

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Friday, 15 September 2023, at 3 p.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**

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

Uncorrected

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|-----------------|----------------|----------------------------|
| <i>Present:</i> | President | Albert J. Hoffmann |
| | Vice-President | Tomas Heidar |
| | Judges | José Luís Jesus |
| | | Stanislaw Pawlak |
| | | Shunji Yanai |
| | | James L. Kateka |
| | | Boualem Bouguetaia |
| | | Jin-Hyun Paik |
| | | David Joseph Attard |
| | | Markiyán Z. Kulyk |
| | | Alonso Gómez-Robledo |
| | | Óscar Cabello Sarubbi |
| | | Neeru Chadha |
| | | Kriangsak Kittichaisaree |
| | | Roman Kolodkin |
| | | Liesbeth Lijnzaad |
| | | María Teresa Infante Caffi |
| | | Jielong Duan |
| | | Kathy-Ann Brown |
| | | Ida Caracciolo |
| | | Maurice K. Kamga |
| | Registrar | Ximena Hinrichs Oyarce |

List of delegations:

STATES PARTIES

New Zealand

Ms Victoria Hallum, Deputy Secretary Multilateral and Legal Affairs Group, Ministry of Foreign Affairs and Trade

Ms Megan Addis, First Secretary, New Zealand Embassy to Belgium

Ms Charlotte Skerten, Lead Adviser, Legal Division, Ministry of Foreign Affairs and Trade

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

1 **THE CLERK OF THE TRIBUNAL:** All rise.

2

3 **THE PRESIDENT:** Please be seated.

4

5 Good afternoon. The Tribunal will continue its hearing in the *Request for an Advisory*
6 *Opinion submitted by the Commission of Small Island States and International Law.*

7 This afternoon we will hear statements from New Zealand, the Republic of Korea
8 and the People's Republic of China.

9

10 I now give the floor to the representative of New Zealand, Ms Hallum, to make her
11 statement. You have the floor, Madam.

12

13 **MS HALLUM:** Mr President, honourable members of the Tribunal, it is a privilege to
14 appear before you in these proceedings on behalf of Aotearoa New Zealand.

15

16 Mr President, the questions before you address climate change, "the defining issue
17 of our time".¹ The Commission on Small Island States (COSIS) has grasped the
18 initiative and framed questions in way that enables the Tribunal to clarify how the
19 obligations under Part XII of the UN Convention on the Law of the Sea apply to the
20 impacts of climate change, and how those obligations fit together with the UN
21 Framework Convention on Climate Change and the Paris Agreement, as well as
22 general international law.

23

24 COSIS has placed its faith in the Tribunal to rationalize and make sense of the
25 interplay between these rules, thereby contributing to coherence in the law of the sea
26 and international law more generally. And we thank them for this.

27

28 These questions are of great significance to all Parties to the Convention and,
29 indeed, all members of the international community. The ocean covers 71 per cent of
30 the Earth's surface and, as the world's largest carbon sink, absorbs 90 per cent of
31 greenhouse gas emissions. Any attempt to address the climate crisis must consider
32 the impact of climate change on the ocean and the marine environment.

33

34 Mr President, you have received a range of submissions concerning the catastrophic
35 impacts climate change is having around the world on the marine environment,
36 including sea-level rise, biodiversity loss and ocean acidification. In our region,
37 Tokelau, which is of special significance to New Zealand because of our
38 constitutional and historical ties, and whose people are New Zealand citizens, is one
39 of those countries particularly impacted. Tokelau is halfway between Hawaii and
40 New Zealand, and is comprised of three small coral atolls generally less than three
41 metres above high tide.

42

43 The Pacific Islands Forum,² of which New Zealand is a member, has recognized
44 climate change as the single greatest threat to the livelihoods, security and

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.

1 well-being of the peoples of the Pacific.³ It is not surprising, therefore, that four
2 members of COSIS come from our Pacific region.

3
4 For New Zealand, the call to action to address these impacts comes not just from the
5 experiences of our Pacific island neighbours to the north but also from the frozen
6 continent to the south of us.

7
8 New Zealand's climate is strongly influenced by the heat and moisture carried by the
9 ocean, especially the Southern Ocean. A recently published study analyses the
10 profound impact of greenhouse gas emissions on Antarctica's atmospheric and
11 weather events, sea ice, ocean, ice shelves, glaciers and marine biodiversity.⁴ It is
12 virtually certain that continued greenhouse gas emissions will lead to larger and
13 more frequent events, leading to an increasing lack of winter ice and ice shelf
14 collapse.⁵ This will have global consequences, as well as consequences for New
15 Zealand. As one of our prominent scientists has said, "New Zealand is ... in the firing
16 line of a more energetic ocean/atmosphere system, capable of delivering more
17 intense storm and rain events, with increasing frequency".⁶ Not only do these events
18 cause mounting damage, but the warming seas around New Zealand are adversely
19 impacting our marine life.⁷

