see International Legal Expert Group on Trade-Related Climate Measures and Policies, “Principles of International Law Relevant for Consideration in the Design and Implementation of Trade-Related Climate Measures and Policies”, 13 September 2023, available at <https://tessforum.org/latest/principles-of-international-law-relevant-for-consideration-in-the-design-and-implementation-of-trade-related-climate-measures-and-policies>, last accessed 18 September 2023.

¹⁸ Republic of Mauritius’ written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 49, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-12-Mauritius.pdf, last accessed 18 September 2023 (hereafter “Republic of Mauritius’ written statement”).

¹⁹ See Articles 197, 207, 211, 212, 213, 237, and 293 of the Convention.

²⁰ See, e.g., Singapore’s Oral Statement, 19 September 2023, Verbatim Record ITLOS/PV.23/C31/13, pp. 4, 7.

give the same weight to international rules and standards: in both cases, the relevant rules and standards must be “taken into account”.

Articles 207(1) and 212(1) of UNCLOS, therefore, chart a second legal route, within the Convention itself, to achieve systemic integration between the Convention and other parts of international law.

Like many other participants,²¹ the African Union considers that the climate change regime sets forth international rules and standards covered by articles 207(1) and 212(1). As a result, these two UNCLOS provisions confirm that the climate regime must be “taken into account” in identifying the specific UNCLOS obligations regarding GHG emissions and climate change.

A handful of participants take the arguments under articles 207(1) and 212(1) considerably further. They rely on these two provisions to assert that the climate change regime exhaustively defines, and effectively displaces, the UNCLOS obligations to protect and preserve the marine environment from GHG emissions and climate change.²²

These participants argue that the climate regime exhausts the UNCLOS obligations because it sets out “*the* internationally agreed rules and standards” regarding the “measures” necessary under UNCLOS with respect to GHG emissions and climate change.²³

However, the African Union disagrees for two reasons: one relating to the wording of UNCLOS; and the other to features of the climate regime.

First, the position overstates the legal significance of “international rules and standards” under articles 207 and 212. The first paragraph, Mr President, of each provision merely requires that rules and standards be “*tak[en] into account*”. These words mean that the rules of the climate regime are weighed as just one interpretive factor that together with other interpretive factors, contribute collectively to establishing the meaning of the relevant UNCLOS provisions. This wording, in itself, excludes the climate regime exhaustively defining the UNCLOS obligations.

Articles 207(2) and 212(2) explicitly confirm this position. Each provision requires that “States shall take *other measures* as may be necessary to prevent, reduce and control such pollution”. Thus, articles 207(2) and 212(2) *expressly mandate* the adoption of “*other [necessary] measures*” *in addition to* those agreed in international rules and standards.

²¹ European Union’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 62, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-9-EU.pdf, last accessed 18 September 2023 (hereafter “European Union’s written statement”); United Kingdom’s written statement (referring to Article 212), para. 68; Australia’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 41, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-11-Australia.PDF, last accessed 18 September 2023 (hereafter “Australia’s written statement”); New Zealand’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 71, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-3-New_Zealand.pdf, last accessed 18 September 2023 (hereafter “New Zealand’s written statement”); Mozambique’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 3.76, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-10-Mozambique_01.pdf, last accessed 18 September 2023 (hereafter “Mozambique’s written statement”)

²² Australia’s written statement, para. 40; European Union’s written statement, para. 68.

²³ Australia’s written statement, para. 46 (underlining added); Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 6.

UNCLOS, therefore, makes clear that, while rules and standards in the climate regime must be “tak[en] into account”, they do not exhaustively define and displace the relevant UNCLOS obligations.²⁴

Second, the argument that the climate regime exhausts the UNCLOS obligations also overstates the relevance of the climate change. In the first place, the climate regime is not formulated to be the exclusive legal regime applicable to climate change. The UNFCCC preamble recognizes, for example, that other parts of international law are relevant, including principles of international law, as well the Ozone treaties.²⁵

In the second place, the climate regime gives the marine environment virtually no attention.

To conclude this section, Mr President:

The applicable law in these proceedings is UNCLOS; UNCLOS must be interpreted in light of the principle of effectiveness;

In interpreting UNCLOS, the climate regime must be taken into account, to ensure an integrated and coherent approach between two complementary areas of international law; articles 207(1) and 212(1) of UNCLOS support this view; and,

articles 207(2) and 212(2) show that the climate regime does not exhaustively define, or displace, the UNCLOS obligation to protect and preserve the marine environment with respect to GHG emissions and climate change.

Mr President, may I now request you to invite Mr Lockhart to address the Tribunal next. Thank you.

THE PRESIDENT: Thank you, Mr Salem Boukhari Khalil.

I now give the floor to Mr Lockhart to make his statement. You have the floor, Sir.

²⁴ Republic of Mauritius’ written statement, para 74; New Zealand’s written statement, para. 71; United Kingdom’s written statement, para. 68.

²⁵ Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol.

STATEMENT OF MR LOCKHART
AFRICAN UNION
[ITLOS/PV.23/C31/17/Rev.1, p. 9-14]

Thank you very much, Mr President, distinguished members of the Tribunal. It is an honour to appear before you today.

I am going to address the first of the two questions before you. As you know well by now, the focus of this question is the specific obligations “to prevent, reduce and control pollution of the marine environment” in relation to the deleterious effects of climate change.

A threshold question is whether human-produced greenhouse gas emissions cause “pollution of the marine environment”. The African Union takes the unequivocal position that they do. In brief, these greenhouse gas emissions involve the “introduction by man”, of a “substance” (carbon dioxide) and “energy” in the form of heat into the marine environment with deleterious effects that, scientifically, are very well established. So for the African Union, the article 194 obligations are fully engaged. These obligations apply to any and all sources of greenhouse gas emissions. This includes, for example, as the Democratic Republic of the Congo has argued, plastic waste entering the oceans directly, breaking down there and releasing greenhouse gas emissions.¹

Mr President, three verbs are at the heart of article 194 – “prevent”, “reduce” and “control”. Each of these verbs has an independent meaning and, by using all three, article 194 imposes cumulative obligations. In line with the principle of effectiveness, the Tribunal should adopt an interpretation that gives practical, real-world effect to each of these verbs.

There is an overwhelming consensus among the participants that the three verbs require States collectively to achieve a significant reduction in greenhouse gas emissions. The participants diverge, though, on the extent of the required emissions reductions and this divergence is driven by a difference in view on the relationship between the Convention and the climate regime.

The African Union takes the view that the Convention and the climate regime apply concurrently and harmoniously, and that under the rules of treaty interpretation the Convention must be interpreted taking into account the climate regime to ensure the proper integration of the two regimes.

A key part of the climate regime, which the Tribunal must take into account, is the Paris Agreement temperature goal. The international community is now very much focused on the lower end of that goal, 1.5°C. This is because the IPCC² has established that the adverse impacts of climate change will be much worse with a temperature increase of 2.0°C.³

¹ Democratic Republic of the Congo’s written statement, paras. 63: “[methane] emanates from landfill and agricultural and livestock waste and is transported to the oceans mainly through the [Land-to-Ocean Aquatic Continuum]. It is also primarily by this route that methane contained in plastics reaches marine ecosystems.”

² African Union’s written statement, para. 217-218.

³ United Nations Environment Programme’s written statement, Request for an Advisory Opinion to the International Tribunal for the Law of the Sea by the Commission of Small Island States on Climate Change and International Law, para. 30, available at

https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-6-UNEP.pdf,

last accessed 18 September 2023; African Union’s written statement, paras. 99, 115, 120, 217-218. For discussions on harm to the marine environment, even at the 1.5 degree level, see IPCC, 2018: Technical Summary [Allen, M.R., H. de Coninck, O.P. Dube, O. Hoegh-Guldberg, D. Jacob, K. Jiang, A. Revi, J. Rogelj, J. Roy, D. Shindell, W. Solecki, M. Taylor, P. Tschakert, H. Waisman, S. Abdul Halim, P. Antwi-Agyei, F. Aragón-Durand, M. Babiker, P. Bertoldi, M. Bindi, S. Brown, M. Buckeridge, I. Camilloni, A. Cartwright, W. Cramer, P. Dasgupta, A. Diedhiou, R. Djalante, W. Dong, K.L. Ebi, F. Engelbrecht, S. Fifita, J. Ford, P. Forster, S. Fuss, V. Ginzburg, J. Guiot, C. Handa, B. Hayward, Y. Hijioka, J.-C. Hourcade, S. Humphreys, M. Kainuma, J. Kala, M. Kanninen, H. Khesghi, S. Kobayashi, E. Kriegler, D. Ley, D. Liverman, N. Mahowald, R. Mechler, S. Mehrotra, Y. Mulugetta, L. Mundaca, P. Newman, C. Okereke, A. Payne, R. Perez, P.F. Pinho, A. Revokatova,

Given the significant additional harm at the higher temperature, the African Union argues that article 194 requires, at a minimum, that States act effectively to limit atmospheric warming to 1.5°C. In short, under UNCLOS, States cannot settle for a higher atmospheric temperature goal, when the science shows that this temperature would mean considerably more harm to the marine environment.

The obligations under article 194 do not, however, end with limiting atmospheric warming to 1.5°C. As we have explained, the Convention’s obligations are neither defined nor exhausted by the climate regime. As New Zealand said earlier this week, while compliance with the climate regime is necessary under UNCLOS, it may not be “sufficient”.⁴ So for you as you consider the weight to give the Paris temperature goal, the weight under UNCLOS and using the rules of treaty interpretation, you should weigh that goal in light of the words of the Convention itself. Here I would stress two points.

First, the Convention is not concerned with the temperature of the *atmosphere*, it is concerned with the protection and preservation of the *marine environment*. The obligations in article 194 must, therefore, be understood in light of the impact of greenhouse gas emissions on the marine environment and not on the atmosphere.

The second, point I would stress here is that the Paris temperature goal must be weighed in light of the three verbs in article 194. While actions to secure the Paris temperature goal can bring about a certain degree of “control” of marine pollution, they do not “prevent” that pollution nor do they “reduce” cumulative levels of the pollution.

Let me be very clear about these facts: even if atmospheric warming is limited to 1.5°C degrees, vast quantities of greenhouse gases will continue to be emitted into the atmosphere, and persistent marine pollution will continue to accumulate in the oceans. As the IPCC has said, far from being “reduce[d]”, as required under article 194, ocean acidification, deoxygenation, temperatures, and sea levels will actually *rise*.⁵

To comply with their UNCLOS obligations, therefore, to “prevent” and “reduce” marine pollution, UNCLOS parties cannot limit their endeavors to holding the atmospheric temperature increase to 1.5°C.⁶ As Mozambique has put it, the 1.5°C standard is “the start, but not the end point”.⁷ Parties are, therefore, obliged to make efforts to limit emissions further.

K. Riahi, S. Schultz, R. Séférian, S.I. Seneviratne, L. Steg, A.G. Suarez Rodriguez, T. Sugiyama, A. Thomas, M.V. Vilariño, M. Wairiu, R. Warren, K. Zickfeld, and G. Zhou]. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)], p. 221-228, available at https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf, last accessed 15 June 2023; IPCC 2022, *Africa, Impacts, Adaptation and Vulnerability*, p. 1291.

⁴ New Zealand’s Oral Statement, 15 September 2023, Verbatim Record ITLOS/PV.23/C31/10, p. 12.

⁵ IPCC, “Technical Summary” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018), p. 37. 50 IPCC 2014, “The Ocean” in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2014) Table 30-1, p. 1667. 51 IPCC, “Impacts of 1.5°C Global Warming on Natural and Human Systems” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC 2018) p. 224. *See also* Mozambique’s Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, pp. 15-16; and Sierra Leone’s Oral Statement, 19 September 2023, Verbatim Record ITLOS/PV.23/C31/12, pp. 30-31.

⁶ African Union’s written statement paras. 225-231.

⁷ Mozambique’s Oral Statement, 18 September 2023, Verbatim Record ITLOS/PV.23/C31/11, p. 15.

To us, this reading of article 194 flows logically from a straightforward understanding of the verbs used: parties cannot settle for conduct that, in the circumstances, merely meets the least demanding of the three verbs: “control”.

We find strong support for this argument in articles 207(2) and 212(2) of the Convention. These provisions expressly envisage that, even when international rules and standards have been agreed, like the those in the climate regime, UNCLOS parties must still take “other measures” that may be necessary to prevent, reduce and control marine pollution. Because the 1.5°C “standard” only effects a degree of “control” over marine pollution, other measures are still necessary to “prevent” and “reduce” that pollution.

Let me turn now to the required level of conduct. Article 194 establishes a due diligence obligation, which varies with the circumstances.⁸ With respect to climate change, the circumstances demand an unparalleled level of diligent conduct. States are not trying to avert a *threat of potential* harm: climate change has already caused severe harm to the marine environment; we know that it threatens much more harm; and we know what action is needed: deep and sustained emission reductions.

In typical cases, distinguished members of the Tribunal, international adjudicators say that due diligence requires States to do their “utmost” and to deploy “all of the means at their disposal”.⁹ But given the unparalleled threats posed by climate change, we cannot simply fall back on the typical due diligence terminology. Instead, the African Union urges the Tribunal to make clear that the conduct required to reduce emissions is as historically unparalleled as the climate crisis itself.

In considering the required level of conduct, we also believe that the Tribunal should reflect on the actions that States are currently taking to reduce emissions. As part of the First Global Stocktake under the Paris Agreement, a recent report finds significant shortcomings.¹⁰ The report states that, and I quote, “much more [action] is needed now on all fronts”.¹¹ It concludes that the current global emissions pathway will lead to atmospheric warming above 2.0 degrees,¹² and it finds that States could reduce emissions more rapidly through: (1) more effective implementation and enforcement of current reduction targets; and (2) by adopting new more “stringent” and “comprehensive” reduction targets.¹³

⁸ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, p. 43, para. 117, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf, last accessed 19 September 2023.

⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, para. 129, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf, last accessed 19 September 2023, citing the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, 1 February 2011, *ITLOS Reports 2011*, para. 110; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, available at para. 116, available at <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>, last accessed 19 September 2023.

¹⁰ UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, FCCC/SB/2023/9, 8 September 2023, available at <https://unfccc.int/documents/631600>, last accessed 19 September 2023, (hereafter “UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”), paras. 9-15.

¹¹ UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 1.

¹² UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, para. 100.

¹³ UNFCCC, “Technical dialogue of the first global stocktake Synthesis report by the co-facilitators on the technical dialogue”, paras. 13-15.

Mr President, what’s really striking about these findings is that they are firmly premised on the view that States are *perfectly capable* of doing much more to *control* emissions and, hence, to control marine pollution. But, for the time being, they are not doing so. It is against that background that the Tribunal must make clear that the due diligence standard under article 194 does not permit States to choose to do less, when they can and, therefore, must do more.

In terms of apportioning obligations, the African Union wishes to emphasize that the burdens are not distributed evenly. Article 194 itself requires States to act “in accordance with their capabilities”, which vary depending on level of development.

This reading is confirmed is confirmed by the context in articles 202, 203, 207(4) and 266 of the Convention. It is also confirmed by the principle of Common but Differentiated Responsibilities and Respective Capabilities, a foundation of the climate regime and is expressed throughout the operative parts of the UNFCCC and the Paris Agreement.¹⁴ Under the rules of treaty interpretation, the principle of CBDR must, therefore, be given proper weight in the Convention. The principle of CBDR is also among the international rules and standards agreed in the climate regime that must be “tak[en] into account” under articles 207(1) and 212(1).

Mr President, to conclude on the first question, I would like to summarize four specific obligations. States Parties are required: (1) to adopt collectively effective and urgent measures to reduce greenhouse gas emissions; (2) to reduce emissions collectively to an extent that meets the 1.5°C standard, which would secure a degree of “control” over marine pollution; (3) to reduce emissions beyond this level in order to “prevent” and “reduce” accumulated marine pollution; and (4) to allocate the burden of emissions reductions asymmetrically in line with the wording of article 194, the context in the Convention, and the principle of CBDR.

Mr President, I thank the Tribunal for its attention and request you to give the floor to Mr Deepak Raju.

THE PRESIDENT: Thank you, Mr Lockhart.

I now invite Mr Raju to make his statement. You have the floor, Sir.

¹⁴ UNFCCC, Article 3(1) (“the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”); UNFCCC, sixth preambular paragraph (“Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries ... in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions”). *See also* Paris Agreement, Articles 2.2 (“This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”), 3 (“...need to support developing country Parties for effective implementation of this Agreement”), 4.1 (“...peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter ... on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty”), 4.3 (“Each Party’s successive nationally determined contribution will represent a progression ... reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”), 4.4 (“Developed country Parties should continue taking the lead...”), and 4.5 (““Support shall be provided to developing country Parties ... recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions”). *See, African Union’s written statement, paras. 137-143.*

STATEMENT OF MR RAJU
AFRICAN UNION
[ITLOS/PV.23/C31/17/Rev.1, p. 14-15]

Thank you, Mr President. Distinguished members of the Tribunal, in this section, the African Union turns to the second question. The participants broadly agree that this question requires the Tribunal to interpret the general obligation in article 192 of the Convention, as well as further provisions in Part XII that elaborate on this general obligation.

At the heart of the obligation in article 192 are two verbs: “protect” and “preserve”. In employing these verbs, article 192 requires States Parties to “protect” the marine environment from future harm, and “preserve” the environment by maintaining and improving its current state.

Both aspects of this obligation are critical in these proceedings, because climate change has already caused, and will continue to cause, significant harm to the marine environment. To echo again the Nairobi Declaration, climate change is “the single biggest threat to all life on Earth”, demanding “urgent and concerted action from all nations”.¹

Article 192 requires just such “action” to end the ongoing harm, prevent future harm, and to undo the harm already caused. Meeting this obligation requires conduct directed towards both mitigation and adaptation.

In this section of African Union’s statement, I will address the obligations under article 192, as they relate to mitigation. Dr Hebié will then address the Tribunal on obligations relating to adaptation.

The most important mitigation obligations under article 192 are emission reduction obligations, identical to the ones discussed under article 192, which we have just addressed. I will now identify several additional obligations related to mitigation.

First, UNCLOS Parties have an obligation to cooperate towards mitigation. As the Tribunal heard earlier, greenhouse gas emissions cannot be made to respect national boundaries,² and the same is true for their deleterious effects. As such, cooperation is central to protecting and preserving the marine environment against climate change. Cooperation is also specifically mandated by article 197 of UNCLOS. Among other things, cooperation must include building and strengthening international institutions and frameworks aimed at mitigating climate change, but with a specific focus on addressing the harmful effects on the marine environment, such as rising ocean temperatures, ocean acidification and rising sea levels. These institutions and frameworks should also be specifically mandated to address the special needs of developing nations in relation to climate change mitigation.

Second, article 192 imposes an obligation for UNCLOS parties to undertake scientific research and technological development towards mitigation. Scientific studies on the effects of greenhouse gases other than carbon dioxide and novel technologies like carbon capture and storage and ocean fertilization, are among the potential areas for such research and development. This research and development must be carried out in a manner consistent with the differentiated and asymmetric nature of UNCLOS obligations, interpreted in light of the principle of CBDR-RC. That is, the research and development should be conducted on an inclusive basis, engaging the scientific communities of developing nations; developed parties must carry the burden of financing this research and development; and any output must be shared inclusively with developing countries to ensure that all countries can take rapid and effective action to reduce emissions within their economies, using the latest techniques and technologies.

¹ Nairobi Declaration, fifth preambular paragraph.

² Australia’s Oral Statement, 13 September 2023, Verbatim Record ITLOS/PV.23/C31/5, p. 11.

Third, in deploying novel mitigation technologies, UNCLOS parties must be alert to the possible adverse impacts of such technologies on the marine environment. This is particularly true for technological solutions that directly implicate the marine environment, such as the storage of carbon in the seabed or the continental shelf. While these technologies may remove carbon from the atmosphere, the risk of leakage and the consequent harm to the marine environment must be avoided.

Finally, as my colleague Mr Lockhart just explained, States Parties are under an obligation to allocate the burden of each of these mitigation obligations in an asymmetric manner, with developed Parties carrying the greater weight of the obligations.

This concludes my part of the statement, and I request the President to invite Dr Hébié to the floor. Thank you.

THE PRESIDENT: Thank you, Mr Raju.

I now invite Mr Hébié to make his statement. You have the floor, Sir.

EXPOSÉ DE M. HÉBIÉ
UNION AFRICAINE
[TIDM/PV.23/A31/17/Rev.1, p. 17–20]

Monsieur le Président, Honorables Membres du Tribunal, c'est un grand honneur pour moi de représenter aujourd'hui l'Union africaine et de continuer sa présentation relative à la question 2.

Mes propos vont se focaliser sur les obligations d'adaptation face aux effets du changement climatique. L'adaptation, Monsieur le Président, est très importante pour tous les pays ; mais elle est une nécessité vitale pour les États les plus vulnérables. Malheureusement, mon continent, l'Afrique, est l'un des continents les plus vulnérables face aux effets du changement climatique.

L'Afrique compte six petits États insulaires en voie de développement. La moitié des pays africains sont des pays côtiers et leurs côtes sont situées à très basse altitude, ce qui les rend vulnérables à l'élévation du niveau de la mer. De surcroît, le caractère exorbitant des coûts nécessaires pour adopter les mesures d'adaptation fait de ceci un gros défi pour les pays africains.