20
21 Mr President, I will first make some brief remarks on jurisdiction and admissibility.
22 The issue of whether the Tribunal has a general advisory jurisdiction has already
23 been addressed by the Tribunal. In the *Request by the Sub-Regional Fisheries*
24 *Commission*, the Tribunal concluded that article 21 of its Statute, together with
25 another agreement that confers jurisdiction on the Tribunal, constitute the
26 substantive legal basis of the Tribunal's advisory jurisdiction.⁸ Article 138 of the
27 Rules of the Tribunal provides the prerequisites for the Tribunal to exercise its
28 jurisdiction.⁹ As the submissions before the Tribunal have confirmed, the COSIS
29 request meets all these prerequisites.

30
31 Nevertheless, even if these prerequisites are met, the Tribunal has a discretion as to
32 whether to give an advisory opinion or not.¹⁰ But, consistent with the view of the
33 International Court of Justice, the Tribunal has determined that, in principle, it should
34 not refuse a request except for "compelling reasons".¹¹

³ *Boe Declaration on Regional Security* Pacific Islands Forum (2018).

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].

1 On that, Mr President, I would like to offer four short observations. First, this is an
2 opinion that is requested on a question which is clearly “of particularly acute
3 concern” to the international community.¹² As the submissions to the Tribunal have
4 emphasized, the issue of the deleterious effects of climate change on the marine
5 environment is of critical importance, not only to COSIS but to all parties to the
6 Convention, and indeed to the international community as a whole.

7
8 Second, an advisory opinion on the question posed in the request has a clear
9 purpose of furnishing to COSIS the elements of law that will be necessary to the
10 organization to fulfil its functions.¹³ An opinion from the Tribunal would also be useful
11 for a range of actors. It will assist States in implementing their law of the sea
12 obligations under the Convention. It can assist a range of intergovernmental and
13 non-governmental organizations in fulfilling their mandates relevant to the
14 implementation of the Convention and its implementing agreements, both now and in
15 the future. And it can provide assistance to other international and domestic courts
16 and tribunals on the interpretation and application of the Convention. Further, as we
17 heard this week from the distinguished Prime Minister of Tuvalu, the advisory opinion
18 will also facilitate international cooperation amongst Parties to the Convention.¹⁴

19
20 Third, it has been suggested that a relevant consideration for the Tribunal is the
21 small number of States that have created an international organization with the
22 power to request advisory opinions that focus on obligations of States not party to
23 the Request.¹⁵ However, in New Zealand’s view, it does not seem relevant whether
24 the agreement conferring jurisdiction has 9 or 90 parties. As the Tribunal has
25 previously stated, the consent of third States that are not party to the requesting
26 organization is not relevant in advisory proceedings.¹⁶

27
28 Finally, the Tribunal will of course wish to consider the propriety of the exercise of its
29 judicial function.¹⁷ That is, whether in order to remain true to its judicial function, the
30 Tribunal should not proceed because of the circumstances of the particular case.
31 New Zealand acknowledges there may be some cases that directly implicate the
32 judicial propriety of the exercise of the Tribunal’s functions that may be of sufficient
33 concern to justify refusing a request for an advisory opinion. But this is evidently not
34 the case here.

35
36 Accordingly, in New Zealand’s view, the Tribunal should exercise its discretion and
37 render an advisory opinion.

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).

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].

1 Mr President, I now turn to some preliminary observations: first, on how the Tribunal
2 should approach the interpretation of the applicable law; and, second, on factual
3 matters.

4
5 New Zealand notes that the Convention provides the legal framework within which all
6 activities in the oceans and seas must be carried out.¹⁸ It is known not only as the
7 Constitution for the Oceans, but as a “living treaty”, able to adapt to new realities.¹⁹
8 As written submissions have highlighted, there are a number of guardrails that
9 support this. I will briefly outline five.

10
11 First, article 237 establishes what has been described as a “double relationship of
12 compatibility” between the Convention and other treaties relating to the protection
13 and preservation of the marine environment.²⁰ Article 237 makes clear that the
14 provisions of Part XII are without prejudice to other past or future treaties; and also
15 that these other treaties are to be applied in a manner consistent with the
16 Convention.²¹

17
18 Second, a number of obligations in Part XII adopt a “rules of reference” approach.
19 That is, they require rules and standards contained in instruments external to the
20 Convention to be taken into account.

21
22 Third, article 31(3)(c) of the Vienna Convention on the Law of Treaties supports an
23 integrated approach to international law, as it requires “any relevant rules of
24 international law applicable in the relations between the parties” to be taken into
25 account in the interpretation of the Convention.

26
27 Fourth, the International Law Commission’s Study Group on Fragmentation has
28 recognized that, consistent with the principle of harmonization, “when several norms
29 bear on a single issue, they should, to the extent possible, be interpreted so as to
30 give rise to a single set of compatible obligations”.²²

31
32 And, fifth and finally, as the Study Group on Fragmentation has also identified, the
33 principle of systemic integration also calls for attention to be given to the rules of
34 customary international law and general principles of law applicable in relations
35 between the parties.²³

36
37 All this demonstrates the Convention’s continuing openness to being informed by
38 other agreements, rules and principles dealing with overlapping issues and to
39 addressing them in an integrated manner. As Portugal’s written submission puts it,

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.*

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].

1 the inherent openness and flexibility of the Convention “means that the interpretation
2 of its provisions must never be taken in isolation”.²⁴

3
4 In summary, the obligations in Part XII interconnect and interlock to produce a
5 coherent system of obligations on States Parties for the protection and preservation
6 of the marine environment. To give an analogy, we can imagine the Convention, and
7 Part XII in particular, as a river. The particular obligations in Part XII are fed by other
8 international rules and standards, like tributaries feeding into the river as it flows
9 towards the sea. And the river and its tributaries sit upon, and draw from, a bed of
10 customary international law and general principles of law. Together, these
11 obligations create a coherent and integrated whole.

12
13 In New Zealand’s view, this suggests that focusing on the extent to which aspects of
14 climate law are or are not *lex specialis* is not helpful. As noted by the International
15 Law Commission’s Fragmentation Study Group, “there are two possible ways in
16 which law may take account of the relationship of a particular rule to a general
17 one”.²⁵ Either a more specific rule can be understood as an elaboration of a more
18 general rule;²⁶ or the more specific rule may be considered to overrule a more
19 general rule.²⁷ Neither situation seems particularly apt here. In this advisory opinion,
20 there is no need to determine the prevalence of one set of rules over another. The
21 Convention, on the one hand, and the treaties that address climate change on the
22 other, are complementary and capable of harmonious application.

23
24 New Zealand therefore submits that although the question posed in this request may
25 require the Tribunal to consider regime interaction, the Tribunal should view this
26 legal landscape as a coherent and integrated whole, rather than different regimes in
27 conflict or having nothing to do with each other.

28
29 Mr President, turning to the question of factual matters, in New Zealand’s view this is
30 straightforward. To the extent the Tribunal needs a factual base on which to issue its
31 opinion, for example on the deleterious impacts of the accumulation of
32 anthropogenic greenhouse gas emissions on the marine environment, the science is
33 clear. COSIS has helpfully provided a dossier of documents that shed light on the
34 question it has posed. These documents include several recent reports of the
35 Intergovernmental Panel on Climate Change, the United Nations body responsible
36 for assessing the science relating to climate change. New Zealand is not aware of
37 any submissions that have disputed the factual basis of the request. The IPCC
38 reports reflect unequivocally the best available science on the impacts of climate
39 change. They provide sufficient facts on which the Tribunal can render the opinion
40 on the question before it.

41
42 Mr President, turning to the specific question posed by the request, I wish to briefly
43 explain New Zealand’s understanding of how the two parts of the question relate to
44 each other.

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](https://www.un.org)) at [88].

²⁶ *Ibid.*, at [98].

²⁷ *Ibid.*, at [103].

1 Mr President, we visualize the relationships between the obligations in Part XII of the
2 Convention as a series of concentric circles. Article 192, which is the first provision in
3 Part XII, is the most expansive obligation. The other, more specific obligations in Part
4 XII sit within this circle including, in particular, the obligation in article 194 to prevent,
5 reduce and control pollution, one of the most obvious and concerning harms to the
6 marine environment. And article 194, in turn, has other, more specific obligations
7 nested within it, such as articles 207 and 212 which deal with pollution from
8 particular sources.

9
10 These relationships between the obligations in Part XII mean that it is not possible to
11 address part (a) of the question, which reflects the language of 194 of the
12 Convention, separately from part (b) of the question, which reflects the language of
13 article 192 of the Convention. The Tribunal's consideration of the standard of
14 conduct necessary to meet States Parties' obligations under article 194 will, in
15 New Zealand's view, also be relevant to the standard of conduct required to meet the
16 obligations under article 192. Further, while compliance with article 194 is a
17 necessary prerequisite for compliance with article 192, compliance with article 194
18 alone would not be sufficient to constitute compliance with article 192.

19
20 With that said, Mr President, I will now focus on part (a) of the question. This
21 addresses States Parties' obligation to take measures to prevent, reduce and control
22 pollution of the marine environment, as specifically required by article 194 of the
23 Convention.