Pourtant, sans des mesures urgentes et effectives d'adaptation, il serait impossible pour les pays africains et leur peuple d'exercer leur droit à l'autodétermination, notamment le droit à l'intégrité territoriale, le droit à l'existence sur la terre de leurs ancêtres et, enfin, leur droit au développement.

C'est donc pourquoi l'Union africaine a traité des questions d'adaptation en détail dans ses exposés écrits¹, et nous invitons le Tribunal à leur prêter une attention particulière.

Mon propos aujourd'hui s'articulera autour de trois points : premièrement, j'élaborerai brièvement les considérations que l'on peut garder à l'esprit lorsqu'on essaye d'identifier les obligations d'adaptation, deuxièmement, je passerai en revue quelques-unes de ces obligations, mais surtout les modalités de leur mise en œuvre, avant de m'appesantir dans un troisième point sur la répartition du fardeau de cette mise en œuvre.

Commençons donc par mon premier point : les considérations à garder à l'esprit pour identifier les obligations spécifiques d'adaptation.

Première considération, il faut partir d'un état des lieux. Quelle est la situation actuelle du milieu marin ? Elle est largement dégradée à cause des effets du changement climatique, mais aussi à cause de certaines actions de l'humain, notamment la pêche illicite, non déclarée et non réglementée. Il faut aussi ajouter à cet état des lieux les effets négatifs futurs du changement climatique sur le milieu marin, prendre aussi en compte les vulnérabilités des États, des peuples, du milieu marin, des écosystèmes marins, y inclus les espèces marines. Tout ceci doit être pris en compte.

Il faut aussi, dans un deuxième point, prendre en compte l'état des besoins. De quoi avons-nous aujourd'hui besoin pour pouvoir faire face à nos obligations de protéger et préserver le milieu marin en termes de connaissances scientifiques, en termes de moyens technologiques, en termes d'adoption de mesures pratiques et également en termes de prise en compte de tous ces éléments.

Troisièmement, il faut prendre en compte l'état des moyens disponibles, mais surtout s'appesantir sur les situations individuelles, notamment en prêtant attention aux difficultés que certains États pourraient rencontrer lorsqu'ils voudront prendre ces mesures en raison de leurs ressources et de leurs capacités limitées.

Monsieur le Président, en gardant ces trois points à l'esprit, il est possible d'identifier les mesures à prendre pour pouvoir protéger et préserver le milieu marin. Mais la bonne

¹ Exposé écrit de l'Union africaine, par. 296-335.

nouvelle, parce qu'il y en a une, c'est que les rédacteurs de la Convention des Nations Unies sur le droit de la mer ont fait du bon travail. Ils ont pris en compte tous les aspects fondamentaux qu'il faut pour pouvoir protéger et préserver le milieu marin. On vous en a parlé pendant toutes ces deux semaines, je ne vais pas m'y appesantir.

Mais lisons brièvement la partie XII : obligation de mener des recherches et des études scientifiques sur les menaces et les vulnérabilités du milieu marin ; de développer les technologies appropriées pour y faire face ; de partager ses connaissances, technologies et financements nécessaires avec les pays en voie de développement ; de renforcer leurs capacités et, de façon générale, de coopérer toutes les fois que cela est indispensable pour protéger le milieu marin. La partie XII impose également aux États d'adopter et de mettre en œuvre, de faire appliquer les lois, règlements et politiques nécessaires pour parvenir à cet objectif.

La Convention, plus généralement, au-delà de la partie XII, prévoit aussi des obligations de conservation, de gestion, d'exploitation des ressources naturelles marines de manière durable et soutenable². Elle interdit toute pratique détruisant ou rendant plus vulnérable les écosystèmes marins, y inclus les espèces marines et leur capacité à se régénérer³.

L'article 192 exige, face à l'urgence climatique, que les États se conforment rigoureusement à ces dispositions. Il ne faut donc pas dégrader le milieu marin.

Il faut prendre des mesures qui lui permettent de se régénérer. Il faut prendre des mesures qui augmentent sa résilience et qui lui permettent de s'épanouir. C'est pourquoi il faut donc prêter une attention particulière aux mesures concrètes dégagées par la Conférence des États Parties à la Convention sur la diversité biologique relativement au milieu marin⁴ et aussi, par un recours systématique à l'étude d'impact environnemental, s'assurer que les mesures d'adaptation qui sont prises ne portent pas, elles-mêmes, dommage au milieu marin.

Monsieur le Président, je passe maintenant à l'examen de trois modalités de mise en œuvre de ces obligations.

Premièrement, l'obligation de coopération. Selon le professeur Abi-Saab, à chaque degré de densité normative correspond un degré de densité institutionnelle qu'il faut pour que les normes produisent tous les effets. Et lorsque ce degré de densité institutionnelle n'est pas rempli, on se retrouve avec des systèmes qui perdent leur effectivité, d'abord, mais, plus tard, leur crédibilité dans leur capacité à atteindre leur finalité⁵.

Il nous faut donc renforcer la coopération et, en le faisant, penser à créer des institutions spécialisées qui s'intéresseraient à la protection du milieu marin pour que ces institutions puissent développer ces normes davantage, les traduire par des mesures concrètes, coordonner les actions des États, surveiller leur mise en œuvre en matière d'adaptation.

Deuxièmement, l'article 192 de la Convention impose aux États Parties de prendre des mesures d'adaptation physiques afin de protéger le milieu marin.

Troisièmement, les mesures d'adaptation ne doivent pas être abordées de manière sectorielle. Tout au contraire, elles doivent innover tous les aspects de la gouvernance des États⁶. L'adaptation doit suivre un cycle qui inclut l'évaluation des risques, la planification, la mise en œuvre, le suivi-évaluation et la mise à jour des mesures adoptées, y inclus l'adoption de nouvelles mesures.

² Articles 61-69 ; 116-120 de la Convention.

³ Voir notamment l'article 194 5) de la Convention.

⁴ UNEP/CBD/COP/DEC/X/29 (biodiversité marine et côtière) ; UNEP/CBD/COP/DEC/X/33 (biodiversité et changement climatique).

⁵ G. Abi-Saab, « Cours général de droit international public », 207 *RCADI* (1987-VII), 95-96 [en italiques dans le texte].

⁶ Rapport de synthèse, par. 144.

Enfin, les mesures d'adaptation doivent pouvoir être évaluées à la lumière d'objectifs clairement définis et mesurables, comme les chefs d'État africains l'ont affirmé au paragraphe 20 de la Déclaration de Nairobi⁷.

Monsieur le Président, cela me conduit à mon dernier point, à savoir comment répartir le fardeau de l'adoption des mesures d'adaptation.

Ces obligations doivent être mises en œuvre de façon asymétrique, en prenant en compte les capacités respectives des États et leur niveau de développement. Plusieurs dispositions de la Convention reflètent déjà cette idée qu'on retrouve également dans le droit, le régime du climat sous la notion de principe des responsabilités communes mais différenciées et des capacités respectives. On vous en a déjà parlé. Ce principe est un principe élémentaire de justice et d'équité.

Pourtant, tout le monde le sait. Même les États les plus développés ont reconnu l'importance de ce principe et se sont engagés à fournir 100 milliards de dollars par an aux pays africains et aux pays en voie de développement pour financer leurs besoins en matière de changement climatique. Toujours sans aucun effet.

Depuis 2009 où cette promesse a été faite, le milieu marin s'est dégradé, les besoins d'adaptation se sont accrus ; l'urgence climatique est plus pressante aujourd'hui que jamais. C'est pourquoi les États développés doivent, maintenant, prendre des engagements supplémentaires pour financer et renforcer adéquatement les capacités des États en voie de développement pour qu'ils puissent faire face à leurs obligations en la matière. Mais il faut également faire preuve de créativité, créativité parce qu'il faut aider ces pays en voie de développement à créer les marges budgétaires nécessaires pour pouvoir mobiliser leurs propres ressources et participer à cet objectif collectif.

Comment ? Restructurer les dettes souveraines, alléger le fardeau de la dette, sont des options que les pays développés doivent adopter dans ce sens.

Je dois m'arrêter ici, parce que certains s'interrogeront : pourquoi est-ce que je commence à parler de la nécessité de créer un ordre international économique juste et équitable ? Mais cette idée n'est pas du tout étrangère à la Convention. Le paragraphe 5 de la Convention le reflète assez clairement parce que les États Parties considéraient que la réalisation des objectifs de la Convention « contribuera[it] à la mise en place d'un ordre économique international juste et équitable » dans lequel il serait tenu compte des intérêts de tous les États, de l'humanité, mais surtout ceux des pays en voie de développement⁸.

Aujourd'hui, la réalisation d'un ordre économique international juste et équitable n'est pas une conséquence de la réalisation des objectifs de la Convention. C'est une nécessité pour que la Convention puisse réaliser ses propres finalités. Sans cet ordre, il sera impossible, difficile de parvenir à protéger le milieu marin tel qu'il se doit.

Monsieur Le Président, j'en arrive à la conclusion de ma présentation. L'exposé écrit de l'Union africaine contient en son paragraphe 341 une énumération de toutes les obligations spécifiques en la matière répondant à la question 1 et à la question 2. Je ne vais donc pas essayer de les résumer ici. J'aimerais plutôt remercier le Tribunal pour sa bienveillante attention, et vous inviter à donner la parole à Son Excellence, M. l'Ambassadeur Tordeta Ratebaye, pour clore l'exposé oral de l'Union africaine.

Je vous remercie.

THE PRESIDENT: Thank you, Mr Hébié.

I now invite Mr Tordeta Ratebaye to continue his statement. You have the floor, Sir.

⁷ Déclaration de Nairobi, p. 4, par. 20.

⁸ Voir également la Résolution sur le développement des infrastructures nationales en matière de sciences de la mer, de technologie et de services océaniques :

[A_CONF.62_120-EN \(1\).pdf \(https://digitallibrary.un.org/record/34377?ln=en\)](https://digitallibrary.un.org/record/34377?ln=en)

STATEMENT OF MR RATEBAYE (continued)
AFRICAN UNION
[ITLOS/PV.23/C31/17/Rev.1, p. 19]

Thank you, honourable President and members of the Tribunal.

In conclusion, we stand before you not merely as the representative of nations but as the collective voice of a continent grappling with an existential crisis. Our plea is for your compassionate attention to the cry for justice, fairness, and a lifeline to the very existence of humanity.

The urgent call echoes across Africa, where international support and intervention are imperative, especially in addressing the devastating impacts of climate change, vividly demonstrated by recent tragedies in Libya.

We call on you to recognize the unique challenges we confront and the injustice we endure, even as we tirelessly strive to mitigate and adapt to the impact of climate change.

Rising temperatures, sea-level rise and ocean acidification knows no borders. They pose a threat to all of us. UNCLOS, a symbol of maritime justice, must collaborate harmoniously with the climate regime to safeguard our oceans and protect our vulnerable coastal communities.

As the African Union makes this impassioned plea for justice and humanity, let us be reminded of the profound words echoed in the Nairobi Declaration on Climate Change: “Africa possesses both the potential and the ambition to be a vital component of the global solution to climate change.” This is not solely a matter of law; it is a moral imperative.

The African Union strongly believes that the Tribunal has jurisdiction to render an advisory opinion in accordance with the relevant provision of UNCLOS. This advisory opinion should clarify the States Parties’ obligations to prevent, to reduce and control the pollution of the marine environment resulting from the climate change.

Honourable President, I just realized why your Tribunal is based here in Hamburg: a very green, clean city. I think it is another way to protect the environment. I do hope that your opinion will allow us to make our oceans more bluer than what we have now, and more clean. I thank you.

THE PRESIDENT: Thank you, Mr Tordeta Ratebaye.

This brings us to the end of this afternoon’s sitting. The Tribunal will sit again on Monday, 25 September, at 10 a.m., when it will hear statements on behalf of France, Italy, the Netherlands and the United Kingdom. I wish you all a good afternoon. This sitting is now closed.

(The sitting closed)

PUBLIC SITTING HELD ON 25 SEPTEMBER 2023, 10.00 A.M.

Tribunal

Present: President HOFFMANN; Vice-President HEIDAR; Judges JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCIOLO, KAMGA; Registrar HINRICHS OYARCE.

List of delegations:

STATES PARTIES

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Ms Sandrine Barbier, Deputy Director of Legal Affairs, Ministry for Europe and Foreign Affairs

Mr Mathias Forteau, Professor, University of Paris Nanterre

Ms Valérie Bore Eveno, Lecturer, University of Nantes

Ms Marie-Pierre Lanfranchi

Italy

Mr Stefano Zanini, Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation

Mr Roberto Virzo, Professor of International Law, University of Messina

The Netherlands

Mr René J.M. Lefeber, Legal Adviser, Ministry of Foreign Affairs

Ms Lotte Kagenaar, Legal Officer, Ministry of Foreign Affairs

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Ms Jennifer Wallace, Assistant Legal Adviser, Foreign, Commonwealth and Development Office

Ms Lowri Mai Griffiths, Head of the Ocean Policy Unit, Foreign, Commonwealth and Development Office

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Ms Amy Sander, Barrister, Essex Court Chambers

Ms Belinda McRae, Barrister, Twenty Essex

Ms Courtney Grafton, Barrister, Twenty Essex

AUDIENCE PUBLIQUE TENUE LE 25 SEPTEMBRE 2023, 10 HEURES

Tribunal

Présents : M. HOFFMANN, *Président* ; M. HEIDAR, *Vice-Président* ; MM. JESUS, PAWLAK, YANAI, KATEKA, BOUGUETAIA, PAIK, ATTARD, KULYK, GÓMEZ-ROBLEDÓ, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mmes LIJNZAAD, INFANTE CAFFI, M. DUAN, Mmes BROWN, CARACCILO, M. KAMGA, *juges* ; Mme HINRICHS OYARCE, *Greffière*.

Liste des délégations :

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Mme Lowri Mai Griffiths, cheffe du service de la politique des océans du Ministère des affaires étrangères, du Commonwealth et du développement
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Mme Amy Sander, *barrister*, cabinet Essex Court Chambers
Mme Belinda McRae, *barrister*, cabinet Twenty Essex
Mme Courtney Grafton, *barrister*, cabinet Twenty Essex

THE PRESIDENT: Good morning. Today we will continue the hearing in the *Request for an Advisory Opinion submitted by the Commission of Small Island States and International Law*. This morning we will hear oral statements from France, Italy, The Netherlands and the United Kingdom.

I now invite the representative of France, Ms Barbier, to make her statement. You have the floor, Madam.

EXPOSÉ DE MME BARBIER

FRANCE

[TIDM/PV.23/A31/18/Rev.1, p. 1–8]

Monsieur le Président, Mesdames et Messieurs les juges, c'est pour moi un grand honneur de représenter mon pays devant le Tribunal. La participation à cette procédure est l'occasion pour la France de réaffirmer tout son soutien au Tribunal et à son rôle essentiel. C'est aussi l'opportunité de rappeler l'attachement qui est le nôtre au droit international de la mer, et particulièrement à la « Constitution des océans » que forme la Convention des Nations Unies sur le droit de la mer.

Je souhaite également exprimer, en mon nom personnel et au nom de la République française, nos sincères condoléances à la famille et aux proches du professeur Alan Boyle, qui avait mis ses compétences internationalement reconnues au service de la Commission des petits États insulaires dans la présente procédure.

Monsieur le Président, Mesdames et Messieurs les juges, « L'Humanité a ouvert les portes de l'enfer »¹. Cette image, convoquée la semaine dernière par le Secrétaire général de l'Organisation des Nations Unies dans son discours d'ouverture du Sommet sur l'ambition climatique fait écho à une terrifiante réalité : le dérèglement climatique est d'ores et déjà la cause de nombreuses catastrophes. Les événements de l'été en Grèce, Turquie, au Canada ou encore en Libye en sont un dramatique témoignage.

Le dérèglement climatique est une urgence d'autant plus pressante qu'il s'accompagne d'effets en cascade qui pourraient remettre en cause l'existence même de certains États. C'est en particulier le cas avec la montée du niveau de l'océan. La France dispose de vastes espaces maritimes, qui s'étendent sur plus de 10 millions de kilomètres carrés. 97 % de ses espaces sont situés dans ses territoires d'outre-mer dont, et je tiens à relever ici, la souveraineté n'a pas à être contestée en cette instance². Compte tenu de cette géographie particulière, la France est ainsi particulièrement concernée et préoccupée par ces évolutions, et elle est pleinement solidaire en particulier des petites îles en développement frappées de plein fouet par l'élévation du niveau des mers.

C'est dans le contexte de cette urgence que la France s'est engagée, tout comme l'Union européenne, dans une démarche de protection du climat ambitieuse, comme en témoigne l'ensemble des instruments que nous avons récemment adoptés, visant à réduire de 55 % nos émissions de gaz à effet de serre à l'horizon 2030 et à atteindre la neutralité carbone en 2050³. L'adoption de tels instruments est plus que jamais nécessaire pour protéger notre environnement dans son ensemble, et notamment nos mers et océans.

Les scientifiques nous avertissent depuis longtemps de ce dérèglement et nous nous devons de prendre en compte ces données. Éclairées par ces constats scientifiques, les

¹ <https://www.un.org/sg/en/content/sg/statement/2023-09-20/secretary-generals-opening-remarks-the-climate-ambition-summit>

² TIDM/PV.23/C31/9, audience du 15 septembre 2023 (matin), p. 16, lignes 40 à 42 (Maurice).

³ <https://www.statistiques.developpement-durable.gouv.fr/edition-numerique/chiffres-cles-du-climat/22-politiques-de-lutte-contre-le>

observations écrites comme les plaidoiries orales témoignent du consensus existant quant aux effets néfastes de l'augmentation des émissions de gaz à effet de serre sur les mers et océans, alors que ces derniers jouent pourtant un rôle essentiel dans la régulation du climat.

Nous nous réjouissons à cet égard de la convergence de vues entre les participants à la procédure sur le fait de se fonder sur les données scientifiques disponibles afin d'établir la matérialité de la pollution du milieu marin au sens de l'article 1 de la Convention, et de définir les moyens et techniques disponibles pour y faire face. Les rapports et conclusions du Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC) sont abondamment cités dans de nombreux exposés écrits, comme lors des plaidoiries orales⁴.

Monsieur le Président, la présente demande d'avis est, au regard de cette urgence, fondamentale, et le droit international doit jouer un rôle central dans la protection de l'océan. La réponse que le Tribunal est appelé à donner à cette demande d'avis doit être le témoin de la vigueur du multilatéralisme et de la nécessité d'une coopération efficace et solidaire de la communauté internationale en matière environnementale et climatique aux fins non pas de protéger la maison de chacun, mais bel et bien notre maison à tous pour faire écho à la célèbre formule du Président français Jacques Chirac en 2002 : « Notre maison brûle et nous regardons ailleurs »⁵.

Cette procédure consultative intervient dans un contexte international encourageant à plusieurs égards. Elle participe en effet d'une prise de conscience généralisée de l'importance vitale de l'océan et de la nécessité de développer le cadre juridique pour mieux préserver le milieu marin.

Un premier exemple en ce sens est l'adoption en juin dernier de l'Accord portant sur la conservation et l'utilisation durable de la diversité biologique marine des zones ne relevant pas de la juridiction nationale, dit « Accord BBNJ », qui constitue une étape majeure pour la préservation de la biodiversité de la haute mer et de la Zone. La signature la semaine dernière par plus de 70 États et l'Union européenne de cet Accord est un signe très positif de la détermination des États à renforcer la protection du milieu marin.

L'accord sur la subvention à la pêche conclu à l'Organisation mondiale du commerce le 17 juin 2022 représente un autre développement encourageant, en ce qu'il contribuera à une gestion durable des stocks halieutiques. D'autres négociations tout aussi fondamentales sont en cours : au sein de l'Autorité internationale des fonds marins s'agissant de l'exploitation des ressources minérales de la Zone ; lors de la prochaine Conférence de Dubaï sur les changements climatiques (COP 28) ou encore au sein du Comité international de négociation de l'ONU dédié à l'élaboration d'un traité contre la pollution plastique avec, comme objectif, l'adoption d'un texte avant la fin 2024. Enfin, l'horizon de l'organisation, en 2025, à Nice, de la Troisième Conférence des Nations Unies sur l'océan, co-présidée par la France et le Costa Rica permettra de maintenir la protection de l'environnement marin en haut de l'agenda politique et de faire converger ces différents processus.

Cette procédure consultative s'inscrit également dans le contexte des discussions en cours à la Commission du droit international sur l'élévation du niveau de la mer au regard du

⁴ V. par exemple TIDM/PV.23/C31/6, audience du 13 septembre 2023 (après-midi), p. 21, lignes 20 à 32 (Bangladesh) ; TIDM/PV.23/C31/9, audience du 15 septembre 2023 (matin), p. 18, lignes 9 à 16 (Maurice) ; TIDM/PV.23/C31/10, audience du 15 septembre 2023 (après-midi), p. 6, lignes 10 à 18 (Nouvelle-Zélande) ; TIDM/PV.23/C31/12, audience du 19 septembre 2023 (matin), p. 7, lignes 30 à 36 (Philippines) ; *ibid.*, p. 28, lignes 20 à 25 (Sierra-Leone) ; TIDM/PV.23/C31/14, audience du 20 septembre (matin), p. 22, lignes 31 à 37 (Timor-Leste) ; *ibid.*, p. 24, lignes 1 à 19 (Union européenne)

⁵ *Déclaration de M. Jacques Chirac, Président de la République, sur la situation critique de l'environnement planétaire et les propositions de la France pour un développement durable*, Johannesburg, 2 septembre 2002. <https://www.elysee.fr/jacques-chirac/2002/09/02/declaration-de-m-jacques-chirac-president-de-la-republique-sur-la-situation-critique-de-lenvironnement-planetaire-et-les-propositions-de-la-france-pour-un-developpement-durable-johannesburg-le-2-septembre-2002>

droit international. Ces travaux sont essentiels, notamment pour répondre au besoin de sécuriser les limites des espaces maritimes des États concernés. La France tient à réitérer ici les observations écrites qu'elle a communiquées à ce sujet à la Commission et le fait qu'elle interprète la Convention comme permettant le recours à des lignes de base fixes⁶.