24
25 An important threshold question for the application of article 194 is whether
26 anthropogenic greenhouse gas emissions fall within the definition of "pollution of the
27 marine environment" as set out in article 1(1)(4) of the Convention. Many written
28 submissions, including New Zealand's, analyse this question in detail, drawing in
29 particular on recent reports by the IPCC.²⁸ They identify the deleterious effects that
30 result, or are likely to result, from the accumulation of anthropogenic greenhouse gas
31 emissions.

32
33 The written submission of COSIS, in particular, clearly explains how the absorption
34 of heat by the ocean and sea ice, and the absorption of carbon by the ocean, can
35 change the physics and chemistry of the marine environment, leading to severe
36 harm.²⁹ The resulting deleterious effects range from: harm to living resources and
37 marine life, including loss of biodiversity; to hazards to human health, such as
38 population displacement; to hindrances to marine activities, including fishing and
39 other legitimate uses of the sea; and to impairment of the quality of sea water.³⁰

40
41 I note that the term "marine environment" is not specifically defined in the
42 Convention, but the written submission of COSIS suggests that the marine
43 environment should be interpreted as encompassing the entire marine ecosystem

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.

1 under and beyond national jurisdiction, including the ocean, the marine cryosphere,
2 coastlines, the air-sea interface, and the habitats and ecosystems of marine life.³¹
3 New Zealand is comfortable with this interpretation, which is consistent with the
4 ordinary meaning of the term in its context.

5
6 In New Zealand's view, Mr President, the evidence shows that anthropogenic
7 greenhouse gas emissions constitute an introduction by humans directly *and*
8 indirectly of substances *and* energy into the marine environment. The global
9 accumulation of these emissions is resulting in, and is likely to continue to result in,
10 the kinds of deleterious effects set out in the Convention's definition of "pollution".
11 This is particularly the case in circumstances where the global accumulation of
12 greenhouse gas emissions is at current and projected future levels.

13
14 Mr President, I wish to highlight another important consideration. These deleterious
15 effects result from the global accumulation of greenhouse gas emissions from
16 *multiple* sources from many actors over time. When assessing the harm that is
17 caused by greenhouse gas emissions, it is therefore necessary and appropriate to
18 consider the global concentration of emissions that accumulate from all
19 anthropogenic sources.

20
21 The inherently aggregate and cumulative nature of the problem means that the
22 emissions originating from the territory of one State in isolation may not meet the
23 threshold of "deleterious effects" set out in the definition of "pollution of the marine
24 environment". The "deleterious effects" required by that definition, which are in fact
25 taking place, result from the accumulation of emissions that originate from all
26 sources over time.

27
28 As the pollution in question is a result of multiple actions, accumulating over time, it
29 follows that the obligation to prevent, reduce and control that pollution is most
30 effectively met through cooperative action. The preamble to the UN Framework
31 Agreement on Climate Change recognizes that "the global nature of climate change
32 calls for the widest possible cooperation by all countries and their participation in an
33 effective and appropriate international response".³²

34
35 The potential need for a collective response is also anticipated in the Convention.
36 This includes article 194 itself, which specifically reflects that it may be appropriate
37 for States Parties to "jointly" take the necessary measures to prevent, reduce and
38 control pollution of the marine environment.

39
40 In addition, the thread of cooperation that runs through the Convention can be seen
41 in Section 2 of Part XII on "Global and Regional Cooperation". This section sets out a
42 number of obligations relating to cooperation. These include the general obligation in
43 article 197 to cooperate on a global or regional basis on the protection and
44 preservation of the marine environment.³³ They also include a range of more specific

³¹ Commission of Small Island States on Climate Change and International Law Written Statement, 16 June 2023, para. 132–142.

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.

1 obligations, such as the obligation in article 201 relating to cooperation on scientific
2 criteria for regulations.

3
4 As well as being reflected across the Convention, the duty to cooperate is a basic
5 tenet of international customary law.³⁴ The Tribunal has recognized on several
6 occasions, beginning with the *MOX Plant* case, that the duty to cooperate is
7 fundamental in the prevention of pollution of the marine environment under Part XII
8 of the Convention and general international law.³⁵ It has been well established by
9 international courts, including the International Court of Justice, that it is through
10 complying with the duty of cooperation, both its substantive and its procedural
11 aspects, that the risks of damage to the environment can be jointly managed.³⁶ The
12 duty is of an ongoing nature,³⁷ and cooperation in accordance with the duty must be
13 meaningful.³⁸ The duty to cooperate permeates international environmental law, and
14 the Convention should be interpreted in the context of this obligation, along with
15 other relevant customary international law rules and principles, as outlined in our
16 written submission.³⁹

17
18 Mr President, compliance with article 194 also requires reference to other
19 frameworks, rules and principles. Article 194 is closely linked to the obligations in
20 Section 5 of Part XII, on international rules and national legislation. These obligations
21 require States to cooperate to formulate international rules and standards to address
22 pollution of the marine environment from particular sources.⁴⁰ They also mandate
23 that when formulating domestic measures, States take into account these
24 international rules and standards.⁴¹

25
26 I will outline three such obligations in Section 5 relevant to the context of the request
27 before the Tribunal.