Enfin, la Cour internationale de Justice est parallèlement saisie par l'Assemblée générale des Nations Unies d'une demande d'avis portant sur une question qui présente un lien de connexité évident avec la présente procédure. La saisine pour avis de la Cour interaméricaine des droits de l'Homme le 9 janvier 2023 par la Colombie et le Chili concernant l'urgence climatique et les droits de l'Homme va aussi en ce sens. Cette concomitance témoigne de l'intérêt global porté à la question de la protection de l'environnement eu égard aux conséquences du changement climatique.

De l'avis de la France, il est essentiel que les réponses apportées par les juridictions internationales soient convergentes et cohérentes. Rien ne serait plus dommageable pour le droit international du climat et pour le droit international de la protection du milieu marin que de placer les États et organisations internationales face à des interprétations divergentes du droit applicable pertinent. Dans le même temps, ce besoin impératif de cohérence juridique ne doit pas conduire à une interprétation restrictive des règles en vigueur, qui ne prendrait pas en compte les besoins contemporains de la communauté internationale.

Monsieur le Président, Mesdames et Messieurs les juges, c'est dans ce contexte que s'inscrit la procédure à laquelle nous prenons part aujourd'hui et qui mérite toute notre attention collective. Notre intention ce matin n'est pas de répéter ce qui figure dans l'exposé écrit de la France, auquel je me permets de renvoyer le Tribunal, mais de nous attacher aux points qui nous apparaissent les plus importants dans le cadre de cette procédure, qu'il s'agisse de la compétence du Tribunal pour rendre l'avis demandé et du droit applicable, sur lesquels je reviendrai très brièvement, ou de certaines questions de fond, que nous traiterons successivement avec le professeur Forteau.

Monsieur le Président, je ne dirai que quelques mots sur la compétence de votre Tribunal pour connaître de la présente demande d'avis eu égard aux nombreuses discussions qui avaient déjà eu lieu dans le cadre de la procédure ayant conduit à votre avis de 2015 et compte tenu du large consensus dont la question a fait l'objet dans les exposés écrits et oraux⁷. La France estime, contrairement à d'autres rares États⁸, que le Tribunal est compétent pour connaître de la présente demande d'avis. Mais elle considère également qu'il importe que le Tribunal saisisse l'opportunité de la présente affaire pour délimiter plus précisément les conditions de sa compétence consultative.

Une demande d'avis peut en effet être consensuelle et utile dans un cas, mais une autre pourrait être particulièrement inopportune et problématique. Il appartient en conséquence au Tribunal de prévenir par des critères appropriés et suffisamment précis tout détournement de la procédure consultative.

⁶ En ce sens, voir https://legal.un.org/ilc/sessions/74/pdfs/french/slr_france.pdf.

⁷ Voir, par exemple, TIDM/PV.23/C31/5, audience du 13 septembre 2023 (matin), p. 19, lignes 4 à 5 (Allemagne) ; TIDM/PV.23/C31/7, audience du 14 septembre 2023 (matin), p. 1, lignes 39 à 41 (Chili) ; TIDM/PV.23/C31/8, audience du 14 septembre 2023 (après-midi), p. 6, lignes 12 à 14 (Guatemala) ; TIDM/PV.23/C31/9, audience du 15 septembre 2023 (matin), p. 40, lignes 11 à 12 (États fédérés de Micronésie) ; TIDM/PV.23/C31/10, audience du 15 septembre 2023 (après-midi), p. 17, lignes 1 à 3 (République de Corée) ; TIDM/PV.23/C31/11, audience du 18 septembre 2023 (matin), p. 6, lignes 32 à 33 (Mozambique) ; TIDM/PV.23/C31/12, audience du 19 septembre 2023 (matin), p. 26, lignes 48 à 50 (Sierra Leone) ; TIDM/PV.23/C31/14, audience du 20 septembre 2023 (matin), p. 44, lignes 43 à 46 (Viet Nam) ; TIDM/PV.23/C31/16, audience du 21 septembre 2023 (matin), p. 4, lignes 34 à 36 (Union africaine / Comores).

⁸ Voir, par exemple, TIDM/PV.22/C31/8, audience du 14 septembre 2023 (après-midi), p. 18, lignes 2 à 34 (Inde) ; TIDM/PV.23/C31/10, audience du 15 septembre 2023 (après-midi), p. 23, lignes 40 à 45 (Chine) ; voir aussi EE Brésil, p. 2-3, par. 6-9

Je souhaiterais notamment rappeler que la compétence du Tribunal est limitée *ratione materiae* par les règles statutaires qui le gouvernent et par la question qui lui est posée⁹. Dans le cas présent, cette question vise seulement à identifier les obligations existantes et particulières dues au titre de la Convention¹⁰ sans que cela n'empêche le Tribunal de faire appel, à des fins d'interprétation, à d'autres règles de droit international pertinentes que celles citées dans la question qui lui est posée¹¹.

Je tiens à cet égard à revenir sur l'articulation entre la Convention sur le droit de la mer et les règles extérieures à celle-ci, car cette question est particulièrement importante dans le contexte de la présente affaire et semble faire l'objet d'appréciations différentes.

Tout d'abord, concernant la portée de l'article 237 de la Convention, il existe des divergences quant à sa qualification : s'agit-il d'une clause de coordination ou d'une clause de renvoi ?

Pour la France, l'article 237 constitue une clause de coordination ou de compatibilité entre, d'une part, la Convention sur le droit de la mer, incluant la partie XII et les principes et objectifs généraux de la Convention et, d'autre part, les obligations extérieures pertinentes, et ce, conformément à l'impératif de cohérence et de soutien mutuel¹².

En effet, les règles extérieures visées par l'article 237 le sont uniquement aux fins de l'articulation entre ces règles et la Convention. Par ailleurs, ces mêmes règles extérieures peuvent être pertinentes pour interpréter la Convention, soit lorsque celle-ci y renvoie dans des dispositions de fond, par exemple aux articles 207 ou 212, soit au titre de la règle générale d'interprétation codifiée à l'article 31 de la Convention de Vienne sur le droit des traités, en tant qu'élément du contexte, pratique ultérieure ou encore règle pertinente de droit international applicable dans les relations entre les parties.

C'est dans ce cadre qu'il faut, de l'avis de la France, traiter le rapport entre la Convention sur le droit de la mer et d'autres conventions internationales pertinentes, en particulier la Convention-cadre sur les changements climatiques et l'Accord de Paris. Cette question est appréciée de diverses façons par les participants à la présente procédure¹³ et le professeur Forteau y reviendra.

Pour ma part, je souhaiterais juste souligner que la conclusion de la Convention-cadre de 1992, comme de l'Accord de Paris, répond aux principes généraux énoncés dans la Convention, au sens de l'article 237 1), et, d'autre part, que ces conventions sont en outre pertinentes aux fins d'interprétation de la Convention sur le droit de la mer¹⁴. Dit autrement, cela signifie que les dispositions de ces conventions sur le climat permettent d'éclairer, d'informer, le contenu des obligations particulières des États Parties à la Convention, y compris de manière évolutive (eu égard aux effets nuisibles qu'a ou peut avoir le changement climatique). Mais elles ne sauraient en revanche imposer à ces États, au titre de la Convention, des obligations conventionnelles auxquelles ils n'auraient pas consenti.

Monsieur le Président, Mesdames et Messieurs les juges, si vous le permettez, je souhaiterais maintenant aborder les questions de fond que soulève la présente demande d'avis.

La question qui a été posée à votre Tribunal ne porte que sur les *obligations*, et je souligne ce mot, qu'il incombe aux États de prendre en vertu de la Convention pour, si je

⁹ EE France, p. 5, par. 13.

¹⁰ EE France, p. 6, par. 15-16.

¹¹ EE France, p. 7, par. 18.

¹² EE France, p. 16-17, par. 43-45.

¹³ Voir, par exemple, TIDM/PV.23/C31/10, audience du 15 septembre 2023 (après-midi), p. 5, lignes 36 à 38 (Nouvelle-Zélande) ; TIDM/PV.23/C31/13, audience du 19 septembre 2023 (après-midi), p. 11, lignes 34 à 37 (Singapour) ; TIDM/PV.23/C31/14, audience du 20 septembre 2023 (matin), p. 8, lignes 24 à 29 (Timor-Leste). Contra, voir notamment TIDM/PV.23/C31/8, audience du 14 septembre 2023 (après-midi), p. 19, lignes 7 à 20 (Inde)

¹⁴ EE France, p. 15, par. 37.

résumé, protéger et préserver le milieu marin compte tenu des incidences du changement climatique.

Cependant, parmi ces obligations, l'obligation de prendre les mesures nécessaires à cette fin, sur laquelle reviendra le professeur Forteau, implique nécessairement la reconnaissance pour l'État du droit de réglementer¹⁵. Ce droit de réglementer apparaît en effet comme le corollaire de cette obligation de faire ; il s'agit des deux faces d'une même médaille. Une telle reconnaissance par votre Tribunal serait particulièrement utile pour assurer une pleine effectivité au régime posé par la Convention, et notamment sa partie XII. De fait, c'est à la lumière de ce droit inhérent des États à réglementer dans l'intérêt public, un droit bien établi en droit international général, comme l'a rappelé la Sierra Leone la semaine dernière¹⁶, que certaines obligations conventionnelles doivent être interprétées, conformément à l'article 31 3) c) de la Convention de Vienne sur le droit des traités.

Mon propos vise ici les tensions qui peuvent notamment surgir dans l'articulation entre le droit des investissements étrangers et les politiques climatiques, et plus généralement environnementales. Pendant longtemps, certains ont été tentés de faire prévaloir les intérêts économiques sur la protection de l'environnement, ce qui n'est plus viable eu égard à l'état de notre planète.

Conscient de la nécessité d'une action renforcée afin d'atteindre les objectifs de lutte contre le dérèglement climatique, mon Gouvernement a notamment pris la décision, comme d'autres États membres de l'Union européenne, de se retirer du Traité sur la Charte de l'énergie¹⁷, retrait qui prendra effet le 8 décembre 2023. Les dispositions de ce Traité ne sont en effet pas compatibles avec la nécessité de protéger le climat et avec les engagements pris par la France en vertu de l'Accord de Paris. Dans cette perspective, nous pensons que seule cette mesure permettra de garantir la fin d'une protection excessive des activités de production d'énergie fossile nocives pour l'environnement.

C'est également pour faire primer la protection du milieu marin sur les intérêts économiques que la France a pris l'engagement de ne pas exploiter les ressources minérales des fonds marins. La solution ne devrait toutefois pas être recherchée dans l'unilatéralisme. Les écosystèmes, le milieu marin, ignorent les frontières nationales et la solution est donc à trouver ensemble dans un cadre multilatéral.

Cette évidence m'amène au dernier point que je souhaiterais traiter ici pour mettre en lumière le caractère essentiel de l'obligation de coopération. La coopération est en effet, évidemment, la voie que nous devons prendre : parce que c'est un impératif politique, parce que nous y sommes tenus juridiquement. Et nous nous félicitons que les participants à la procédure soient largement d'accord sur ce point¹⁸. Comme l'a qualifié votre Tribunal en 2001 dans l'*Affaire de l'Usine MOX*, la Convention érige l'obligation de coopération en « principe fondamental en matière de prévention de la pollution du milieu marin »¹⁹ non seulement en y consacrant l'ensemble de la section 2 de sa partie XII, mais aussi en ce que cette obligation infuse un grand nombre d'autres dispositions de la Convention. L'importance de cette obligation de coopérer a aussi été rappelée tout à la fois par la Cour internationale de Justice

¹⁵ Voir dans ce sens EE Mozambique, p. 29, par. 3.69.

¹⁶ TIDM/PV.23/C31/12, audience du 19 septembre 2023 (matin), p. 36, lignes 4-6

¹⁷ <https://www.tresor.economie.gouv.fr/Articles/97189b64-0ff2-42df-8f06-fd6b7ee2b03a/files/a59a9fe0-f41b-4cab-8246-f52b6217dd16>.

¹⁸ Voir, par exemple, TIDM/PV.23/C31/4, audience du 12 septembre 2023 (après-midi), p. 10, lignes 10 à 24 (COSIS) ; TIDM/PV.23/C31/5, audience du 13 septembre 2023 (matin), p. 114, lignes 16 à 30 (Australie) ; *ibid.*, p. 26, lignes 26 à 33 (Arabie Saoudite) ; TIDM/PV.23/C31/7, audience du 14 septembre 2023 (matin), p. 18, lignes 34 à 37 (Portugal) ; TIDM/PV.23/C31/10, audience du 15 septembre 2023 (après-midi), p. 8, lignes 21 à 27 (Nouvelle-Zélande).

¹⁹ *Usine MOX (Irlande c. Royaume-Uni)*, mesures conservatoires, ordonnance du 3 décembre 2001, TIDM Recueil 2001, p. 110, par. 82.

dans l'*Affaire de l'Usine de pâte à papier sur le fleuve Uruguay* en 2010²⁰ et par la sentence arbitrale *Mer de Chine méridionale* en 2016²¹.

D'importance cruciale pour une mise en œuvre effective du régime de protection et de préservation du milieu marin²², l'obligation de coopération répond en outre à une nécessité logique et sociale forte. Les atteintes au milieu marin résultant des émissions de gaz à effet de serre génèrent, en effet, du fait de leur impact cumulé et en raison de l'unité du milieu marin, des problèmes environnementaux à l'échelle globale, communs à l'ensemble des États de la planète. À titre d'exemple, on retrouve cette nécessité à la base de l'obligation de coopérer prévue par la directive 8 1) des projets de directive sur la protection de l'atmosphère adoptés par la Commission du droit international en seconde lecture en 2021²³.

La coopération n'est pas une chimère. Elle permet concrètement l'élaboration du cadre normatif nécessaire pour protéger le milieu marin et témoigne de notre volonté d'équilibrer nos intérêts propres en tant qu'États et nos intérêts mutuels en tant que communauté. Je me permettrais ici de citer le juge Wolfrum selon lequel « [l']obligation de coopérer dénote un changement important dans l'orientation générale de l'ordre juridique international. Elle fait contrepoids au principe de la souveraineté des États et assure ainsi que les intérêts de la communauté soient pris en considération face aux intérêts individuels des États »²⁴.

Les différents processus que je rappelais précédemment, qu'il s'agisse notamment de la conclusion de l'Accord BBNJ ou de la négociation en cours du traité contre la pollution plastique, sont une parfaite illustration de cette volonté de trouver de tels compromis en vue d'assurer une meilleure protection de l'environnement, en particulier marin.

L'obligation de coopération nous impose, en tant que communauté, de définir les règles relatives à la protection de l'environnement sur la base des connaissances scientifiques disponibles. Elle constitue dès lors un moyen efficace de prévention et d'adaptation face aux perturbations potentielles ou avérées du milieu marin. La préservation des écosystèmes passe par cette adaptabilité. Les risques et les dommages évoluent. Et, comme je l'ai déjà rappelé, le milieu marin ne connaît pas de frontières.

Les mesures ciblées et individuelles sont utiles et même indispensables à la préservation du milieu marin ; elles ne suffiront néanmoins pas à contenir sa dégradation. Il nous faut agir collectivement. C'est vrai d'abord d'un point de vue strictement normatif, et nous partageons pleinement l'affirmation de la COSIS sur le fait que « [l]es émissions de [gaz à effet de serre] nécessitent une réponse réglementaire sophistiquée, appuyée par une coordination internationale fondée sur des normes internationalement reconnues. »²⁵

C'est vrai ensuite dans une perspective plus large. Ce défi majeur auquel nous sommes confrontés nous oblige à changer d'échelle et à concevoir autrement notre solidarité internationale. C'était l'objectif du Sommet pour un nouveau pacte financier qui s'est tenu à Paris en juin dernier et qui a clairement mis en exergue le fait que la lutte contre le dérèglement

²⁰ CIJ, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, 20 avril 2010, *C.I.J. Recueil 2010*, p. 49, par. 77, disponible à l'adresse <https://icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-FR.pdf>.

²¹ *Arbitrage entre la République des Philippines et la République populaire de Chine concernant la mer de Chine méridionale*, affaire CPA n° 2013-19, sentence du 12 juillet 2016, par. 985, *Recueil des sentences arbitrales*, vol. XXXIII, p. 539, disponible à l'adresse https://legal.un.org/riaa/cases/vol_XXXIII/153-617.pdf.

²² V. not. EE Nouvelle-Zélande, par. 45, 55, 59, 64.

²³ CDI, projets de directive sur la protection de l'atmosphère, directive 8, paragraphe 1, in Rapport de la Commission du droit international sur les travaux de sa soixante-douzième session (2021), A/76/10, p. 12, disponible à l'adresse https://legal.un.org/ilc/reports/2021/french/a_76_10.pdf ; voir aussi le commentaire, p. 37-41.

²⁴ *Usine MOX (Irlande c. Royaume-Uni), mesures conservatoires, ordonnance du 3 décembre 2001, opinion individuelle de M. Wolfrum, TIDM Recueil 2001*, p. 135, disponible à l'adresse https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/A10-O-3_dec_01-SO_W.pdf.

²⁵ EE COSIS, p. 89, par. 316.

climatique implique une refonte de notre système financier mondial, notamment en vue d'assister les pays en développement pour la mise en œuvre de leurs obligations en la matière, mais aussi en adaptant nos politiques de financement et de taxation des activités carbonées. En ce sens, ce Sommet s'inscrit dans la lignée de l'Accord de Paris qui met sur un pied d'égalité l'atténuation, l'adaptation et le financement de la lutte contre le changement climatique alors que la Convention-cadre de 1992 privilégiait l'atténuation.

Comme cela a été rappelé à l'occasion du Sommet sur l'ambition climatique la semaine passée, cette solidarité s'exprime concrètement pour la France par des financements pour le climat dans les pays en développement à hauteur de 7,6 milliards d'euros en 2022, dont 2,6 milliards d'euros pour l'adaptation²⁶. Cet engagement financier va au-delà de ce qui était prévu lors de la COP21 en 2015. Cette solidarité s'exprime aussi par la proposition, soutenue par la France avec l'Union européenne et ses États membres, de mettre en place un mécanisme inédit de financement obligatoire d'un fonds pour le renforcement des capacités au sein de l'Accord BBNJ.

Monsieur le Président, Mesdames et Messieurs les juges, je vous remercie pour la patiente attention avec laquelle vous avez bien voulu m'écouter et je laisserai maintenant la parole, si vous me le permettez Monsieur le Président, pour le reste du temps imparti à la France, au professeur Mathias Forteau.

THE PRESIDENT: Thank you, Ms Barbier.

I now invite Mr Forteau to make his statement. You have the floor, Sir.

²⁶ <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/climat-et-environnement/actualites-et-evenements/2023/article/la-france-depasse-largement-ses-engagements-en-matiere-de-financements-pour-le>

EXPOSÉ DE M. FORTEAU

FRANCE

[TIDM/PV.23/A31/18/Rev.1, p. 8–17]

Je vous remercie, Monsieur le Président.

Monsieur le Président, Mesdames et Messieurs les juges, c'est un grand honneur de me présenter devant vous aujourd'hui et de prendre la parole dans la présente affaire au nom de mon pays.

Il me revient ce matin d'aborder un certain nombre d'éléments de fond en complément des importantes observations présentées à l'instant par l'agente de la France.

Bien entendu, il est impossible dans le temps qui nous a été imparti de revenir sur tous les arguments échangés durant la présente procédure. Ce n'est du reste pas nécessairement utile ni opportun puisque beaucoup a déjà été dit pendant les deux semaines d'audience qui viennent de s'écouler, et nous pensons que le Tribunal nous sera reconnaissant, à ce stade avancé de la procédure, d'aller à l'essentiel et d'être aussi synthétique que possible. Je me limiterai donc à quelques observations sur les points qui nous paraissent les plus importants – tout ceci sans préjudice de la position de la France à l'égard des autres points en discussion.

J'aborderai cinq points successivement. Je commencerai par plusieurs observations sur ce qui constitue la question première, celle de savoir si les émissions de gaz à effet de serre et les effets nuisibles des changements climatiques constituent une pollution du milieu marin au sens de la Convention sur le droit de la mer.

Cela exige, de manière préliminaire, d'identifier ce que constitue le milieu marin. Les États Parties à la présente procédure semblent d'accord pour retenir une interprétation englobante de cette expression, qui couvre sa dimension à la fois géographique et matérielle.

Dans sa dimension géographique, le milieu marin est constitué par l'ensemble des espaces maritimes régis par la Convention, à la fois au sein et au-delà des juridictions nationales, depuis les eaux intérieures jusqu'à la haute mer et la Zone. Ces espaces incluent non seulement la colonne d'eau, mais aussi les estuaires et le littoral (en tout cas pour ce qui concerne ce dernier, dans sa relation aux espaces maritimes). Ils incluent également les fonds marins et leur sous-sol¹.

Sur le plan matériel ensuite, le milieu marin ne constitue pas seulement un espace, mais aussi un écosystème caractérisé par la richesse de sa biodiversité et dont les différentes composantes sont en interaction². Cette approche, qualifiée d'« écosystémique », a été largement partagée par d'autres États dans leurs exposés écrits et lors des audiences, et je n'y reviens donc pas. Une pollution du milieu marin est, de ce fait, susceptible d'affecter tout à la fois la biodiversité, le fonctionnement et l'équilibre des écosystèmes marins.

En ce qui concerne à présent les sources de la pollution touchant le milieu marin, la France considère, à l'instar de la grande majorité des participants à la présente procédure, que les émissions anthropiques de gaz à effet de serre sont une source de pollution du milieu marin et que, par conséquent, les obligations de la partie XII s'y appliquent³.

De la même manière, il existe entre les participants à la présente procédure un large consensus pour considérer que les émissions de gaz à effet de serre relèvent de différentes formes de pollution régies par la Convention, et qu'elles relèvent plus particulièrement de la pollution d'origine tellurique, envisagée à l'article 207, et de la pollution d'origine atmosphérique, envisagée à l'article 212⁴.

¹ EE France, p. 18-20, par. 48-50.

² EE France, p. 20-21, par. 51-52.

³ EE France, p. 23, par. 57.

⁴ EE France, p. 28-31, par. 67-71.

S'agissant en outre de la notion d'atteintes au milieu marin, il convient de rappeler que l'article 1^{er} de la Convention adopte une définition large de la pollution du milieu marin. Sans revenir sur l'ensemble des points abordés dans notre exposé écrit⁵, il importe de rappeler ici que l'expression « a ou peut avoir » qui figure dans l'article 1^{er} suppose de prendre en compte tant les effets nuisibles avérés ou certains que les effets nuisibles potentiels.

Dès lors que les effets nuisibles potentiels sont également concernés, l'approche de précaution entre en jeu. Comme nous avons eu l'occasion de l'indiquer dans nos écritures, les considérations scientifiques, et notamment les évaluations du GIEC, jouent un rôle décisif ici⁶. Lorsque les informations disponibles sont insuffisantes pour évaluer l'effet potentiellement nuisible sur le milieu marin d'un comportement envisagé, celui-ci ne doit pas être mis en œuvre. C'est notamment ce qui explique la nécessité de ne pas autoriser aujourd'hui les activités d'exploitation minière des fonds marins dans la Zone, comme la France l'a rappelé à l'occasion de la 28^e session de l'Autorité internationale des fonds marins, en juillet dernier⁷.

La protection du milieu marin doit rester un impératif dans la conduite des activités dans la Zone, notamment dans la mesure où l'écosystème des grands fonds marins est essentiel à la stabilisation du climat et à la protection de la biodiversité marine. Il est par conséquent particulièrement nécessaire de tenir compte des grandes incertitudes quant aux conséquences que l'exploitation minière des grands fonds marins pourrait avoir sur ce rôle important des océans.

Cela étant précisé, il existe des divergences entre les participants à la présente procédure quant au champ des dommages couverts par la demande d'avis. Selon nous, tout effet consécutif à la pollution du milieu marin n'entre pas nécessairement dans la définition de la « pollution du milieu marin » au sens de la Convention sur le droit de la mer.

Par exemple, le fait que les changements climatiques conduisent au réchauffement des océans et peuvent, de ce fait, mettre en danger le droit à l'alimentation du fait de pertes potentielles de ressources halieutiques n'érige pas l'atteinte au droit à l'alimentation en une pollution du milieu marin qui relèverait des obligations pertinentes dues au titre de la Convention sur le droit de la mer – je précise bien, des obligations *dues au titre de la Convention sur le droit de la mer*. Cela est bien entendu sans préjudice de ce qu'il en est au regard d'autres règles internationales qui ne relèvent pas de la compétence *ratione materiae* du Tribunal.

La présente procédure consultative se limite aux obligations qui incombent aux Parties en vertu de la Convention sur le droit de la mer et, par conséquent, aux dommages qui sont causés au milieu marin en tant que tel. Par-là, je ne veux pas dire que d'autres effets ou dommages ne pourraient pas entrer dans le champ d'autres règles internationales comme le droit à un environnement sain ou le droit à l'alimentation. Cela signifie uniquement que ceci ne relève pas du champ de la question posée au Tribunal ni de sa compétence.

J'en viens, Monsieur le Président, à mon deuxième point. Une des questions qui a été particulièrement débattue devant vous et qui divise plusieurs participants⁸ porte sur la nature des obligations imposées par la partie XII de la Convention : s'agit-il d'obligations de comportement ou d'obligations de résultat ?

⁵ EE France, p. 35, par. 80. Voir également, par exemple, EE Singapour, par.14 ; EE Chili, par. 30 ; EE Rwanda, par. 89 ; EE République démocratique du Congo, par. 42.

⁶ EE France, p. 41, par. 92.

⁷ Déclaration de la France du 26 juillet 2023 portant sur le point 8 de l'ordre du jour, Assemblée, 28^e session de l'Autorité internationale des fonds marins, p.3-4, disponible à l'adresse <https://www.isa.org.jm/wp-content/uploads/2023/07/France.pdf>.

⁸ Voir par exemple ITLOS/PV.23/C31/9, audience du 15 septembre 2023 (matin) (version anglaise), p. 13, ligne 6 (Lettonie), et p. 27, lignes 7 à 10 (Maurice) ; ITLOS/PV.23/C31/11, audience du 18 septembre 2023 (matin) (version anglaise), p. 13, lignes 31 à 33 (Mozambique) ; *ibid.*, p. 40-41, lignes 29 et s. (Belize).

Les débats sur ce point ont été sans doute obscurcis par le fait qu'une certaine confusion conceptuelle règne autour de cette distinction⁹, et qu'elle a reçu par ailleurs des définitions différentes selon les époques, notamment au cours des travaux de la Commission du droit international, comme certains auteurs l'ont remarqué fort justement¹⁰. Il importe donc de commencer par préciser ce qu'il faut entendre aujourd'hui par obligation de comportement et par obligation de résultat.

Ce qui les distingue fondamentalement est que, en cas d'obligation de comportement, l'obligation n'est pas d'aboutir au résultat dans chaque cas ; l'obligation de comportement est une obligation de prendre les mesures qui s'imposent pour éviter qu'un évènement ou un dommage ne se produise, mais sans garantir pour autant que celui-ci ne se produira pas¹¹.

Au vu de cette définition, il ne fait aucun doute selon nous, comme pour la plupart des intervenants à la présente procédure¹², que les obligations de fond imposées par la partie XII de la Convention (il en va différemment de certaines obligations procédurales) sont des obligations de comportement. La Chambre pour le règlement des différends relatifs aux fonds marins l'a reconnu dans son avis consultatif de 2011¹³, et la Commission du droit international avait fait de même dans le commentaire relatif à l'article 3 des articles de 2001 sur la prévention des dommages transfrontières résultant d'activités dangereuses¹⁴.

Ce constat vaut y compris pour l'article 194 1) de la Convention sur le droit de la mer. Cette disposition, en effet, n'impose pas une « obligation de prévenir, réduire et maîtriser la pollution du milieu marin », comme l'a suggéré la Commission demanderesse lors des audiences¹⁵. La structure grammaticale de l'article 194 1) est différente : ce que cet article impose, c'est une obligation de *prendre* toutes les *mesures* nécessaires *pour* prévenir, réduire et maîtriser la pollution du milieu marin. Cette formulation est caractéristique des obligations de comportement, ce que confirme la référence qui suit immédiatement dans la même disposition à la mise en œuvre des « moyens les plus adaptés » dont les États disposent.

À l'inverse, vouloir transformer cette obligation en une obligation de résultat impliquerait un engagement pesant sur *chaque* État que le milieu marin ne soit *jamais* contaminé par *aucune* pollution, ce qui, à supposer même qu'une telle obligation ait un sens, ne correspond pas au droit existant, ni au plan universel ni au plan régional ou national.

Cela ayant été clarifié, quatre précisions fondamentales s'imposent.

Premièrement, il n'y a rien de dépréciatif ou de péjoratif à qualifier une obligation comme étant une obligation de comportement plutôt qu'une obligation de résultat. De fait,

⁹ Voir le deuxième rapport du Rapporteur spécial à la CDI, James Crawford, sur la responsabilité des États, A/CN.4/498 et Add. 1 à 4, 1999, par. 52-92.

¹⁰ V. P. d'Argent, « Les obligations internationales », *Recueil des cours de l'Académie de droit international de La Haye*, tome 417, 2021, p. 150 et s. ; C. Economidès, « Content of the Obligation : Obligations of Means and Obligations of Result », in J. Crawford, A. Pellet, S. Olleson (dir.), *The Law of International Responsibility*, OUP, 2010, p. 374 et s.

¹¹ EE France, p. 47-48, par. 103-104.

¹² Voir par exemple ITLOS/PV.23/C31/13, audience du 19 septembre 2023 (après-midi) (version anglaise), p. 2, lignes 21-26 (Singapour), ou ITLOS/PV.23/C31/14, audience du 20 septembre 2023 (matin) (version anglaise), p. 44, lignes 5-13 (Viet Nam).

¹³ *Responsabilités et obligations des Etats qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone (Demande d'avis consultatif soumise à la Chambre pour le règlement des différends relatifs aux fonds marins)*, avis consultatif, 1^{er} février 2011, *TIDM Recueil 2011*, p. 41-42, par. 110-113.

¹⁴ CDI, Projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses, article 3 et paragraphes 7-8 du commentaire, *Annuaire CDI 2001*, tome II(2), p. 164-165.

¹⁵ TIDM/PV.23/C31/3, audience du 12 septembre 2023 (matin), version française, p. 18, lignes 44-45 (« L'article 194 1) pose donc une obligation composite, qui est de prévenir, réduire et maîtriser la pollution du milieu marin (...) ») (COSIS).

comme des auteurs l’ont noté, « il est des obligations de résultat floues ou ambiguës, comme il est des obligations de comportement très précises »¹⁶.

Deuxièmement, le recours à des obligations de comportement est particulièrement opportun en matière de changement climatique. Comme l’a indiqué la Commission demanderesse, « [c]limate change is a moving target », « les changements climatiques sont une cible mouvante »¹⁷. L’accent doit donc être mis sur les mesures à prendre et sur la nécessité de les adapter ou de les renforcer pour répondre efficacement aux évolutions et à l’aggravation des changements climatiques. Votre Tribunal l’a d’ailleurs confirmé en 2011 lorsqu’il indiquait que la notion d’obligation de comportement a « un caractère variable » et qu’elle « peut changer dans le temps lorsque les mesures réputées suffisamment diligentes à un moment donné peuvent ne plus l’être en fonction, par exemple, des nouvelles connaissances scientifiques ou technologiques. Cette notion peut également changer en fonction des risques encourus par l’activité »¹⁸.

Les obligations de comportement présentent, de par leur nature, le double avantage d’engager juridiquement l’État et de le faire de manière à la fois évolutive et adaptable aux situations¹⁹. Face aux menaces et aux effets changeants des dérèglements climatiques, ces obligations de comportement sont tout à fait centrales. Elles le sont d’autant plus qu’elles permettent de concentrer l’attention sur les mesures à prendre dès maintenant, avant qu’il ne soit trop tard, avant le « moment fatidique » évoqué jeudi dernier par la République démocratique du Congo²⁰.

Troisièmement, comme la Commission du droit international l’avait fort bien remarqué en 1977, la distinction entre obligations de comportement et de résultat « ne doit pas faire perdre de vue que toute obligation internationale poursuit un but ou, si l’on veut, un résultat, y compris les obligations de “comportement” ou de “moyens” »²¹. En ce qui concerne l’article 194 de la Convention sur le droit de la mer, un tel but est clairement identifié : il s’agit de prendre « toutes les mesures » qui sont « nécessaires *pour* prévenir, réduire et maîtriser la pollution du milieu marin ».

Quatrièmement, nous sommes pleinement d’accord avec la Commission demanderesse que l’appréciation de ce qui constitue une mesure nécessaire à cette fin s’établit objectivement et n’est pas laissée au seul pouvoir discrétionnaire des États²².

Ces différents éléments ont conduit la France à souligner dans son exposé écrit que les obligations de comportement imposées par la Convention sur le droit de la mer étaient en matière de changements climatiques « exigeante[s] » et « particulièrement rigoureuses »²³. Au

¹⁶ M. Forteau, A. Miron et A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ-lextenso, Paris, 2022, p. 1092, n° 732.

¹⁷ ITLOS/PV.23/A31/4, audience du 12 septembre 2023 (après-midi) (version anglaise), p. 34, lignes 9-10 (COSIS).

¹⁸ *Responsabilités et obligations des Etats qui patronnent des personnes et des entités dans le cadre d’activités menées dans la Zone (Demande d’avis consultatif soumise à la Chambre pour le règlement des différends relatifs aux fonds marins), avis consultatif, 1^{er} février 2011, TIDM Recueil 2011*, p. 43, par. 117.

¹⁹ Voir ITLOS/PV.23/C31/4, audience du 12 septembre 2023 (après-midi) (version anglaise), p. 30, lignes 16-27 (COSIS).

²⁰ TIDM/PV.23/A31/16, audience du 21 septembre 2023 (matin) (version française), p. 27, lignes 32-35 (p. 25, lignes 18-29, de la version anglaise) (République démocratique du Congo).

²¹ *Annuaire de la CDI*, 1977, vol. II, paragraphe 8) du commentaire de l’article 20 du projet sur la responsabilité des États, p. 15 (p. 13 du *Yearbook of the ILC*, 1977, Vol. II : « The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result, including the obligations called obligations ‘of conduct’ or ‘of means’ »).

²² TIDM/PV.23/A31/3, audience du 12 septembre 2023 (matin), version française, p. 20-21 (COSIS).

²³ EE France, p. 47, par. 103, et p. 49, par. 107.

regard de la gravité et de l'urgence de la situation, il faut aller plus loin qu'une obligation générale de comportement, un niveau de diligence « renforcée » s'impose²⁴.

Cela me conduit à mon troisième point, qui concerne le principe des responsabilités communes mais différenciées. La substance de ce principe confirme que nous sommes bel et bien en présence d'obligations de comportement, puisque celles-ci peuvent varier dans ce qu'elles imposent à chaque État en fonction de sa situation particulière. Comme l'a notamment souligné la Chambre pour le règlement des différends relatifs aux fonds marins, les critères de mise en œuvre de l'obligation d'appliquer l'approche de précaution « pourront être plus stricts » pour les États développés que pour les États en développement²⁵ – et la France confirme que tel est bien le cas²⁶.

Les accords adoptés dans le domaine climatique depuis la Déclaration de Rio de 1992 ont progressivement permis de mieux préciser le sens du principe des responsabilités communes mais différenciées et des capacités respectives. Fondé sur la disparité objective des niveaux de développement économique entre les pays et faisant appel à l'équité, ce principe est nécessaire pour que chacun puisse, à son échelle, contribuer aux objectifs climatiques fixés par l'Accord de Paris.

Les pays qui ont été historiquement les plus grands émetteurs de gaz à effet de serre et qui sont les plus gros consommateurs de ressources abiotiques ont une responsabilité particulière dans la réduction de leur impact sur l'environnement. De leur côté, les autres pays ont le droit de poursuivre leur développement économique et social légitime. Le principe des responsabilités communes mais différenciées le reconnaît, en permettant une approche plus flexible et équilibrée, qui prend en compte les besoins spécifiques et les capacités de chaque nation.

Cela étant dit, il faut également préciser, comme l'Union européenne l'a fait la semaine passée²⁷, que ce principe ne doit pas être utilisé comme un prétexte pour s'exonérer de la responsabilité qui pèse sur l'ensemble des États, individuellement et collectivement, de protéger les océans contre les changements climatiques.

Nous relevons que la Commission demanderesse a été très claire quant au fait que la responsabilité d'agir ne pèse pas que sur les États développés – même si ceux-ci sont appelés à « continuer de montrer la voie » selon la formule de l'Accord de Paris²⁸. Selon la Commission demanderesse, il appartient à tous les États de « faire leur juste part dans la protection du milieu marin ». La Commission demanderesse a par ailleurs précisé que « la liste des principaux pollueurs ne se limite pas aux États développés »²⁹. Dans le même temps, et comme le prévoit l'Accord de Paris, il importe de tenir dûment compte de la situation des pays les moins avancés et des petits États insulaires en développement qui sont particulièrement vulnérables aux effets des changements climatiques.

Monsieur le Président, je souhaiterais maintenant passer à mon quatrième point qui concerne les études d'impact environnemental. Comme nous l'avons souligné dans nos écritures, l'Accord BBNJ comprend une partie relative aux évaluations d'impact sur

²⁴ EE France, p. 71, par. 144.

²⁵ *Responsabilités et obligations des États qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone (Demande d'avis consultatif soumise à la Chambre pour le règlement des différends relatifs aux fonds marins), avis consultatif, 1^{er} février 2011, TIDM Recueil 2011, p. 54, par. 161.*

²⁶ EE France, p. 54, par. 113.

²⁷ TIDM/PV.23/A31/14, audience du 20 septembre 2023 (matin) (version anglaise), p. 27 (lignes 8-27) (UE).

²⁸ Article 4, §4, de l'Accord de Paris ; v. également le dernier alinéa de son préambule et l'article 9, §3.

²⁹ TIDM/PV.23/C31/1, audience du 11 septembre 2023 (matin) (version française), p. 28, lignes 36-39 (COSIS) (pour la version anglaise originale, v. ITLOS/PV.23/C31/1/Corr.1 (version anglaise), p. 25, lignes 35-38) ; v. également, par exemple, ITLOS/PV.23/C31/12, audience du 19 septembre 2023 (matin) (version anglaise), p. 31, lignes 33-35 (Sierra Leone) ; ITLOS/PV.23/C31/14, audience du 20 septembre 2023 (matin) (version anglaise), p. 18, lignes 17-26 (Timor Leste). Voir également, entre autres, EE Portugal, §§ 38-41.

l'environnement qui a pour objet d'opérationnaliser et de concrétiser l'obligation inscrite à l'article 206 de la Convention sur le droit de la mer. À cet égard, l'Accord BBNJ définit, en tenant compte des effets du changement climatique, les modalités de mise en œuvre de l'obligation de procéder à des évaluations d'impact sur l'environnement pour les activités appelées à se dérouler dans les espaces maritimes internationaux et qui sont susceptibles de causer des modifications considérables et nuisibles au milieu marin³⁰.

L'Accord BBNJ pose en particulier – et ceci mérite d'être souligné ici – l'obligation de veiller à ce que les impacts *cumulés* des activités envisagées soient étudiés et évalués lorsqu'une étude d'impact environnemental est réalisée³¹. La prise en compte du caractère cumulatif des atteintes au milieu marin nous semble devoir intégrer la jurisprudence internationale contemporaine relative à l'obligation de conduire des études d'impact environnemental et devrait être dûment prise en compte par le Tribunal dans la présente procédure consultative³².

Monsieur le Président, il me reste à évoquer – c'est mon cinquième et dernier point – les relations entre la Convention sur le droit de la mer et l'Accord de Paris. Deux thèses semblent s'affronter ici, opposant ceux qui voient dans l'Accord de Paris une limite au-delà de laquelle la Convention sur le droit de la mer ne pourrait pas s'aventurer, et ceux qui estiment que la Convention irait au-delà de l'Accord de Paris³³.

À dire vrai, ce n'est pas la meilleure manière de poser les termes du débat. Il ne s'agit pas de choisir entre ces deux traités, ni de savoir si l'un serait plus protecteur que l'autre. C'est d'ailleurs un jeu quelque peu dangereux que de chercher à dénigrer l'Accord de Paris pour mieux faire ressortir, par contraste, les potentialités qui seraient offertes par la Convention sur le droit de la mer. Certains orateurs ont suggéré en ce sens que, contrairement à la Convention sur le droit de la mer, l'Accord de Paris ne serait pas porteur de véritables obligations³⁴. Selon la France, l'Accord de Paris est bel et bien la source d'engagements juridiquement contraignants et il importe dans le cadre de la présente procédure consultative de ne pas porter atteinte à l'autorité de cet accord.

Ces précisions étant apportées, les choses se présentent en réalité de manière à la fois simple et harmonieuse – et la France tient à préciser sa position sur ce point, car celle-ci a été apparemment mal interprétée par un participant à la procédure lors des audiences la semaine passée³⁵.

³⁰ EE France, p. 61, par. 124 ; p. 82, par. 160.

³¹ Accord BBNJ, article 31(1)(c).

³² CIJ, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, 20 avril 2010, *C.I.J. Recueil 2010*, p. 83, par. 204 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, arrêt, 16 décembre 2015, *C.I.J. Recueil 2015*, p. 705-707, par. 101-105, p. 719-723, par. 146-162. Voir aussi TIDM, *Responsabilités et obligations des États qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone (Demande d'avis consultatif soumise à la Chambre pour le règlement des différends relatifs aux fonds marins)*, avis consultatif, 1^{er} février 2011, *TIDM Recueil 2011*, p. 49-52, par. 141-150.