28
29 Article 211 requires States to establish international rules and standards with respect
30 to pollution from vessels “acting through the competent international organization”,
31 which is the International Maritime Organization. It is noteworthy that in July this
32 year, the Marine Environment Protection Committee of the IMO adopted a revised
33 strategy on the reduction of greenhouse gas emissions from ships.⁴²

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].

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.

1 International efforts will now continue to develop measures to operationalize this
2 strategy. In New Zealand’s view, this represents an important example of the
3 process by which international cooperation can take place to establish rules and
4 standards to prevent, reduce and control pollution of the marine environment from
5 vessels, consistent with article 211 of the Convention.
6

7 In addition, articles 207 and 212 of the Convention address pollution from land-
8 based sources and pollution from and through the atmosphere, respectively. They
9 require States Parties to adopt laws and regulations to prevent, reduce and control
10 such pollution “taking into account internationally agreed rules, standards and
11 recommended practices and procedures”. These provisions also require States
12 Parties to endeavour to develop global rules to prevent, reduce and control pollution
13 of the marine environment from the relevant sources, through competent
14 international organizations and diplomatic conferences.
15

16 The UNFCCC and the Paris Agreement are highly relevant in this regard. These
17 treaties reflect the current multilateral legal framework and principles for international
18 climate change cooperation. They are aimed at stabilizing atmospheric
19 concentrations of greenhouse gases to avoid dangerous anthropogenic interference
20 with the climate system.⁴³ As such, the UNFCCC and the Paris Agreement represent
21 “internationally agreed rules” that States Parties are required to take into account
22 when adopting laws and regulations to prevent, reduce and control pollution of the
23 marine environment from the accumulation of greenhouse gas emissions.
24

25 The UNFCCC and the Paris Agreement are also important tools that will help to
26 define the “necessary measures” and standard of conduct required of States to meet
27 these obligations. My colleague will provide more detail as to what this means in
28 practical terms.
29

30 Mr President, members of the Tribunal, I thank you for your attention and invite you
31 to call my colleague, Ms Charlotte Skerten, to address part (b) of the question.
32

33 **THE PRESIDENT:** Thank you, Ms Hallum. I now give the floor to Ms Skerten to
34 make her statement. You have the floor, Madam.
35

36 **MS SKERTEN:** Mr President, honourable members of the Tribunal, it is an honour to
37 appear before you today in these proceedings and to do so on behalf of Aotearoa,
38 New Zealand.
39

40 In our view, the need for international cooperation and collective efforts is even more
41 pronounced in the context of article 192 of the Convention, given this is an
42 overarching obligation to protect and preserve the marine environment.
43

44 In New Zealand’s view, article 192 of the Convention requires a holistic approach to
45 be taken to the protection and preservation of the marine environment.
46

47 New Zealand notes that the arbitral tribunal in the *South China Sea Arbitration*
48 interpreted the general obligation in article 192 as extending “both to ‘protection’ of

⁴³ UNFCCC Art 2.

1 the marine environment from future damage, as well as ‘preservation’ in the sense of
2 maintaining or improving its present condition”.⁴⁴ It seems appropriate to adopt the
3 view of that tribunal that article 192 “entails the positive obligation to take active
4 measures to protect and preserve the marine environment, and by logical
5 implication, entails the negative obligation not to degrade the marine environment”.⁴⁵
6

7 Accordingly, in addition to measures to prevent, reduce and control pollution, which
8 my colleague has already covered, article 192 also requires States to take active
9 measures to protect biodiversity and the integrity of ecosystems from the harm
10 caused by the accumulation of anthropogenic greenhouse gas emissions.
11

12 Mr President, as noted earlier, article 197 of the Convention reflects States Parties’
13 duty to cooperate on a global basis in formulating and elaborating international rules,
14 standards and recommended practices and procedures consistent with the
15 Convention, for the protection of the marine environment.
16

17 This obligation is particularly relevant in the context of issues such as climate change
18 that can only be effectively addressed through collective action. In the context of
19 article 192, this obligation requires States to cooperate on an ongoing basis to
20 protect and preserve the marine environment from the impacts of climate change.
21

22 The UNFCCC and the Paris Agreement reflect the results of cooperation to date
23 among States on the establishment of a multilateral legal framework to address
24 climate change. As such, the obligations under the UNFCCC and the Paris
25 Agreement help to define the minimum standard of conduct for States Parties under
26 article 192 of the Convention, just as they do in relation to article 194.
27

28 In New Zealand’s view, Mr President, States Parties’ duty to cooperate for the
29 protection and preservation of the marine environment includes the following six
30 specific elements from the UNFCCC and the Paris Agreement:
31

32 First, States must actively engage in international collaborative efforts to reduce
33 greenhouse gas emissions at the global level.
34

35 Second, as suggested in Singapore’s written submission, States’ obligation to
36 cooperate in the context of climate change extends to participating in good faith in
37 international efforts at rule-making and standard-setting, such as under the UNFCCC
38 and Paris Agreement.⁴⁶
39

40 Third, States must adopt ambitious nationally determined contributions, consistent
41 with the Paris Agreement. This third element is linked to a number of more specific
42 obligations under the Paris Agreement. In particular:
43

⁴⁴ *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.*

⁴⁶ Singapore Written Statement, 16 June 2023, para 41.

1 Parties shall prepare, communicate and maintain successive nationally determined
2 contributions that they intend to achieve and pursue domestic measures aimed at
3 achieving them;⁴⁷

4
5 Parties shall also communicate NDCs every five years,⁴⁸ which will represent a
6 progression beyond their current NDCs and reflect their highest possible ambition;⁴⁹

7
8 Further, Parties shall account for progress against these NDCs in a manner that
9 promotes, among other things, transparency, completeness and environmental
10 integrity;⁵⁰

11
12 In addition, these obligations and commitments are to be carried out with a view to
13 achieving the purpose of the Paris Agreement,⁵¹ that is, to “strengthen the global
14 response to the threat of climate change, including by ... pursuing efforts to limit the
15 temperature increase to 1.5°C above pre-industrial levels”.⁵²

16
17 Returning now to my list of six elements, my fourth point is that States must take
18 action to mitigate emissions through their NDCs and should cooperate to enhance
19 adaptation to the impacts of climate change within their capabilities and in light of
20 their circumstances.⁵³ Adaptation actions may include building resilience in marine
21 ecosystems to enhance the capacity of the ocean to act as a carbon sink.⁵⁴

22
23 Fifth, States must take action to provide financial resources to assist developing
24 country Parties with respect to both mitigation and adaptation, as required by
25 article 9 of the Paris Agreement.⁵⁵

26
27 And sixth and finally, capacity-building under the Paris Agreement should enhance
28 the capacity and ability of developing country Parties to take effective climate change
29 action, including, in particular, least developed countries and those that are
30 particularly vulnerable to the adverse effects of climate change, such as Small Island
31 Developing States.⁵⁶ This is reflected in article 11 of the Paris Agreement and
32 specifically includes, among other measures, capacity-building to implement both
33 adaptation and mitigation measures, as well as technology facilitation and access to
34 climate finance.

35
36 Mr President, it is important to note that the obligations under the UNFCCC and the
37 Paris Agreement reflect the international climate change architecture at the present
38 time. Cooperation on these matters is of a continuing nature, it is ongoing, including
39 within the Conference of the Parties and its subsidiary bodies. States’ obligations
40 relating to climate change are likely to continue to evolve and may become more
41 specific and ambitious in the future. In New Zealand’s view, the duty to cooperate

⁴⁷ Paris Agreement, article 4(2).

⁴⁸ Paris Agreement, article 4(9).

⁴⁹ Paris Agreement, article 4(3).

⁵⁰ Paris Agreement, article 4(13).

⁵¹ Paris Agreement, article 3.

⁵² Paris Agreement, article 2(1)(a).

⁵³ Paris Agreement, article 2(1)(b) and article 7.

⁵⁴ See COSIS Written Submission, 16 June 2023 at [421].

⁵⁵ Paris Agreement, article 9(1).

⁵⁶ Paris Agreement, article 11(1).

1 requires States to participate meaningfully in international collaborative efforts to
2 address and respond to climate change on an ongoing basis, and to do so in good
3 faith.

4
5 Mr President, while compliance with the UNFCCC and the Paris Agreement and
6 ongoing cooperation in that context is a crucial aspect of States Parties' obligation to
7 protect and preserve the marine environment under article 192, it will not necessarily
8 be *sufficient* to fulfil this obligation.

9
10 Article 192, like article 194 of the Convention, reflects States' obligation under
11 customary international law to act with due diligence.⁵⁷ The Tribunal has previously
12 described this kind of due diligence obligation as an obligation "to deploy adequate
13 means, to exercise best possible efforts, to do the utmost".⁵⁸ In the context of
14 article 192, New Zealand's view is that the obligation to act with due diligence
15 requires action to be taken through appropriate measures such as policies,
16 legislation and administrative controls, to protect and preserve the marine
17 environment.⁵⁹ As the Republic of Korea's written submission notes, "the concept of
18 due diligence is to be understood in light of the continuing development of
19 international law and the relevant circumstances that rules of international law intend
20 to address."⁶⁰

21
22 In this context, States Parties may be required to take additional steps that go
23 beyond the provisions of the UNFCCC and the Paris Agreement to respond to the
24 accumulation of greenhouse gas emissions in order to protect and preserve the
25 marine environment.