³³ V. par exemple ITLOS/PV.23/C31/5, audience du 13 septembre 2023 (matin) (version anglaise), p. 6, lignes 13-19, p. 9, lignes 23-26 et p. 16, lignes 20-26 (Australie) ; ITLOS/PV.23/C31/8, audience du 14 septembre 2023 (après-midi) (version anglaise), p. 17, lignes 30-38 (Inde) ; ITLOS/PV.23/C31/9, audience du 15 septembre 2023 (matin) (version anglaise), p. 34, lignes 37-38 (Maurice) ; ITLOS/PV.23/C31/10, audience du 15 septembre 2023 (après-midi) (version anglaise), p. 27, lignes 37 à 46 (Chine) ; ITLOS/PV.23/C31/11, audience du 18 septembre 2023 (matin) (version anglaise), p. 30 et s., lignes 19 et s. (Belize) ; ITLOS/PV.23/C31/14, audience du 20 septembre 2023 (matin) (version anglaise), p. 16-17, lignes 13 et s. (Timor Leste).

³⁴ ITLOS/PV.23/C31/4, audience du 12 septembre 2023 (après-midi) (version anglaise), p. 28, lignes 33-38 (COSIS) ; ou TIDM/PV.23/C31/16, audience du 21 septembre 2023 (matin) (version française), p. 24, lignes 34-37 (p. 22, lignes 42-43, de la version anglaise) (République démocratique du Congo).

³⁵ ITLOS/PV.23/C31/11, audience du 18 septembre 2023 (matin) (version anglaise), p. 35, lignes 23-33 (Belize).

D'une part, chacun des traités pertinents – la Convention sur le droit de la mer et les engagements climatiques, au premier chef l'Accord de Paris – impose ses propres obligations, de manière autonome, et chacun de ces traités, chacune de ces obligations, compte, est important et doit être respecté. *Pacta sunt servanda*. C'est d'autant plus vrai que ces différents accords et obligations ne se contredisent pas, comme l'ont rappelé l'Union européenne³⁶, les Comores³⁷ ou l'Union africaine³⁸. Il ne s'agit donc pas de choisir entre les uns et les autres, comme s'ils s'excluaient mutuellement, mais au contraire de les appliquer ensemble, *dans toute leur complémentarité*, en ayant conscience qu'ils se soutiennent mutuellement aux fins de la protection des océans.

D'autre part, lorsque les dispositions de ces accords se chevauchent, il importe alors de recourir à une interprétation cohérente et harmonieuse³⁹. C'est le cas en particulier lorsqu'il s'agit de déterminer quels doivent être, en vertu des obligations de comportement de la Convention sur le droit de la mer, les objectifs chiffrés à poursuivre en matière de riposte mondiale à la menace des changements climatiques. C'est à l'Accord de Paris qu'il convient de se référer sur ce point, car c'est cet accord qui a établi à l'échelle universelle l'objectif chiffré de limitation de l'élévation de la température de la planète que les États doivent s'efforcer d'atteindre⁴⁰.

Encore une fois, et pour conclure Monsieur le Président, cela ne veut pas dire que l'Accord de Paris écarterait de ce fait même les obligations particulières dues au titre de la Convention sur le droit de la mer. Ces obligations particulières continuent de s'appliquer à la protection et la préservation du milieu marin, dans toute leur étendue et dans toute leur rigueur, de manière complémentaire à ce que prévoit l'Accord de Paris.

Monsieur le Président, Mesdames et Messieurs les juges, ces derniers mots viennent conclure l'exposé oral de la République française. Qu'il me soit permis, au nom de sa délégation, de vous remercier bien vivement de votre écoute patiente et attentive.

Je vous remercie, Monsieur le Président.

THE PRESIDENT: Thank you, Mr Forteau.

I now invite the representative of Italy, Mr Zanini, to make his statement. You have the floor, Sir.

³⁶ ITLOS/PV.23/C31/14, audience du 20 septembre 2023 (matin) (version anglaise), p. 25-26, à partir de la ligne 45 (UE).

³⁷ ITLOS/PV.23/C31/16, audience du 21 septembre 2023 (matin) (version anglaise), p. 6, lignes 27-31 (Comores).

³⁸ ITLOS/PV.23/C31/17, audience du 21 septembre 2023 (après-midi) (version anglaise), p. 4-5, lignes 31 et s. (UA).

³⁹ EE France, p. 15, par. 38.

⁴⁰ Voir par exemple également en ce sens EE Bangladesh, par. 42 et pars. 46-48 ; ou ITLOS/PV.23/C31/13, audience du 19 septembre 2023 (après-midi) (version anglaise), p. 7-9 (à partir de la ligne 36) (Singapour).

STATEMENT OF MR ZANINI
ITALY
[ITLOS/PV.23/C31/18/Rev.1, p. 15-18]

Mr President, distinguished members of the Tribunal, it is an honour for me to appear before you, and to do so on behalf of Italy.

I will be addressing the Tribunal mainly on matters of procedure. With your permission, Mr President, Professor Roberto Virzo will then follow with some more comments concerning the applicable law.

The issues of jurisdiction have been addressed in our written statement.¹ In the present submission, therefore, I will not repeat the detail of all we argued there, although Italy maintains it in full. I will simply reiterate that, in Italy's view, the Tribunal may also exercise an advisory jurisdiction in this case. In fact, the combined provisions of article 21 of the Statute of the Tribunal and the ones contained in the pertinent "other agreement" expressly conferring advisory jurisdiction on the Tribunal constitute the legal basis of such jurisdiction. As the Tribunal itself made clear in its advisory opinion of 2015: "Article 21 and the 'other agreement' conferring jurisdiction on the Tribunal are interconnected".² Consequently, Italy qualifies article 21 of the Statute as an "enabling *renvoi* clause".

I also confirm that, in Italy's view, the request in the present Case No. 31 seems to satisfy all the conditions required by article 138 of the Rules of the Tribunal.³ Therefore, Italy shares the view of other States Parties⁴ that no compelling reasons exist in the present case for the Tribunal to decline its power to give the advisory opinion requested.

I would like to add a few observations concerning the role of the States Parties to United Nations Convention on the Law of the Sea in both written and oral proceedings.

As a starting point, it is worth recalling that as one of the results of the "enabling *renvoi* clause", the legal questions on which the Tribunal may give an advisory opinion cannot but be formulated by the body authorized by or in accordance with the "other agreement". Hence, the States Parties to UNCLOS not members of the organization which submitted the request for the advisory opinion do not take part in the drafting of the legal questions.⁵

Precisely with regard to the legal questions asked to the Tribunal, I would like to focus on the role of the States Parties to UNCLOS invited to submit written statements and take part in the oral proceedings, as well as the function of their written and oral statements.

Mr President, members of the Tribunal, Italy considers that this role could be twofold: namely, States can express their views both on the request for an advisory opinion and on the specific legal questions asked.

Regarding the first role, States Parties to UNCLOS may present their general views on the request for the advisory opinion. This is, of course, not a matter of expressing a form of consent, which indeed, as the Tribunal also clarified, is "not relevant".⁶ Italy is aware that the a-consensual basis is one of the hallmarks of the advisory jurisdiction of international courts and tribunals.

¹ Italy, written statement (WS), 15 June 2023, paras. 5-11.

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

³ *Ibidem*, para. 59.

⁴ See, for example, Germany, WS, 14 June 2023, para. 28; New Zealand, WS, 15 June 2023, para. 29.

⁵ With reference to the specificities of Case No. 21, see ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission, Declaration of Judge Cot*, para. 8: "The request was written by the States of the [Sub-Regional Fisheries Commission], representing the interests, clearly legitimate interests, of coastal States. On the other hand, flag States did not take part in drafting the questions." See also France, WS, 16 June 2023, para. 22.

⁶ ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, para. 76.

However, especially when the request is made by an organization or body with a relatively small number of members, the statements submitted to the Tribunal may, *inter alia*, indicate whether there is a widespread interest in the request of the advisory opinion among the other States Parties to UNCLOS.

The greater the number of States Parties which feel the need for the advisory opinion or consider it appropriate, the more it can be deemed that the very interest in the advisory opinion is not confined to the requesting body. It could also be inferred that a significant number of States Parties recognize a substantial interconnection between the UNCLOS and the other agreement conferring advisory jurisdiction on the Tribunal.

A different situation would be if the statements submitted did not show that the other States Parties felt the need for or desirability of the advisory opinion. Although this, as stated above, in no way affects the possible existence of the advisory jurisdiction, it would be perceived, first, that the Tribunal is asked to give an advisory opinion on legal issues considered relevant mainly, if not exclusively, under the “other agreement”. Secondly, that the interconnection between UNCLOS and the “other agreement” conferring advisory jurisdiction on the Tribunal is merely formal.

With specific reference to the present case, most of the States Parties to UNCLOS that submitted written statements recognized that the requested advisory opinion may be of not exclusively interest to the Commission of Small Island States on Climate Change and International Law (COSIS).

Some States expressed a genuine endorsement in favour of an advisory opinion of the Tribunal in Case No. 31.⁷ I would recall here, for example, that the Federated States of Micronesia strongly encouraged the Tribunal to give the requested advisory opinion. According to the Federated States of Micronesia; such an advisory opinion could represent

a vital tool in support of efforts by COSIS and other members of the international community to protect present and future generations – and the natural environments bequeathed to us by our ancestors – from the scourge of anthropogenic greenhouse gas emissions, particularly on the marine environment.⁸

For its part, Italy concluded its written statement by emphasizing that

The Tribunal could assist COSIS Member States and, more generally, all other States Parties to UNCLOS to correctly implement Part XII provisions also in the light of other existing obligations under international environmental law emerged since 1982.⁹

Regarding the role of UNCLOS and Member States on the specific legal questions asked, Italy respectfully recalls that, through their written and oral statements, the States Parties to UNCLOS have the possibility to express their views on the specific legal questions asked, as well as on the law applicable by the Tribunal. While Professor Virzo, with your permission,

⁷ See, for example, Bangladesh, WS, 16 June 2023, para. 53; Belize, WS, 16 June 2023, para. 4; Mauritius, WS, 16 June 2021, para. 90; Mozambique, WS, 16 June 2023, para. 1.7; Nauru, WS, 15 June 2023, para 67; Norway, WS, 15 June 2023, para. 2.5; Sierra Leone, WS, 16 June 2023, para. 8.

⁸ Federated States of Micronesia, WS, 16 June 2023, para. 69.

⁹ Italy, WS, 15 June 2023, para. 20. See also, for example, The Netherlands, WS, 16 June 2023, para. 7.1.: “The Netherlands considers that, through its advisory opinion, the Tribunal could raise awareness and provide guidance on the protection and preservation of the marine environment and/or the prevention, reduction and control of pollution of the marine environment. In this manner, the advisory opinion could contribute to the interpretation and application of the obligations arising from the Convention, in particular the obligations arising from Part. XII of the Convention”.

Mr President, will deal with the latter, I will briefly focus on the object and purpose of the legal questions submitted to the Tribunal.

Italy considers that the legal questions legitimately formulated by COSIS, in a fully autonomous manner, are aimed at the identification by the Tribunal of certain obligations of the States Parties to UNCLOS.

Although in the exercise of its advisory jurisdiction, the Tribunal may “even reformulate the question”,¹⁰ this does not seem strictly necessary in the present case. In Italy’s view, the legal questions asked have a clear¹¹ and unambiguous object and purpose. More precisely, the real legal questions upon which the advisory opinion of the Tribunal is sought are the mere identification and “elucidation”¹² of specific obligations of States Parties to UNCLOS concerning the protection and preservation of the marine environment.

Appropriately, it was not asked by COSIS: “What are the legal responsibilities of States Parties to UNCLOS with respect 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 emissions into the atmosphere?”

Nor was it asked: “What are the legal consequences for States Parties to UNCLOS arising from 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 emissions into the atmosphere?”

Accordingly, Italy respectfully contends that issues of international responsibility – which indeed were not even expressly requested by COSIS during these oral hearings – should not be relevant at all in ITLOS Case No. 31.¹³

With these remarks, Mr President, on the object and purpose of the legal questions submitted in the present case to the Tribunal, my intervention ends.

Mr President, distinguished members of the Tribunal, I thank you for your kind attention and would now request that you give the floor to Professor Roberto Virzo.

THE PRESIDENT: Thank you, Mr Zanini.

I now invite Mr Virzo to make his statement. You have the floor, Sir.

¹⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 38.

¹¹ See also Germany, WS, 14 June 2023, para. 30.

¹² COSIS, WS, 16 June 2023, para. 427.

¹³ See also Australia, WS, 16 June 2023, para. 19; Portugal, WS, 16 June 2023, para. 5.

STATEMENT OF MR VIRZO

ITALY

[ITLOS/PV.23/C31/18/Rev.1, p. 19-22]

Mr President, distinguished members of the Tribunal, it is an honour to appear before you, and to do so on behalf of Italy. My task today is to address certain issues of applicable law.

At the outset, I would respectfully point out that the authoritative identification and “elucidation”¹ of the obligations pertaining to climate change impacts – *currently* falling within the scope of the UNCLOS – would also serve for the purpose of the proper fulfilment of the Convention.

Like any international treaty in force, the UNCLOS “must be performed” by the States Parties to it in good faith. This second part of the customary rule codified in article 26 of the Vienna Convention on the Law of Treaties (VCLT) establishes an obligation of conduct and expresses, *inter alia*, the dynamic conception of treaties as living instruments. Continuous and dynamic performance in good faith covers most of the treaty provisions. It also extends to, among others: (a) international rules and standards existing at the time of the *actual* application of the treaty and to which specific treaty clauses refer; (b) where provided for, coordination clauses with other international treaties, including *subsequent* treaties.

That said, Italy shares the view of other States Parties² that “climate change and ocean acidification caused by the introduction of anthropogenic greenhouse gas emissions into the atmosphere fall within the meaning of “pollution of the marine environment” for the purposes of article 1(1)(4) of UNCLOS”.³ Accordingly, although not expressly mentioned, these types of pollution of marine environment, are likely to fall within the scope of Part XII of the Convention.

While there seems to be no doubt on this point, it is nevertheless necessary to identify what “specific obligations” exist in this regard for States Parties to UNCLOS. It is, indeed, with respect to this question that COSIS ultimately “seek[s] guidance”.⁴

Mr President, members of the Tribunal, Italy, maintaining in full what it argued in the written statement, considers that, for the purposes of identifying such obligations, the interpretative criterion of systemic integration and the coordination clause contained in article 237 of the Convention may also be relevant.

Apropos of systemic integration, for the sake of brevity and opportunity, I respectfully refer here to what Italy argued in the written statement.⁵ Instead, as to article 237 of UNCLOS, I will, first, briefly recall the three core points we made there. Subsequently, I will address some additional remarks concerning the possible application of this provision to the case at hand.

¹ COSIS, WS, 16 June 2023, para. 427.

² See, for example, Australia, WS, 16 June 2023 para. 24; Bangladesh, WS, 16 June 2023, para. 30; Belize, WS, 16 June 2023, para. 52; Canada, WS, 16 June 2023, para. 16; Democratic Republic of the Congo, WS, 13 June 2023, para. 187; Egypt, WS, 16 June 2023, para. 26; European Union, WS, 15 June 2023, para 42; Federates States of Micronesia, WS, 16 June 2023, para. 31; France, WS, 16 June 2023; para. 78; Mauritius, WS, 16 June 2023, para. 72; Mozambique, WS, 16 June 2023, para. 3.19; Nauru, WS, 15 June 2023, para. 38; New Zealand, WS, 15 June 2023, para. 39; Portugal, WS, 16 June 2023, para. 71; Republic of Korea, 16 June 2023, para. 12; Rwanda, WS, 17 June 2023, para. 214; Sierra Leone, WS, 16 June 2023, para. 58; Singapore, WS, 16 June 2023, para. 18; The Netherlands, WS, 16 June, para. 4.7; Vietnam, WS, 16 June 2023, para. 1.3.

³ United Kingdom, WS, 16 June 2023, para. 42.

⁴ To repeat *mutatis mutandis* ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 76.

⁵ Italy, WS, 15 June 2023, paras. 15-23.

In Italy's view, first, article 237 contains a treaty coordination clause which confines its scope to the relationship that can be established between Part XII of UNCLOS and certain categories of international treaties.

Second, unlike the subordination and non-incompatibility clauses laid down in article 30(2) of the Vienna Convention on the Law of Treaties, article 237 does not state that "the provisions of [the] other treaty prevail"; rather, in coordinating Part XII with other treaties, it establishes a "double relationship of compatibility".⁶ More precisely, the provisions of Part XII are without prejudice to those treaties, but the obligations assumed under the latter "should be carried out in a manner consistent with the general principles and objectives"⁷ of UNCLOS.

Third, 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.

Mr President, members of the Tribunal, I now turn to my additional remarks.

Two international agreements on which – given the object, purpose and scope of the questions submitted – the Tribunal could provide guidance to States Parties on whether and to what extent it is possible, under article 237 of UNCLOS, to coordinate them with Part XII of the Convention are: the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement.

Both are subsequent to the UNCLOS. Consequently, it should first be assessed whether they fall within the category covered by article 237(1) of agreements "concluded in furtherance of the general principles set forth" in the Convention.

In this regard, it does not seem relevant that the agreements falling into this category have, as their main object and purpose, the protection and preservation of the marine environment. In order to make the coordination clause operational, it is only required that States Parties to UNCLOS assume "specific obligations [under these agreements] with respect to the protection and preservation of the marine environment".

It is not even necessary that the treaties in question are formally – as, for example, in the case of the 1995 agreement on management and conservation of straddling and highly migratory fish stocks – "agreements for the implementation" of certain UNCLOS provisions; rather, in order to make the coordination clause operational, it is required that the substantial obligations concerning the protection and preservation of the marine environment established by the subsequent treaties implement "the general principles set forth" in the Convention.

Hence, in Italy's view, both the UNFCCC and the Paris Agreement may be qualified as agreements "concluded in furtherance of the general principles set forth" in the Convention, within the meaning of article 237(1) of UNCLOS.

An additional factor that the Tribunal might consider is specifically related to the case at hand. It consists of the *ratione personae* scope of the external multilateral agreement.

In fact, unlike a contentious case submitted to an UNCLOS court or tribunal, where it is sufficient to find that the pertaining agreements falling within the categories of article 237 are in force between the parties to the dispute; and, unlike an advisory proceeding where the questions asked to the Tribunal expressly concern the interaction of a specific multilateral environmental treaty with the UNCLOS, regardless of whether there is a coincidence of contracting parties between that multilateral treaty and the Convention, in the present case, at least for reasons of judicial propriety, it should be ascertained that the agreement to be coordinated with the Convention through article 237 binds almost all States Parties to UNCLOS.

⁶ Italy, WS, 15 June 2023, para. 13. See also, New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 4, lines 11-12 (Hallum).

⁷ UNCLOS, Article 237(2).

Mr President, members of the Tribunal, the condition just mentioned exists with regard to both the UNFCCC and the Paris Agreement. All States Parties to UNCLOS are also parties to the UNFCCC and, with one exception, to the Paris Agreement.

In the light of the foregoing, Italy considers that, for the purposes of these advisory proceedings, article 237 allows the coordination of the UNCLOS with the UNFCCC and the Paris Agreement.

Let me now respectfully return to one of the core points made in our written statement. Article 237 does not affirm the prevalence of external agreements but aims, precisely, at coordinating them with the UNCLOS. It is, therefore, a question of clarifying how– to borrow Professor Mbengue’s suggestion – the relationship of “complementarity and mutual supportiveness”⁸ between the UNCLOS and the pertaining external agreements is concretely established.

In Italy’s view, with reference to the case at hand, it could first be determined in relation to which “specific obligations, assumed by States” under the UNFCCC and the Paris Agreement, Part XII is “without prejudice”, so that they might be included among the specific obligations that COSIS seeks to identify in its request. Second, it could be provided guidance on how those specific obligations “should be carried out in a manner consistent with the general principles and objectives”⁹ of the Convention, and in order “to produce a coherent system of obligations”.¹⁰

That leads to my final remarks.

The complementary relationship between the UNCLOS, on the one hand, and both the UNFCCC and the Paris Agreement, on the other, should also be considered in light of the “legal order for the seas and oceans”.¹¹

In the 2015 Advisory Opinion, the Tribunal clarified that

laws and regulations adopted by the Coastal State in conformity with the provisions of the Convention for the purposes of conserving the living resources and protecting and preserving the marine environment within its exclusive economic zone, constitute part of the legal order for the seas and oceans established by the Convention.¹²

Coherently, even “obligations under other conventions on the protection and preservation of the marine environment”,¹³ consistent with the UNCLOS, and other rules of international law not incompatible with the Convention, which may be taken into account by means of the interpretative criterion of systemic integration, also reflected in article 293 of UNCLOS, could “constitute part of the legal order for the seas and oceans”.¹⁴

The latter is a living legal order, open to new values emerging in the international community and in which the UNCLOS, the “Constitution of the Oceans”,¹⁵ is central. The mentioned other sources that may constitute part of it complement the Convention and dynamically contribute to the progressive “achievement of [its] goals”¹⁶ including the

⁸ COSIS oral statement, 11 September 2023: ITLOS/PV.23/C31/2, p. 30, line 36 (Mbengue).

⁹ UNCLOS, Article 237(2).

¹⁰ New Zealand, oral statement, 15 September 2023: ITLOS/PV.23/C31/10, p. 5, lines 4-5 (Hallum).

¹¹ UNCLOS, Preamble (4).

¹² ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

¹³ UNCLOS, Article 237.