26
27 To give just one example, biodiversity is of fundamental importance to the marine
28 environment, and must be protected and preserved, consistent with article 192 of the
29 Convention.

30
31 As summarized in the written submission of the Federated States of Micronesia, the
32 Conference of the Parties to the Convention on Biological Diversity has undertaken
33 important work in connection to anthropogenic greenhouse gas emissions, including
34 on minimizing the impacts of climate change and ocean acidification on biological
35 diversity.⁶¹

36
37 Likewise, the recent adoption of the Agreement under the Convention on the
38 conservation and sustainable use of marine biological diversity of areas beyond
39 national jurisdiction, or the "BBNJ Agreement", provides a valuable example of
40 cooperation among States on the formulation of international rules for the protection
41 and preservation of the marine environment, consistent with article 197 of the
42 Convention.

⁵⁷ 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].

⁵⁸ *SRFC Advisory Opinion* at [129]; *Activities in the Area (Advisory Opinion)*, above n 36, at [110].

⁵⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & The Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 147.

⁶⁰ Republic of Korea Written Statement, 16 June 2023, para 10.

⁶¹ Micronesia Written Statement, 16 June 2023, para 47.

1 Negotiations for the BBNJ Agreement were initiated as a result of a recognition by
2 States that further elaboration of international rules for areas beyond national
3 jurisdiction was needed. States have an obligation under article 192 of the
4 Convention to protect and preserve the marine environment of areas beyond
5 national jurisdiction from the impacts of climate change, and a duty to cooperate to
6 that end. By becoming parties to the BBNJ Agreement and by participating in the
7 mechanisms for cooperation that it establishes, States will be in the best position to
8 meet their obligation to protect and preserve the marine environment in areas
9 beyond national jurisdiction.

10
11 Mr President, New Zealand agrees with other submitters that a range of other
12 customary international law rules and general principles of law are also relevant and
13 should help guide States in taking action, in addition to the duty to cooperate and
14 due diligence. I will now touch briefly on three pertinent examples.

15
16 First, articles 192 and 194 engage the customary international law principle of
17 prevention, in that they require States to ensure that activities within their jurisdiction
18 and control respect the environment beyond that geographical area.⁶² Seeking to
19 prevent harm before it is caused is one way to protect and preserve the marine
20 environment.

21
22 Second, the use of the best available science is also relevant to the minimum
23 standard of conduct under article 192.⁶³ As explained by the United Kingdom, best
24 available science provides part of the context in which States make decisions –
25 including on information-sharing, consulting on necessary preventative measures,
26 and on the specific assistance to be provided to developing States.⁶⁴ As my
27 colleague has indicated, Mr President, the best available science is before the
28 Tribunal.

29
30 And third and finally, the precautionary approach is relevant to the interpretation and
31 application of a treaty relating to a common concern, such as the marine
32 environment.⁶⁵ This essentially requires States to act with “prudence and caution”⁶⁶
33 to “prevent the degradation of the marine environment”.⁶⁷ Where the interaction
34 between States’ activities and the marine environment are not fully understood, the
35 precautionary approach is particularly relevant to the planning and management of
36 those activities. We acknowledge, however, that this is becoming less applicable
37 given the level of certainty of the scientific evidence.
38

⁶² 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 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].

⁶³ See United Kingdom Written Statement, 16 June 2023, para. 89(c).

⁶⁴ *Ibid.*

⁶⁵ See *Pulp Mills* at [164].

⁶⁶ See *Southern Bluefin Tuna Cases (PMO)* at [77].

⁶⁷ *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].

1 Mr President, to conclude, the present case provides the Tribunal, as guardian of the
2 Convention, with an important opportunity to clarify States' law of the sea obligations
3 in relation to climate change, the defining issue of our time. The Tribunal, as the
4 specialist and permanent court for the law of the sea, has an authoritative role in
5 clarifying obligations and textual ambiguities in the Convention. Recourse to the
6 Tribunal, including through advisory proceedings, can provide greater stability,
7 security, certainty and predictability in the law of the sea.

8
9 In New Zealand's view, it is clear that the global accumulation of anthropogenic
10 greenhouse gas emissions constitutes pollution of the marine environment, as
11 defined in the Convention. Consequently, States Parties are obliged to take
12 measures to prevent, reduce and control this pollution. The overarching
13 requirements of article 192 are also engaged.