¹⁴ ITLOS, *Request for Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para. 102.

¹⁵ TOMMY KOH, *A Constitution for the Oceans*, in UN, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), xxxiii.

¹⁶ UNCLOS, Preamble (5).

“equitable utilization of [marine] resources, the conservation of the [marine] living resources and the study, protection and preservation of the marine environment”.¹⁷ In addition, for the achievement of these goals, “the interest and needs of mankind as whole, and, in particular the special interests and needs”¹⁸ of small island States adversely affected by sea-level rise and climate change should not be disregarded.¹⁹

Mr President, distinguished members of the Tribunal, this concludes the oral statement of Italy in these advisory proceedings. I deeply thank you for your kind attention.

THE PRESIDENT: Thank you, Mr Virzo, for your statement.

We have now reached 11:17. May I get an indication from the representative from the Netherlands if you wish to take the floor now? If you wish, Mr Lefeber, I give you the floor.

¹⁷ UNCLOS, Preamble (4).

¹⁸ UNCLOS, Preamble (5).

¹⁹ According to some States Parties to UNCLOS, the principle “in no case may a people be deprived of its own means of subsistence” – codified in Common Article 1(2) of the 1966 International Covenant and Civil Rights and of the 1966 International Covenant on Economic, Social and Cultural Rights – could be relevant in order to take into account such special interests and needs. See Chile, oral statement, 14 September 2023: ITLOS/PV.23/C31/16, p. 12, lines 16-29 (Fuentes Torrijó); Nauru, oral statement, 14 September 2023: ITLOS/PV.23/C31/18, p. 29, lines 24-27 (Bjorge); Mauritius, oral statement, 15 September 2023: ITLOS/PV.23/C31/19, p. 15, lines 39-42 (Koonjul).

STATEMENT OF MR LEFEBER
NETHERLANDS
[ITLOS/PV.23/C31/18/Rev.1, p. 23-29]

Thank you, Mr President. Mr President, distinguished members of the International Tribunal for the Law of the Sea, it is an honour to appear before you today on behalf of the Kingdom of the Netherlands to participate in this hearing with regard to the *Request for an Advisory Opinion on Climate Change and International Law*. I will present to you, further to its written comments submitted on 16 June 2023, some additional observations of the Kingdom with respect to this request.

The Kingdom would first like to refer to the advisory proceedings before the International Court of Justice on climate change and international law, for which the deadline for the submission of written statements is 22 January 2024. The Kingdom has co-sponsored the request for this advisory opinion to be given by the International Court of Justice. Given that both requests for an advisory opinion before the Tribunal and before the International Court of Justice relate to climate change and international law, the Kingdom would like to encourage the timely delivery of an advisory opinion by this Tribunal. This will ensure that this advisory opinion can inform the advisory proceedings before the International Court of Justice.

The Kingdom would further like to highlight that as a Member State of the European Union, it aligns itself with the written and oral statements presented on behalf of the European Union.

Mr President, the Kingdom would like to turn to the substance of the questions posed in the present request for an advisory opinion, starting with the scientific basis underlying the request.

Along with air pollution and the loss of biological diversity, the Kingdom recognizes climate change as one of the three planetary crises. The Kingdom believes that this triple planetary crisis and its deleterious effects can and should be addressed in a holistic and integrated manner. This is thus the approach taken by the Kingdom in these advisory proceedings.

Like others that have presented statements to the Tribunal, the Kingdom takes the work of the Intergovernmental Panel on Climate Change as the basis for its statements. In this respect, the Kingdom would like to express its appreciation to the Commission of Small Island States on Climate Change and International Law for its extensive scientific presentation during its oral statement.

On the basis of the work of the Intergovernmental Panel on Climate Change, it is evident that both the process of the absorption of energy leading to ocean warming, as well as the process of the absorption of carbon dioxide resulting in ocean acidification, negatively impact the marine environment.

It is becoming clear in these proceedings that there is a widely shared view that human activities directly or indirectly cause the climate to change. This view finds its basis in the United Nations Framework Convention on Climate Change, which defines climate change as a change of climate which is attributed directly or indirectly to human activity. This framing is important for the remainder of our statement.

Mr President, it is the view of the Kingdom that the Convention was designed to be a “living treaty”. This means that the Convention serves as a “framework” for the coordination between and harmonization of the Convention and other relevant existing and future legal instruments and frameworks.

The Kingdom notes that many statements refer to this open, dynamic and progressive character of the Convention, thereby acknowledging that the Convention is designed to leave room for the development and substantiation of its provisions in a variety of manners. As

expressed by the European Union in its oral statement, the architecture of the Convention is not one of an isolated regime. This means that its provisions are intended to enable the interaction with other rules and principles of international law.

The Kingdom does therefore not share the views expressed by some participants that no specific obligations can be derived from the Convention with respect to climate change, because climate change was not discussed during the negotiations of the Convention.

In fact, as many participants have argued, the open, dynamic and progressive character of the Convention leaves room for the further development of general obligations enshrined in the Convention, such as articles 192 and 194.

Mr President, these provisions are at the heart of this request for an advisory opinion. In this respect, like others, the Kingdom wishes to highlight the European Union's view that the different legal regimes are to be applied in conjunction. This means that it is not necessary to apply the principle of *lex specialis*, as that principle is used to resolve treaty conflicts, whereas no conflict exists between the rules concerned, as I will address in more detail shortly.

In addition, the Kingdom wishes to emphasize that it shares the view that the global climate regime does not prevent the Tribunal from interpreting the obligations relating to climate change and its effects upon the marine environment flowing from the Convention.

Mr President, I will now turn to the substance of the provisions that are central to these advisory proceedings, and, to be specific, those are articles 192 and 194 of the Convention.

It is undisputed that article 192 establishes the general obligation of Parties to protect and preserve the marine environment, which, in the view of the Kingdom, reflects customary international law. This obligation applies to all marine areas, both within and beyond national jurisdiction, as was confirmed by the arbitral tribunals in the *Iron Rhine Arbitration* and the *South China Sea Arbitration*.

Mr President, the Kingdom notes that the content of article 192 of the Convention is further developed in the subsequent provisions of Part XII of the Convention. This includes article 194. This article establishes the obligation for States to take measures to prevent, reduce and control pollution of the marine environment. I will turn to the meaning of "pollution" shortly. For now, it suffices to say that, through article 194, States are obliged to take measures, be it individually or collectively, to achieve the goal of this provision; that is, to prevent, reduce and control pollution.

Both articles 192 and 194 of the Convention are obligations of conduct. The Kingdom underscores some of the views presented that measures *need* to be taken in order to prevent, reduce and control pollution of the marine environment. The wording of article 194 is "States shall take" and "to ensure". Such wording assumes that such measures *must* be taken. However, contrary to what has been argued by some participants before this Tribunal, this in itself does not lead to the conclusion that this is an obligation of result.

Mr President, in this respect, it follows from the *Advisory Opinion of the Seabed Disputes Chamber on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* that the obligation "to ensure", as enshrined in paragraph 2 of article 194 of the Convention, "is not an obligation to achieve". Rather, in the wording of the Seabed Disputes Chamber, "it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result". In the present proceedings, the result to be obtained relates to the prevention, reduction and control of pollution in accordance with article 194.

This also follows from the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay*. Here, the Court stated that an obligation to adopt regulatory or administrative measures, and enforce them, is an obligation of conduct, and, because of its characterization as an obligation of conduct, the Court concluded that it is also an obligation of due diligence.

That the obligation is one of conduct, and thus to exercise due diligence, does not, in any way, mean that it results in a low level of environmental protection. The question then arises, what precisely is the specific content of this due diligence obligation?

In its Advisory Opinion, the Seabed Disputes Chamber determined that the content of the due diligence obligation cannot be described in precise terms; rather, it is a variable concept. In this sense, the content of the obligation and the measures that need to be taken so as to comply with the obligation of due diligence, may vary according to circumstances. It may, for example, change in relation to the risks involved in an activity, and the standard of due diligence has to be more severe for riskier activities.

In particular, scientific or technological knowledge is very important to establish the standard of due diligence that needs to be acted upon. As the Seabed Disputes Chamber stated: “Due diligence may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge”.

This is clearly applicable to climate change. The Kingdom wishes to note the importance of the precautionary principle, meaning that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This should thus be taken into account in determining the standard of due diligence exercised.

Mr President, the Kingdom agrees with other participants that the obligation to exercise due diligence under articles 192 and 194 of the Convention applies to every single State. The Kingdom also shares the views expressed that capabilities of States differ. In this respect, the Kingdom would like to refer to the work of the International Law Commission on the Prevention of Transboundary Harm from Hazardous Activities.

In its commentaries, it observed that

the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.

These observations are also relevant for climate change law and policy, in particular the adoption of mitigation and adaptation measures, to which I will now turn your attention.

Mr President, mitigation and adaptation measures find their origin in the United Nations Framework Convention on Climate Change and related instruments, such as the Paris Agreement. In the view of the Kingdom, the obligations enshrined in articles 192 and 194 of the Convention include the adoption of such mitigation and adaptation measures.

Whereas mitigation measures seek to regulate the concentration of greenhouse gases in the atmosphere that have an anthropogenic origin, adaptation measures are intended to respond to actual or expected impacts of climate change, including on the marine environment.

In the context of mitigation measures, the principle of common but differentiated responsibilities and respective capabilities is relevant, as reflected in the system of nationally determined contributions under the Paris Agreement. This system has not only been designed to reflect differentiated responsibilities and historical emissions, but also to reflect respective capabilities. This should be taken into account in the degree of care expected of States to comply with their international obligations. In complying with these obligations, States should, individually or collectively, implement mitigation measures.

In the context of adaptation measures, the principle of common but differentiated responsibilities and respective capabilities is relevant as well. Bearing in mind this principle,

the international community, including coastal States as well as all States with respect to the Area, are responsible for the implementation of adaptation measures to enhance the climate resilience of the marine environment. Such measures will vary from State to State depending on State-specific circumstances, including the conditions of their natural environment and their socioeconomic status.

As for the European part of the Kingdom, of which a substantial part is situated below sea level, it requires the Netherlands to consider how to continue to manage its coast with sand nourishment in the coming decades, in order to guarantee the safety of the Netherlands in the future. As for the Caribbean part of the Kingdom, which have some of the most pristine coral reefs in the world, it requires enhancing the resilience of those reefs to protect them against ocean warming and ocean acidification.

An example of a *collective* measure enhancing the climate resilience of the marine environment is the designation and management of marine protected areas, as well as other area-based management tools, including in accordance with the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

Mr President, the applicability of article 194 of the Convention is based on the occurrence of pollution of the marine environment and the prevention, reduction and control thereof. In its written statement, the Kingdom explained why it considers the deleterious effects of climate change and ocean acidification, as well as the harm resulting from such effects, to fall within the meaning of the phrase “pollution to the marine environment” as defined in article 1(4). The Kingdom has not been convinced by the view, expressed by a few participants, suggesting otherwise, nor does it agree with the view that the obligations under article 194 do not relate to climate change, its effects and ocean acidification.

Furthermore, the Kingdom took note of statements that merely focused on land-based sources of pollution and sources of pollution from or through the atmosphere in response to the questions before the Tribunal. As a consequence, these statements only address the interaction between the obligations related to these sources under the Convention and the obligations under the United Nations Framework Convention on Climate Change and related instruments.

In the view of the Kingdom, other sources of pollution mentioned in the Convention may also contribute to climate change and ocean acidification, such as pollution by dumping, pollution from vessels, and pollution from installations and devices in the exploitation of the natural resources of the seabed and subsoil.

Accordingly, the Kingdom has addressed the interaction between the obligations related to *all these* sources with other instruments, frameworks and bodies. These do not only include the United Nations Framework Convention on Climate Change and its related instruments; they also include instruments under the auspices of international organizations, in particular the International Maritime Organization and the International Civil Aviation Organization.

These organizations have assumed responsibilities for reducing emissions from greenhouse gases from shipping and aviation, respectively, and are pursuing strategies to achieve such reductions. This has also been convincingly illustrated by the International Maritime Organization in its statements before the Tribunal.

Mr President, such initiatives are examples of the furtherance of the general principles and objectives set forth in this Convention relating to the protection and preservation of the marine environment and the protection, reduction and control of pollution thereto in accordance with article 237 of the Convention.

Several participants have referred to the general duty of cooperation enshrined in article 197 of the Convention in respect of the marine environment and consider this duty to be a fundamental principle of international environmental law. The Kingdom agrees, as the Tribunal held, in the case concerning the *Mixed Oxide Fuel Plant*, that cooperation is a

“fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom”.

Furthermore, some participants have referred to loss and damage to the marine environment resulting from the adverse effects of climate change. The Kingdom would observe that this issue has not been explicitly raised in the questions posed in the request for an advisory opinion. However, the issue becomes pertinent once the implementation of mitigation measures and adaptation measures have not proven effective to prevent damage to the marine environment, including the loss of marine biological diversities, in areas within and in areas beyond the limits of national jurisdiction.

The Kingdom wishes to note that the issue of loss and damage resulting from climate change is being addressed under the United Nations Framework Convention on Climate Change, which includes decisions on the establishment of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, as well as on Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage.

The Kingdom considers that damage to the marine environment, including the loss of marine biological diversities, in areas within and in areas beyond the limits of national jurisdiction, could be addressed under these initiatives relating to loss and damage resulting from the adverse effects of climate change.

In this context, the Kingdom considers that particular relevance should be given to the obligation, under the Convention on Biological Diversity, to rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies.

Mr President, distinguished members of the Tribunal, the Kingdom considers that, through its advisory opinion, the Tribunal has a unique opportunity to raise awareness and provide guidance on the protection and preservation of the marine environment and/or the prevention, reduction and control of the pollution of the marine environment.

In this manner, the advisory opinion will contribute to the interpretation and application of the obligations arising from the Convention, in particular the obligations arising from Part XII of the Convention. This would also contribute to the advancement of the holistic implementation, in a coherent and cooperative manner, of the obligations under the Convention and the obligations under other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

Mr President, honourable members of this Tribunal, I now conclude my presentation. The Kingdom would like to thank the Tribunal for her time and attention and looks forward to its Advisory Opinion on Climate Change and International Law. I thank you.

THE PRESIDENT: Thank you, Mr Lefeber, for your statement.

We have now reached 11:45. At this stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 12:15.

(Pause)

THE PRESIDENT: I now invite Mr Juratowitch to make his statement on behalf of the United Kingdom. You have the floor, Sir.

STATEMENT OF MR JURATOWITCH
UNITED KINGDOM
[ITLOS/PV.23/C31/18/Rev.1, p. 29-40]

Mr President, members of the Tribunal, it is an honour to appear before you to seek to assist you with the task that lies ahead of you. That task is simultaneously very broad and very delicate.

In this final session, the United Kingdom seeks to assist the Tribunal by identifying the considerable common ground, and then focusing on the central issues with which the Tribunal will need to grapple. The United Kingdom emphasizes six areas of common ground.

The first concerns the definition in article 1(1)(4). Nearly all participants accept that the actual or likely deleterious effects on the marine environment caused by anthropogenic greenhouse gas emissions constitute “pollution of the marine environment”.¹ This, of course, means that the pollution regime in Part XII is engaged by greenhouse gas emissions. If the Tribunal endorses this approach, that alone will be significant.²

The second concerns the scope of the Tribunal’s enquiry. Whilst, in theory, the request goes beyond Part XII, no party has seriously engaged with any provision outside it and the associated definitional provisions. The Tribunal can thus limit its opinion to relevant obligations in Part XII.

The third concerns the character of the obligations in Part XII. It is common ground that articles 192 and 194 are governed by the due diligence standard. The same is true for the duties to take cooperative action under Part XII.³

The fourth is that the IPCC’s reports emerging from its Sixth Assessment Cycle reflect best available science on the issues of climate change and ocean acidification, and their effects on the marine environment. The Tribunal endorsing this common ground would also be a significant result.

The fifth is that the UNFCCC and the Paris Agreement are relevant to the interpretation of obligations in Part XII. How they are relevant is a different matter and I will ultimately focus on that.

The sixth concerns the approach to the dispositive part of the Tribunal’s forthcoming opinion. The Tribunal may recall, having seen slides during the presentation of COSIS, the proposed dispositive part. The Tribunal may also recall the level of generality of those paragraphs. COSIS asks the Tribunal for a dispositive part that takes the terms of the relevant Part XII provisions and recognizes that they are engaged by anthropogenic greenhouse gas emissions. That much is common ground. The common ground ends where COSIS adds to what UNCLOS says by including the 1.5°C temperature goal and a stipulation as to timing, and to that I will also come.

Conscious of that significant common ground, the United Kingdom will use its time today on three subjects: first, jurisdiction, discretion, and characterization of the request; second, States’ obligations to take “necessary measures” under articles 194 and 212; and third, the duty of cooperation.

Ms Sander will address you on the duty of cooperation, and I will deal with the first two subjects.

¹ Cf India Oral Submissions, ITLOS/PV.23/C31/8, p. 17 (lines 40-49) (Rangreji); China Oral Submissions, ITLOS/PV.23/C31/10, p. 28 (lines 1-50) – p. 29 (lines 1-9) (Ma); see further Indonesia written statement, paras. 58 and 81.

² See generally Commission of Small Island States on Climate Change and International Law (‘COSIS’) Oral Submissions, ITLOS/PV.23/C31/4, p. 25 (lines 40-43) (Lowe).

³ See, e.g., COSIS written statement, paras. 319-320 and 327.

Before I do, the United Kingdom pays tribute to Professor Alan Boyle who passed away during the course of this hearing. He will be greatly missed.

Members of the Tribunal, like most participants, the United Kingdom does not challenge the existence of the Tribunal’s advisory jurisdiction. It recognizes the Tribunal’s finding in *SRFC* that it had such a jurisdiction.⁴

The United Kingdom shares the views of several States⁵ that the Tribunal could take this opportunity to elaborate on the basis of its advisory jurisdiction. In particular, the United Kingdom seeks clarification as to how an agreement empowering an international organization to seek an advisory opinion confers jurisdiction on the Tribunal to issue one for the purposes of article 21 of its Statute.⁶

Turning to discretion, the Tribunal is now faced with a request in very different circumstances from *SRFC*.

Unlike the *SRFC*,⁷ the type of international organization making the request is not expressly referred to in UNCLOS. Nor are its functions described in UNCLOS. Instead, COSIS was created by two States,⁸ without consultation with all other UNCLOS States Parties. Nonetheless, prominent among the purposes and activities of COSIS is seeking advisory opinions from the Tribunal concerning the obligations of *all* States Parties to UNCLOS.

In *SRFC*, the Tribunal found that the object of the *SRFC*’s request was “to seek guidance in respect of its own actions”.⁹ Here, the Commission does not seek guidance in respect of its own actions, but on the obligations of all UNCLOS States Parties in relation to climate change and ocean acidification.

The United Kingdom considers that risks arise from a small group of States being able to request ITLOS advisory opinions through a treaty of restricted membership devised for that principal purpose. This is all the more so when the questions posed concern the obligations of all States Parties to UNCLOS. To use the words of Judge Cot in *SRFC*, there are “dangers of abuse and manipulation” in future cases.¹⁰ These are dangers that are not protected against by article 21 of the Statute, article 138 of the Rules or the Tribunal’s approach to its advisory jurisdiction in *SRFC*.

The United Kingdom therefore invites the Tribunal to identify parameters governing the exercise of its discretion for the purpose of both this and future cases, as set out in paragraph 20 of its written statement. Two are particularly relevant to this case.

The first concerns the content of the question and the scope of the answer. The request must ask a legal question that is framed with enough specificity to ensure that in answering it, the Tribunal acts compatibly with its judicial function. The Tribunal was explicit in *SRFC* that a request must be “clear enough to enable it to deliver an advisory opinion”.¹¹ It is implicit that

⁴ See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4 (‘*SRFC* Advisory Opinion’), Operative Clause, para. 1.

⁵ Germany Oral Submissions, ITLOS/PV.23/C31/5, p. 19 (lines 31-35) (Von Uslar-Gleichen); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 24 (lines 29-31) (Mohammed Algethami); Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 5 (lines 40-44) (Ortega Lemus); India Oral Submissions, ITLOS/PV.23/C31/8, p. 16 (lines 21-23) (Rangrejji); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 6 (lines 21-24) (Jalloh); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 21 (lines 26-35) (Motzfeldt Kravik).

⁶ United Kingdom written statement, para. 15.

⁷ UNCLOS, article 118.

⁸ The COSIS Agreement entered into force with the signatures of Antigua and Barbuda and Tuvalu on 31 October 2021 (see article 4(2) providing that “[t]his Agreement shall enter into force upon signature by two or more States”). Membership of COSIS now also includes Palau, Niue, Vanuatu, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, and the Bahamas.

⁹ *SRFC* Advisory Opinion, para. 76.

¹⁰ See Separate Declaration of Judge Cot in the *SRFC* Advisory Opinion proposing that the Tribunal “provide a procedural framework” and establish “a coherent system” (paras. 9 and 13).

¹¹ *SRFC* Advisory Opinion, para. 72.

the scope of the question cannot go beyond what can feasibly and properly be addressed in advisory proceedings. This is not just a matter of focusing only on Part XII. The Tribunal will wish to keep in mind the procedure it has adopted in this case when determining the scope of, and level of detail in, its opinion.

Distinguished Judges:

33 States and 10 intergovernmental organizations filed written statements, spanning nearly 1,500 pages.

Participants were not afforded an opportunity to file a reply statement, although several States requested that opportunity.

COSIS was granted two full days to make its oral submissions. That allowed it to make 20 separate presentations from 20 individual advocates. Two of those advocates were testifying scientific experts. They appeared despite the well-established and important distinction between expert evidence and advocacy in international practice,¹² and despite the lack of notice to States that this would occur. The United Kingdom's position is that this approach to expert evidence is contrary to principle and should be avoided in any future case.

Each State Party has been allotted a maximum of just one hour to make its oral submissions. That is not enough time to respond to all relevant points arising from the extensive written submissions or the extensive oral submissions of COSIS.

The United Kingdom respectfully invites the Tribunal to take this procedural context into account when considering the appropriate ambit of its advisory opinion.

The second factor on discretion is the importance of the request comprising a legal question concerning one or more obligations under UNCLOS, or an agreement implementing it. The Tribunal is not the appropriate forum for the interpretation or application of other treaties. This factor is of real significance in the present case, given the specialized climate treaty regime.

We come now to a point about the objective characterization of the request. The Tribunal is asked to identify the "specific obligations" under Part XII that are relevant to climate change and ocean acidification. This requires the Tribunal to identify and to describe the content and meaning of those obligations. The Tribunal is not asked to identify means by which States may comply with those obligations. The Tribunal will have recognized that a number of arguments made to it have nonetheless focused on what would be necessary to comply with obligations in light of scientific evidence, rather than on the identification, content and meaning of the relevant obligations.

While I am on matters outside scope, the United Kingdom notes that the Falkland Islands have been raised before you.¹³ The United Kingdom's position is well known and so I need say nothing further on it.

Distinguished Judges, that brings us to my second subject: what is meant by "necessary measures" in articles 194 and 212.

To resolve that issue in this context, the Tribunal will need to consider two questions.

First, what is the relationship between best available science and States' legal obligations to take "necessary measures" to prevent, reduce and control climate change and ocean acidification?

Second, what is the relevance of the specialized climate treaty regime to UNCLOS, and in particular, to articles 194 and 212?

I turn first to best available science.

The Seabed Disputes Chamber has already acknowledged that best available science is relevant to obligations that are subject to a due diligence standard. In its 2011 Opinion, the

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 ('Pulp Mills'), Separate Opinion of Judge Greenwood, para. 27.

¹³ Argentina's Oral Submissions, ITLOS/PV.23/C31/6, p. 11 (lines 28-41) (Herrera).

Chamber considered the content of obligations in article 139(1) and article 4(4) of Annex III “to ensure” a particular state of affairs.¹⁴ It held that these were “obligations ‘of conduct’ and not ‘of result’”.¹⁵ It also held that the concept of due diligence may vary with “new scientific or technical knowledge”.¹⁶ The Chamber referred to article 194(2) as an example of a provision falling within that category of obligations.¹⁷ In doing so, it rightly drew no relevant distinction between the language of article 194(2) and that of article 139(1).¹⁸

This brings us to the role of the current IPCC reports in the present case.

The approach of COSIS is that “[s]ettled scientific conclusions based on current and best available evidence dictate what is ‘necessary’”.¹⁹ “Dictate” is a strong word. You have also been told that you must “follow the science”.²⁰

This line of argument has the practical effect of seeking to elevate the findings and recommendations made in the current Panel reports to the status of binding legal obligations through the operation of articles 194 and 212. That, with respect, is not a permissible approach, for two reasons.

First, asking the Tribunal to declare what States must do because of what the science says is not asking the Tribunal to declare the content or meaning of UNCLOS obligations, “specific” or otherwise. It is asking the Tribunal to explain what States must do at the present time to comply with those obligations in light of particular scientific evidence. That, members of the Tribunal, is not what the request, objectively characterized, calls for.

The second reason would only become relevant if the Tribunal were nonetheless to consider compliance to be a matter within scope. It is that both the precise content of the due diligence standard and its application to any given facts ultimately remain legal questions, not scientific ones.

The United Kingdom accepts that the recommendations in the current IPCC reports are a highly relevant factor when a State is assessing what measures are objectively necessary for the purposes of complying with its obligations under articles 194 and 212. But the Panel reports are not the beginning and end of the enquiry.

Pursuant to the plain terms of UNCLOS and the established jurisprudence, there are factors relevant to a State’s assessment of “necessary measures” beyond best available science. Some of those factors may point in different directions from others, and a State must weigh them in any particular circumstance. I will identify eight.

First, practical considerations are crucial. Article 194(1) makes clear that States are to use “the *best practicable means* at their disposal” and act “in accordance with their *capabilities*”. An assessment of what is “necessary” cannot be separated from practical realities. A State is permitted to consider economic, political, social and other factors that may affect what is practicable for a particular State at a particular time.

Second, the *degree of risk of harm* generated by any particular conduct is a relevant consideration. This is consistent with the Chamber’s recognition, which you have heard many times, that “the standard of due diligence has to be more severe for riskier activities”,²¹ as emphasized by many participants.²²

¹⁴ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 (‘*Activities in the Area, Advisory Opinion*’), para. 107 and following.

¹⁵ *Activities in the Area, Advisory Opinion*, para. 110.

¹⁶ *Activities in the Area, Advisory Opinion*, para. 117.

¹⁷ *Activities in the Area, Advisory Opinion*, para. 113.

¹⁸ Cf COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 21 (lines 18-35) (Thouvenin).

¹⁹ COSIS written statement, para. 338.

²⁰ Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 21 (lines 11 and 40), p. 22 (line 2), p. 30 (line 28) (Sands).

²¹ *Activities in the Area, Advisory Opinion*, para. 117.

²² See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 9 (lines 3-5) and p. 10 (lines 1-2) (Brunnée); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 20 (lines 30-31) (Sands); Singapore Oral Submissions,

Third, States' obligations to take necessary measures under Part XII include a duty to avoid activities causing damage to other States. Article 194(2) makes this express.

Fourth, the concept of *effectiveness* reinforces the need to take measures under Part XII that are targeted, timely and as far-reaching and efficacious as possible.²³ On this, the Panel's recognition of the need for deep, rapid and sustainable cuts to emissions and to have regard to tipping points²⁴ is particularly significant, but it is not the entire test.

Fifth, within UNCLOS, the *precautionary principle*²⁵ remains relevant insofar as there is any remaining scientific uncertainty as to the character or extent of the likely harm, the risk of it eventuating, or the efficacy of mitigatory measures.²⁶ This means that any such uncertainty cannot justify inaction or more limited action.

Sixth, the results of *monitoring and assessment* conducted by a State pursuant to articles 204 or 206, and any reports made available to States Parties pursuant to article 205, may also be relevant to an assessment of what measures are necessary.

Seventh, under article 194(1) States shall take measures "individually or jointly as appropriate" and "shall endeavour to harmonize their policies". UNCLOS does not divorce what is necessary from what is capable of being agreed.

Related to that, eighth, the provisions of *the specialized climate treaty regime* inform the content of the due diligence standard under Part XII, and I will return to the question of how they do so.

Distinguished Judges, that best available science is not the only relevant factor is illustrated by the issue of the significance to be given to the 1.5-degree temperature goal.

Several participants take the view that "necessary measures" under UNCLOS must be aimed at limiting average global temperature rise specifically to 1.5 degrees above pre-industrial levels. This is on the basis that the IPCC has concluded that limiting temperature rise to this level would significantly reduce the risks and harm of climate change.²⁷

This, with respect, incorrectly seeks to elevate scientific information to the status of a legal obligation under UNCLOS, without accounting for the other factors I have identified.

The United Kingdom accepts that the Panel has, with medium to high confidence, identified a 1.5-degree rise as the threshold which, if exceeded, causes the risk of extreme effects of climate change to begin to move from moderate to high.²⁸ The United Kingdom also accepts that this scientific conclusion is a highly relevant factor to take into account when States are assessing what steps they must take to comply with articles 194 and 212.

But the Panel reports are one of many factors that States must consider. To focus exclusively on the science on 1.5 degrees is to underestimate the complex and competing factors that States must weigh in practice.

ITLOS/PV.23/C31/13, p. 2 (lines 33-37) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 27 (lines 29-30) (Bouquet).

²³ See further United Kingdom written statement, paras. 85-87.

²⁴ For the climate system, 'tipping points' refers to a critical threshold when global or regional climate changes from one stable state to another stable state: IPCC, 2019: Glossary, p. 699.

²⁵ As explained in the United Kingdom written statement at para. 76, the precise status and content of the principle are unsettled.

²⁶ See further United Kingdom written statement, paras. 75-78; cf Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 28 (lines 10-13) (Jalloh).

²⁷ See e.g., African Union written statement, paras. 202 and 220-221; Bangladesh written statement, paras. 35, 42, 45-48; COSIS written statement, para. 425; IUCN written statement, para. 108; Micronesia written statement, para. 51; Mozambique written statement, para. 3.65; Nauru written statement, paras. 56 and 66; COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 30-35) (Amirfar) and ITLOS/PV.23/C31/4, p. 29 (lines 25-28) (Lowe); Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 12 (lines 37-41) (Okowa); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 24 (lines 16-19) and p. 27 (lines 29-35) (Tladi).

²⁸ See 2018 Special Report on Global Warming of 1.5°C, p. 11, figure SPM.2.

Treating 1.5 degrees as a limit with the force of law derived from Part XII also ignores the character of the relevant obligations. They are due diligence obligations. There is common ground on the due diligence character of articles 192, 194, and 197 through to 204.²⁹ The same characterization also applies to articles 206, 207, 212, 213 and 222. They are all obligations of *conduct*, not of *result*.³⁰ As the Tribunal has heard many times, this means that States are obliged to “deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [the relevant] result”.³¹

Those participants that are seeking to give the 1.5-degree goal legal significance through the rubric of “necessary measures” assume that the “result” towards which States must exercise “best efforts” under UNCLOS is the 1.5-degree goal. It is not.

In *Activities in the Area*, the “result” was the sponsored contractors’ compliance with article 139(1) and article 4(4) of Annex III.³² That is clear from the terms of those provisions.

In the context of article 194(1), the relevant “result” is also clear on the face of the provision. It is the prevention, reduction and control of pollution. The Netherlands made the same point this morning. For article 194(2), the result is that activities within a State’s jurisdiction or control do not cause damage by pollution. The meaning of article 194 is not that a number identified by best available science at a given point in time is the result towards which States must expend their efforts. Any result at which States must aim under article 194 cannot be so specifically described.

As the Tribunal has in mind, however the result at which States must aim is described, the content of the obligation is to exercise due diligence to achieve it. There is no legal obligation to achieve it.

The attempt to give 1.5 degrees legal significance under UNCLOS is further undermined by the words used in the provision of the Paris Agreement that refers to 1.5 degrees, which is article 2(1)(a).

It is to the relationship between the climate change treaties and the due diligence standard in UNCLOS that I now turn.

Like many participants,³³ the United Kingdom’s position is that the UNFCCC and the Paris Agreement have primary importance in the context of climate change. The provisions of those treaties inform the content of States’ obligations under Part XII of UNCLOS.

²⁹ COSIS written statement, paras 319-320 and 327; see also, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 10 (lines 28-30) and page 13 (lines 18-20) (Brunneé) (in respect of articles 192 and 194), New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 12 (lines 10-11) (Skerten) (in respect of articles 192 and 194); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 18 (lines 5-6) (Hwang) (in respect of articles 192 and 194); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 13 (lines 1-11) (Paparinskis) (in respect of “key rules”, e.g., articles 194, 204, 206, and 207); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 9 (lines 5-8) (Middleton), p. 15 (lines 30-33) (Stoeger) and p. 20 (lines 28-39) (Bouquet) (in respect of articles 192, 194 and 197).

³⁰ See, para. 18 above; see further *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

³¹ *Activities in the Area*, Advisory Opinion, para. 110; endorsed by the Tribunal in *SRFC* Advisory Opinion, paras. 128-129.

³² *Ibid.*

³³ See European Union written statement, paras. 28 and 93; IUCN written statement, paras. 96 and 194; Mauritius written statement, paras. 47 and 50-51; Norway written statement, p. 3; Portugal written statement, para. 65; Singapore written statement, para. 38; see also Australia written statement, paras. 31, 39 and 41; Micronesia written statement, para. 47; New Zealand written statement, para. 94(f). See also, e.g., Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 17 (lines 6-7) (Koonjul); Indonesia Oral Submissions, ITLOS/PV.23/C31/9, p. 6 (lines 24-26) (Jinangkung); China Oral Submissions, ITLOS/PV.23/C31/10, p. 23 (lines 36-37) - p.24 (lines 1-2) (Ma); Norway Oral Submissions, ITLOS/PV.23/C31/11, p. 26 (lines 10-12) (Motzfeldt Kravik).

The Tribunal will provide significant guidance by being specific about how and why the Framework Convention and the Paris Agreement are relevant to the questions before it. There are five different and complementary bases for such relevance.

First, they contain specific rules that elaborate the “general obligation” in article 192 to preserve the marine environment.

Second, they are an example of “joint” measures for the reduction of greenhouse gas emissions for the purposes of article 194(1).

Third, they contain internationally agreed rules or standards for the purposes of article 212(1). UNCLOS States Parties are obliged to take them into account in adopting domestic laws and regulations under article 212.

Fourth, they contain relevant rules of international law to be taken into account in the interpretation of Part XII of UNCLOS, by operation of the rule reflected in article 31(3)(c) of the Vienna Convention. The United Kingdom of course recognizes that the Framework Convention and the Paris Agreement, on the one hand, and UNCLOS on the other, are separate treaties, with separate obligations.³⁴ The essential point is that the Tribunal will wish to interpret Part XII so that its meaning is harmonious with the climate change treaties. This is not a case of different treaties being in conflict. It is a case in which States are to be presumed to intend coherence and consistency across their treaty obligations.

Fifth, they are additionally relevant because of their creation of relevant fora for international cooperation, including for the purposes of articles 197 and 212(1) of UNCLOS. Article 222 then requires States to implement legal obligations agreed in those fora by adopting appropriate domestic laws and regulations.

I have already analyzed the 1.5-degree goal in the context of best available science. I return to it now to illustrate the more general relevance of the Paris Agreement to the interpretation of Part XII obligations.

Some participants have relied on the Paris Agreement’s reference to the 1.5-degree goal as constituting an “agreed” threshold and thus an “internationally agreed ... standard” for the purposes of articles 207(1) and 212(1). This is said to require “necessary measures” to be targeted at the 1.5-degree goal.³⁵

There are two key difficulties with this approach.

First, the obligation in articles 207(1) and 212(1) – where the phrase “internationally agreed ... standards” is found – is limited in character. It only concerns the adoption of domestic laws and regulations and it is only to “take into account” relevant internationally agreed rules and standards. That is not an obligation to take necessary measures.

Second, it is not clear on what basis the reference in article 2(1)(a) of the Paris Agreement to the 1.5-degree goal could be said to constitute an “internationally agreed standard” when one considers, even superficially, what it actually says and the context in which it says it. Article 2(1) addresses the Paris Agreement’s “aims”. In that context, article 2(1)(a) refers to: “Holding the increase in global average temperature to well below 2°C ... and pursuing efforts to limit the temperature increase to 1.5°C.” The reference to 1.5 degrees in the Paris Agreement cannot be isolated from the true sense of the provision in which it occurs. International law abhors cherry-picking.

³⁴ COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 28 (lines 15-21) (Lowe), Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 3 (line 24) (Yee).

³⁵ COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 30 (lines 4-10) and p. 34 (lines 12-25) (Amirfar). As to the 1.5 degree goal under the Paris Agreement representing a “standard” under articles 207 and 212 more generally, see, e.g., Bangladesh Oral Submissions, ITLOS/PV.23/C31/6, p. 20 (lines 9-11) (Amirfar); Comoros Oral Submissions, ITLOS/PV.23/16, p. 9 (lines 10-20) (Coppens); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 26 (lines 11-13) (Sands); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 7 (lines 18-23) (Yee).

The primary relevance of the Paris Agreement to this case is in construing the terms of articles 194 and 212(2). The United Kingdom’s interpretative case is *not* that articles 194 and 212(2) contain a *renvoi* to the Paris Agreement that operates to deprive them of any meaningful independent effect.³⁶ Nor has the United Kingdom said that the Paris Agreement constitutes a “subsequent agreement” or “subsequent practice” between the parties to UNCLOS.³⁷ Nor do any provisions of UNCLOS incorporate any provisions of the Framework Convention or Paris Agreement so as to make them also obligations pursuant to UNCLOS.³⁸

The United Kingdom’s case is straightforward: like many participants,³⁹ it contends that the obligation to take “necessary measures” should be interpreted taking into account the Framework Convention and the Paris Agreement as required by the rule in article 31(3)(c) of the Vienna Convention. That is not a matter of limiting, diluting or “neutralizing”⁴⁰ UNCLOS, but of interpreting it harmoniously with the relevant, more specialized treaty on climate change. The contentious question is what this means in practice.

The United Kingdom’s position is that the Paris Agreement can be taken to reflect a near-universal consensus on the measures that States must take to combat climate change in view of best available science. Those measures are introduced by a preamble expressly “recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge”. Notwithstanding that preamble, the Paris Agreement does not go on to impose a binding temperature rise limit of 1.5 degrees, as the Tribunal is effectively being asked to impose through UNCLOS. The way that the Paris Agreement does treat the temperature rise goal should inform what legal meaning is to be given to what is “necessary” under articles 194 and 212.

Members of the Tribunal, the general words of articles 194 and 212 of UNCLOS cannot credibly be interpreted as imposing more stringent or more specific obligations than the Paris Agreement, which is the specialist climate change treaty specifically addressing the measures to be taken.

If States are to be obliged to take measures that collectively reduce emissions to a level that ensures that the increase to global average temperatures is limited to 1.5 degrees, or to reach global peaking of greenhouse gases within a certain time period, States can, of course, collectively agree to that, including by way of amendment to the Paris Agreement pursuant to its article 22.

The invitation to ITLOS appears to be to impose through advisory proceedings concerning the very general obligations in Part XII of UNCLOS a precise limit that has thus far not been agreed in the forum dealing specifically with the topic. That is both wrong as a matter of law, and would risk undermining rather than enhancing cooperation on this vital issue in practice.

Like several other States,⁴¹ the United Kingdom’s position is that it is unnecessary and would be inappropriate for the Tribunal to offer an interpretation of any provision of the Framework Convention or the Paris Agreement.

The interpretation and implementation of those treaties involve highly technical matters, the relevance and impact of which extend far beyond the law of the sea, and on which

³⁶ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (line 14) - p. 32 (line 9) (Aughey).

³⁷ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 8-12) (Aughey).

³⁸ Cf Mozambique Oral Submissions, ITLOS/PV.23/C31/11, p. 8 (lines 14-17) (Okowa).

³⁹ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/2, pp. 35 (lines 24-28) (Mbengue); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 12 (lines 33-35); Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 33 (lines 18-23) (Aughey).

⁴⁰ Cf Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 30 (lines 32-35) (Aughey).

⁴¹ Brazil written statement, para. 20; Canada written statement, para. 61; Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 23 (lines 15-21) and p. 28 (lines 22-23) (Mohammed Algethami). See also France written statement, para. 18.

the Tribunal has not received full submissions. They are also matters that it is unnecessary for the Tribunal to opine on in order to answer the request made to it, which focuses exclusively on UNCLOS obligations. It is sufficient for the Tribunal to recognize the primary importance of those treaties and their relationship with the relevant provisions in Part XII.

The United Kingdom does, however, invite the Tribunal to bear a number of important points in mind concerning the climate change treaties:

The Framework Convention, the Paris Agreement, the annual decisions of the Conferences of the Parties under their auspices and their multitude of implementing decisions that exist already and that will be created in the future constitute a dynamic system. That system is the product of regular negotiations resulting in careful compromise between States that can shift over time. It is through that vital process that States cooperate to reach consensus on the complex matters with which they are confronted at any given time.

That careful compromise reflects a balance of competing objectives and interests both within and between States, and, accordingly, the Tribunal is invited to have careful regard to the scope of its judicial function, appreciating the delicate balances inherent in and managed through the global treaty regime concerning climate change.

The United Kingdom recognizes that some States, including but not only small island States, are very understandably of the view that those treaties and processes are not moving fast enough or doing enough in the light of the dangers they, in particular, already face and will continue to face. The United Kingdom agrees that comprehensive action needs to be taken quickly through the Framework Convention and Paris Agreement processes, and other fora dealing with greenhouse gas emissions, and that existing commitments need to be honoured and improved if the world is to keep within the Paris Agreement temperature goal.

But this is all a matter of painstaking detailed negotiations within the forum dedicated to them, and the implementation of what is agreed in that forum. ITLOS cannot accept an invitation, no matter how understandable its motivation, effectively to trump the treaties and the forum dedicated specifically to climate change on the basis of the very general obligations found in UNCLOS.

What the Tribunal can and should recognize is that it is through States' collective efforts to implement their commitments and enhance their ambition in the climate change treaty framework that we will resolve the global challenge presented for the marine environment by climate change and ocean acidification.

On that note, Mr President, I invite you to call upon Ms Sander to address the most important aspect of these proceedings, which is the duty of cooperation. I thank you for your attention.

THE PRESIDENT: Thank you, Mr Juratowitch, for your statement.

I now invite Ms Sander to make her statement. You have the floor, Madam.

STATEMENT OF MS SANDER
 UNITED KINGDOM
 [ITLOS/PV.23/C31/18/Rev.1, p. 40-48]

Mr President, members of the Tribunal, good morning. It is an honour to appear before you.

Before diving into the specifics of the duty of cooperation under Part XII, I consider a broader question: why is the United Kingdom focusing on this duty? In short: because of its importance to Part XII of UNCLOS and because of its importance to the specific context of this case, as reflected in its prominence in the submissions in these proceedings.¹

It is well-trodden ground that in many respects UNCLOS is a framework convention that, at various junctures, provides for the development of more detailed regulation and guidance by States. To ensure the effectiveness of many of its terms, States Parties must cooperate to establish the necessary legal rules and practices on specific issues, and Part XII is no exception to this. Of course, there are certain specific individual obligations on States set out in Part XII,² but the United Kingdom agrees with COSIS that cooperation is a “core normative thread”,³ and with the African Union that it is a “cornerstone principle”.⁴ Indeed, numerous references have been made in these proceedings to the Tribunal’s description in *Mox Plant* of the duty as “a fundamental principle”.⁵

But it is the particular significance of the duty to cooperate under UNCLOS in the *specific* context of this case – and its critical role in realizing the obligations under articles 192 and 194(1) – that the Tribunal is invited to expressly recognize and elucidate.

As Mr Juratowitch foreshadowed, cooperation leading to effective collective action is key to addressing the acute challenges of climate change impacts on the marine environment.

¹ See, e.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 10) – p. 14 (line 14) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 4 (lines 1-6) (Donaghue); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 18-22) (Mohammed Algethami); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-21) (Paparinskis); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 28 (lines 12-17) (Sands); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 7 (lines 40-44) - p. 8 (lines 1-16) (Hallum); China Oral Submissions, ITLOS/PV.23/C31/10, p. 26 (lines 10-21) (Ma); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-42) (Jalloh); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 13-25) (Yee); European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet); African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 39-47) - p. 16 (lines 1-2) (Raju).

² See COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 34-40) (Blake).

³ COSIS written statement, para. 316.

⁴ African Union written statement, para. 263; Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

⁵ *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 82 cited as follows: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 14 (lines 10-12) (Blake); Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 14 (lines 35-38) (Parlett); Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 2 (lines 6-9) (Herrera); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 8 (lines 5-8) (Hallum); Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 28 (lines 15-17) (Sands); Saudi Arabia Oral Submissions, ITLOS/PV.23/C31/5, p. 25 (lines 20-22) (Mohammed Algethami); Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 8-9) (Yusuf); Latvia Oral Submissions, ITLOS/PV.23/C31/9, p. 12 (lines 11-13, fn 18) (Paparinskis); Republic of Korea Oral Submissions, ITLOS/PV.23/C31/10, p. 19 (lines 40-43, fn 76) (Hwang); Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 33 (lines 7-11) (Jalloh); European Union, ITLOS/PV.23/C31/14, p. 34 (lines 6-7) (Bouquet); Mozambique Oral Submissions, ITLOS/PV.23/C31/11 p. 19 (lines 33-35) (Loewenstein); Philippines Oral Submissions, ITLOS/PV.23/C31/12, p. 14 (lines 32-35) (Sorreta).

That is a view reflected in the submissions of Argentina,⁶ Australia,⁷ Brazil,⁸ Canada,⁹ Chile,¹⁰ Comoros,¹¹ Djibouti,¹² the European Union,¹³ Guatemala,¹⁴ India,¹⁵ Mauritius,¹⁶ New Zealand,¹⁷ Portugal,¹⁸ Sierra Leone,¹⁹ Singapore,²⁰ and Timor-Leste,²¹ as well as COSIS²² and the African Union.²³ The United Kingdom adds its voice to that chorus and considers it important to do so.

However, to adopt the words of Judge Paik from his Separate Opinion in the *SRFC* advisory proceedings, “simply emphasizing the obligation of cooperation ... would hardly be sufficient”.²⁴

Rather, the question for ITLOS is: what is the specific content of the obligation of cooperation in the present context? It is the United Kingdom’s response to that question to which I now turn. Happily, there is a large degree of consensus among participants in these proceedings in this regard, and so my task primarily involves identifying points of common ground.

The key relevant obligation in Part XII is article 197, addressing the formulation and elaboration of international rules, standards, and recommended practices and procedures. The Tribunal will be familiar with its plain terms, and so I highlight three key elements of that provision that it is understood are not controversial.

First, flexibility as to format: whilst cooperation must be global, and can also be regional as appropriate, cooperation may be bilateral or multilateral –

THE PRESIDENT: I am sorry to interrupt. There seems to be no interpretation at the moment, so can you bear with us for a second and see if we can resolve that.

MS SANDER: Of course, Mr President. I am in your hands.

THE PRESIDENT: Thank you very much. Thank you.

(Pause)

THE PRESIDENT: Thank you, Ms Sander, please proceed.

MS SANDER: If I may backtrack just to locate it in my submissions.

⁶ Argentina Oral Submissions, ITLOS/PV.23/C31/6, p. 8 (lines 31-33) (Herrera).

⁷ Australia written statement, para. 59; Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 15 (lines 34-37) (Parlett).

⁸ Brazil written statement, para. 14.

⁹ Canada written statement, para. 10.

¹⁰ Chile written statement, para. 81.

¹¹ Comoros Oral Submissions, ITLOS/PV.23/C31/16, p. 12 (lines 26-29) (Connolly).

¹² Djibouti Oral Submissions, ITLOS/PV.23/C31/7, p. 31 (lines 15-20) (Yusuf).

¹³ European Union Oral Submissions, ITLOS/PV.23/C31/14, p. 22 (lines 28-32) (Bouquet).

¹⁴ Guatemala Oral Submissions, ITLOS/PV.23/C31/8, p. 12 (lines 38-42) (Neumann).

¹⁵ India Oral Submissions, ITLOS/PV.23/C31/8, p. 20 (lines 9-10) (Rangreji).

¹⁶ Mauritius written statement, para. 76.

¹⁷ New Zealand written statement, para. 59.

¹⁸ Portugal Oral Submissions, ITLOS/PV.23/C31/7, p. 18 (lines 33-36) (Teles).

¹⁹ Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 32 (lines 22-24) (Jalloh).

²⁰ Singapore written statement, para. 42.

²¹ Timor-Leste Oral Submissions, ITLOS/PV.23/C31/14, p. 20 (lines 20-23) (Sthoeger).

²² COSIS Oral Submissions, ITLOS/PV.23/C31/4, pp. 9 (lines 15-22) (Blake).

²³ African Union Oral Submissions, ITLOS/PV.23/C31/17, p. 15 (lines 43-44) (Raju).

²⁴ Separate Opinion of Judge Paik in the *SRFC* Advisory Opinion, p. 102, para. 34.

THE PRESIDENT: Yes.

MS SANDER: Article 197, I am highlighting three key elements of that provision that is understood and not controversial.

First, flexibility as to format: whilst cooperation must be global and can also be regional as appropriate, cooperation may be bilateral or multilateral.

Second, flexibility as to forum: multilateral cooperation may take place through competent international organizations, be they established under the auspices of UNCLOS, or outside of it.

Third, flexibility as to objective, to a degree. The purpose of international cooperation is law and policy-making. Its result may have the status of a legally binding treaty, or ‘soft law instruments’ or a recommended practice or procedure. But those laws, practices or procedures must be consistent with UNCLOS and have the protection and preservation of the marine environment as their aim.

Beyond these textual features, the duty of international cooperation in article 197 has three facets:

First, it is an obligation of conduct, rather than result. Article 197, on its plain terms, does not oblige States Parties to reach an agreed position, and it is recalled that COSIS emphasized the due diligence nature of cooperative action under Part XII.²⁵

Second, it is a continuing obligation, as others have noted.²⁶ Depending on the circumstances, article 197 may require an ongoing dialogue²⁷ or may require a subject to be reassessed or revisited at a later date.

Third, it is an obligation which requires States Parties to engage with one another in good faith.²⁸ As the ICJ has recognized, this reflects the “trust and confidence inherent in international co-operation”.²⁹ The ICJ’s observation that parties must engage “with a genuine intention to achieve a positive result”³⁰ is equally apt in the context of cooperation under article 197.

Further, the United Kingdom considers that, consistent with the position set out by New Zealand in its written statement³¹ and indicated by Sierra Leone in its oral submissions,³² what States are required to do by the duty to cooperate – to engage in good faith – should be assessed in a proportional manner relative to the degree of risk at issue. This is consistent with the observation in the *Activities in the Area* Advisory Opinion that “the standard of due diligence has to be more severe for riskier activities”.³³

Of course, the content of article 197 informs and is informed by its surrounding provisions. Those provisions have been categorized in different ways during these

²⁵ COSIS written statement, paras. 319-320 and 327; cf International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p. 35 (lines 14-17) (Payne).

²⁶ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 38) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 12 (line 25) (Yee).

²⁷ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p.12 (lines 1-3) (Skerten).

²⁸ E.g.: COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 9 (line 42-43) (Blake); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) - p.12 (lines 1-3) (Skerten); Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 15) (Yee).

²⁹ *Pulp Mills* para. 145, citing *Nuclear Tests Case, Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49.

³⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 87.

³¹ New Zealand written statement, para. 62.

³² Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p.32 (lines 22-24) (“The gravity of the effects of climate change justifies the highest levels of cooperation among all”).

³³ *Activities in the Area*, Advisory Opinion, para. 117.

proceedings.³⁴ I will address those provisions in two categories: those relating to law and policy-making, and those going beyond law and policy-making.

Turning to the *first category*, the general obligation in article 197 addressing law and policy-making is reinforced by three further provisions that apply in this context:

First, article 212(3) requires States Parties to endeavour to establish “global and regional rules, standards and recommended practices and procedures to prevent, reduce and control” pollution from or through the atmosphere, and article 207(4) echoes that wording.

Next, as Mr Juratowitch mentioned, article 194(1) obliges States Parties to cooperate in two ways. It requires measures to be taken “jointly” where “appropriate”, thus contemplating individual and joint measures being taken concurrently. Article 194(1) also obliges States to “endeavour to harmonize their policies” relating to those measures, with article 207(3) echoing this language.

Finally, article 201 specifically focuses on the development of scientific criteria relevant to the global and regional legal frameworks developed pursuant to articles 197 and 212(3).

I turn to the *second category* of obligations going beyond law and policy-making, and it is here perhaps that one gets a bit closer to answering the plea to pin down specifically the content of the cooperation duty. These obligations also serve as useful concrete examples of how best available science is relevant to informing aspects of cooperation under UNCLOS.³⁵

Most relevantly, States Parties are obliged to cooperate on the following:

the undertaking of scientific research and exchange of information and data (I refer to article 200);

the provision of scientific and technical assistance to developing States (I refer to articles 202 and 203);

the monitoring of the risks or effects of pollution, including the effects of any activities which they permit or engage in (I refer to both paragraphs in article 204);

finally, the communication of reports pursuant to that monitoring as well as to after the assessment of planned activities under a State’s jurisdiction or control where a State has reasonable grounds to believe that those activities may cause substantial pollution of, or significant and harmful changes to, the marine environment (I refer to articles 205 and 206).

I pause here with two observations on article 206.

First, the United Kingdom agrees that the existence of “reasonable grounds” for the purposes of article 206 provides for an objective assessment of State conduct.³⁶

Second, the United Kingdom highlights that there is a threshold for the application of article 206 of “substantial pollution of” or “significant and harmful changes to” the marine environment.³⁷ That threshold is clearly not to be equated to a threshold of “more than minor or transitory”, as was indicated in certain submissions,³⁸ and that distinction is reflected in the plain terms of article 30 of the BBNJ Agreement.³⁹

Mapping the various provisions to the present context, and taking into account the submissions made over the last two weeks, the United Kingdom’s position is that States Parties to UNCLOS have a continuing obligation to engage with one another in good faith in at least five different ways.

³⁴ E.g., COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 10 (lines 1-4) (Blake).

³⁵ United Kingdom written statement, para. 89(c); COSIS Oral Submissions, ITLOS/PV.23/C31/3, p. 33 (lines 26-29) (Amirfar).

³⁶ Belize Oral Submissions, ITLOS/PV.23/C31/11, p. 37 lines 26-27 (Wordsworth).

³⁷ Cf Mauritius Oral Submissions, ITLOS/PV.23/C31/9, p. 27 (lines 41-44) - p. 28 (lines 6-9) (Sands).

³⁸ Cf International Union for the Conservation of Nature written statement, paras. 153 and 161; Belize written statement, para. 80f.

³⁹ Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

First, States Parties must cooperate by undertaking *scientific research* on climate change and ocean acidification. States Parties' good faith participation in the IPCC process is key in this regard.

Second, States Parties must cooperate in *monitoring* the risks or effects of climate change and ocean acidification on the marine environment, including through the IPCC. They must also monitor the effects of activities that they permit or engage in. The objective of this surveillance links to the assessment obligation under article 206.

Third, States Parties must cooperate in the *exchange of reports, information and data* produced pursuant to articles 200 and 205, with this aspect of transparency of critical importance to the effective functioning of the protections in Part XII in the present context.

Fourth, States Parties must cooperate by providing technical, scientific and other *assistance to developing States*, either bilaterally, or through international organizations, such as the Conference of the Parties of the UNFCCC. The United Kingdom recognizes the particularly vulnerable position of small island States, as reflected in its Small Island Developing States Strategy.⁴⁰ The United Kingdom has noted the expert report of Dr Maharaj highlighting that States require assistance in building capacity to address chronic data gaps.⁴¹ As recognized by COSIS, "different forms of international assistance, financial and non-financial" is required "as is appropriate in each case".⁴²

Finally, States Parties must cooperate by participating in *discussions* with three aims:

(a) to formulate and elaborate rules, standards and recommended practices and procedures consistent with UNCLOS to protect and preserve the marine environment from the threat of climate change and ocean acidification;

(b) to establish appropriate scientific criteria for the formation and elaboration of the subset of those instruments specifically addressing the prevention, reduction and control of climate change and ocean acidification, as forms of pollution;

(c) to devise specific and effective measures to prevent further harm to the marine environment and to mitigate existing harm where possible.

The United Kingdom makes two further observations with respect to those discussions.

The first observation is that it recognizes, as have other States,⁴³ that the principal relevant fora for those discussions are those established pursuant to the UNFCCC framework and also specialist bodies that address sector or pollutant-specific emissions, such as the IMO, ICAO and the Montreal Protocol's Meeting of the Parties.

In its written statement, the United Kingdom made express reference to the relevant COP under each of the UNFCCC, the Kyoto Protocol and the Paris Agreement, which operate as the supreme decision-making bodies of those treaties. The United Kingdom takes this opportunity to confirm two points of agreement.

The first concerns Singapore's written statement that highlighted, as regards the establishment of appropriate scientific criteria, the discussions of the Subsidiary Body for Scientific and Technological Advice (the SBSTA).⁴⁴ That body, one of just two permanent subsidiary bodies established under the UNFCCC, supports the work of the relevant COP through the provision of timely information and advice in scientific and technological matters. The SBSTA is, of course, informed by the work of the IPCC, with that body, or the COP more

⁴⁰ United Kingdom written statement, para. 5.

⁴¹ COSIS Annex 5, paras. 8-12; Sierra Leone written statement, para. 88; Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 22 (lines 43-45) (Sorreta).

⁴² COSIS Oral Submissions, ITLOS/PV.23/C31/4, p. 13 (lines 11-15) (Blake).

⁴³ Australia written statement, para. 61; Canada written statement, paras. 48-52. See also Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (line 21) (Yee).

⁴⁴ Singapore written statement, para. 48.

broadly, sometimes requesting specific scientific information, analysis or reporting from the IPCC.

This illustrates an important reality that, central to discussions under the auspices of the UNFCCC is scientific and technical expertise; it is not just lawyers and diplomats gathered around the table but is a process underpinned by serious expert input and dialogue.

The second point of agreement is with the position set out by the EU and Norway that the Ocean and Climate Change Dialogue is a relevant forum in the present context.⁴⁵ Mandated at COP25 in 2019, this is an example of how, pursuant to the UNFCCC framework, discussions are held as to effective measures to prevent and mitigate harm to the *marine environment* specifically. The SBSTA Chair has also been mandated to strengthen ocean-based action.⁴⁶ These serve as examples of the “augmenting” of the existing UNFCCC framework with respect to the marine environment, as urged by the African Union.⁴⁷

Furthermore, the United Kingdom highlights that in addition to COP, there is a range of bodies and events which are regularly convened, and which serve as complementary fora for cooperation on climate change. Examples include the Petersberg Climate Dialogue, the Ministerial on Climate Action and the Climate Ambition Summit. Looking ahead, the United Kingdom agrees that there will be also cooperative work upon the BBNJ Agreement coming into force.⁴⁸

The United Kingdom’s second observation with respect to discussions is to emphasize that States Parties’ participation in any discussions must be meaningful,⁴⁹ and that this is an aspect that is a serious one.⁵⁰ As the Tribunal recognized in a different context in the *SRFC* advisory proceedings, this means “substantial effort should be made by all States concerned, with a view to adopting effective measures”.⁵¹ This is a requirement of obvious direct and immediate significance in the present context. The United Kingdom acknowledges the immense challenges with respect to the progress of UNFCCC processes. But as recognized by so many in these proceedings, key to addressing climate change impacts on the marine environment is enhancing cooperation, not eschewing it. The United Kingdom agrees with France and other States that the BBNJ Agreement is a timely example of the value of international cooperation in oceans governance.⁵²

In conclusion on the matter of international cooperation, the United Kingdom invites the Tribunal:

first, to confirm the paramount importance of that duty in the context of climate change and ocean acidification; and,

second, to give it appropriately precise and practical content in the present context by recognizing the five incidents of the duty I have just outlined.

Mr President, members of the Tribunal, the United Kingdom reiterates its recognition of the severe impact of anthropogenic climate change and ocean acidification on the marine

⁴⁵ EU written statement, para. 63; Norway written statement, para. 2.4.

⁴⁶ Decision 1/CP.26 (Glasgow Climate Pact), para. 61.

⁴⁷ African Union written statement, para. 267; Comoros Oral Submissions, ITLOS/PV.23/C31/16 p. 12 (lines 36-38) (Connolly).

⁴⁸ Singapore Oral Submissions, ITLOS/PV.23/C31/13, p. 11 (lines 21-23) (Yee).

⁴⁹ New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 11 (line 41) – p.12 (lines 1-3) (Skerten).

⁵⁰ United Kingdom written statement, para. 84.

⁵¹ *SRFC* Advisory Opinion, para. 210; also cited Sierra Leone Oral Submissions, ITLOS/PV.23/C31/12, p. 33 (lines 13-15).

⁵² Australia Oral Submissions, ITLOS/PV.23/C31/5, p. 1 (lines 42-45) (Clarke); New Zealand Oral Submissions, ITLOS/PV.23/C31/10, p. 13 (lines 1-9) (Skerten); International Union for the Conservation of Nature Oral Submissions, ITLOS/PV.23/C31/16, p. 35 (lines 17-20) (Payne); European Union Oral Submissions, ITLOS/PV.23/C31/14 p. 38 (lines. 22-25) (Jalloh).

environment, and that UNCLOS obliges States Parties to take certain affirmative steps to protect and preserve the marine environment from that impact.⁵³

The United Kingdom has sought to assist the Tribunal in its task of addressing the broad questions presented by COSIS by identifying the relevant specific obligations under Part XII and elaborating on their precise content, in particular teasing out the key contested issues and, significantly, the substantial common ground that has emerged over the past two weeks.

Mr President, members of the Tribunal, that brings the submissions of the United Kingdom to a close. I thank you for your attention.

THE PRESIDENT: Thank you, Ms Sander, for your statement. You may step down.

⁵³ United Kingdom written statement, paras. 4 and 8.

Closure of the Oral Proceedings

[ITLOS/PV.23/C31/18/Rev.1, p. 48; TIDM/PV.23/A31/18/Rev.1, p. 52-53]

THE PRESIDENT: This concludes the oral presentations of today and also brings us to the end of the oral proceedings in Case No. 31.

I wish to seize this opportunity to thank all delegations who have addressed the Tribunal for the high quality of their statements made in the course of these 10 days. In addition, the Tribunal would also like to convey its appreciation to all delegations for the great professionalism and courtesy shown during the hearing. I also thank the 34 States Parties and 9 organizations participating in the written proceedings.

The Registrar will now address the questions in relation to transcripts.

THE REGISTRAR: Mr President, pursuant to article 86, paragraph 4, of the Rules of the Tribunal, representatives who have participated in the hearing may, under the supervision of the Tribunal, make corrections to the transcript of their oral statements, but in no case may such correction affect the meaning and scope thereof. The corrections relate solely to the statements in the original language used during the hearing. The corrections should be submitted to the Registry as soon as possible and, in any event, by Wednesday, 4 October 2023 at 5 p.m. Hamburg time at the latest.

Thank you, Mr President.

THE PRESIDENT: Thank you, Madam Registrar.

The Tribunal will now withdraw to deliberate on the case. The advisory opinion will be read on a date to be notified to all participants.

In accordance with the usual practice, I request the participants to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberation prior to the delivery of its advisory opinion.

I thank you in advance. The hearing is now closed.

(The hearing closed)


These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques dans *Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international (Demande d'avis consultatif soumise au Tribunal)*.

Le 15 février 2024
15 February 2024



Le Président
Albert J. Hoffmann
President



La Greffière
Ximena Hinrichs Oyarce
Registrar