14
15 In our view, just as the nature of the problem is a global one, to be effective, our
16 solutions must also be global. The need for collective action to address some
17 problems was recognized by the negotiators of the Convention, and this is
18 underpinned by the duty to cooperate under customary international law. The
19 protection and preservation of the marine environment requires collaborative and
20 active measures to protect biodiversity and marine ecosystems, including from the
21 cumulative impacts of climate change and ocean acidification.

22
23 In New Zealand's view, cooperation between States – through the UNFCCC
24 Conference of the Parties and other frameworks – is the most effective way of
25 discharging our collective responsibility for the protection of the marine environment,
26 given the cumulative and aggregated nature of the problem of climate change. The
27 rules, standards and international best practices and procedures that exist today are
28 important in helping to define the current minimum standard of conduct required of
29 States Parties to meet their obligations under the Convention.

30
31 But it is also important to acknowledge that what exists today is not the end of the
32 story. The duty of cooperation, as reflected in the Convention, requires States to
33 continue to collaborate, meaningfully and in good faith, to protect and preserve the
34 marine environment.

35
36 Mr President, I would like to close by recalling the words of the distinguished
37 Attorney-General of Vanuatu: "We know from ancient wisdom that if we respect the
38 Earth, then the Earth will respect us."⁶⁸ For us, this brings to mind a Māori proverb:
39 "Toitū te whenua, Toitū te moana, Toiora te tangata." This means simply: if the land
40 is well and the sea is well, the people will thrive. This proverb seems particularly apt
41 in the context of the request the Tribunal is considering today, as the question posed
42 is about the connection between people and the marine environment and States'
43 obligation under the Convention to protect and preserve it.

44
45 Mr President, distinguished members of the Tribunal, this concludes New Zealand's
46 observations. Thank you for your kind attention.

⁶⁸ 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].

1 **THE PRESIDENT:** Thank you, Ms Skerten. I now give the floor to the representative
2 of the Republic of Korea, Mr Hwang Jun-shik, to make his statement. You have the
3 floor, Sir.

4
5 **MR HWANG:** Mr President, distinguished Members of the Tribunal, it is an honour to
6 appear before you today on behalf of the Republic of Korea to speak about the
7 request for an advisory opinion made to the Tribunal by the Commission of Small
8 Island States on Climate Change and International Law.

9
10 In our written statement, we expressed our appreciation for the Commission's
11 request. We also expressed our hope that the Tribunal will be able to contribute to
12 the endeavours of the international community to respond to the grave challenge of
13 climate change and its adverse effects on the marine environment. As we indicated,
14 our own purpose in the present proceedings is to assist the Tribunal in examining the
15 matter brought before it, by presenting some of the main elements that should be
16 addressed.

17
18 Today, I will expand on some of the views presented in our written statement and
19 share our thoughts on certain additional matters. My remarks will be organized as
20 follows. I will begin by discussing jurisdiction and admissibility as well as the
21 applicable law. Next, I will make some general observations on the relationship
22 between UN Convention on the Law of the Sea ("the Convention") and climate
23 change. I will then highlight some specific obligations under the Convention in
24 relation to climate change, before concluding by commenting on the role of the
25 Tribunal in addressing climate change within its mandate. All this supplements the
26 position expressed in our written statement.

27
28 Mr President, I turn first to jurisdiction and admissibility. The Republic of Korea
29 shares the view that the advisory jurisdiction may contribute to the legitimate
30 expansion of the Tribunal's judicial activity. At the same time, it is important that the
31 Tribunal clarifies the legal basis of its jurisdiction in each advisory proceeding,
32 including the present one.

33
34 As a number of States Parties have recalled, there is no express provision in the
35 Convention for the advisory jurisdiction of the full Tribunal. In its advisory opinion
36 of 2015, the Tribunal founded its advisory jurisdiction upon article 21 of its Statute.⁶⁹
37 The Tribunal also clarified that article 21 of the Statute and any "other agreement
38 conferring jurisdiction on the Tribunal" are "interconnected and constitute the
39 substantive legal basis of the advisory jurisdiction of the Tribunal."⁷⁰

40
41 The Republic of Korea agrees with the 2015 Advisory Opinion in this respect, and it
42 further considers that in the present case the prerequisites specified in article 138 of
43 the Rules of the Tribunal are satisfied. Accordingly, the Republic of Korea considers
44 that the Tribunal has jurisdiction to entertain the request submitted to it by the
45 Commission. We do not believe there is any compelling reason for the Tribunal to
46 decline to exercise this jurisdiction.

47

⁶⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 20, para. 52.*

⁷⁰ *Id.*, at p. 22, para. 58.

1 Mr President, the Republic of Korea nevertheless shares the view that the present
2 case affords the Tribunal an opportunity to clarify further the circumstances in which
3 it would be appropriate for the Tribunal to respond to a request for an advisory
4 opinion under article 21 of its Statute. We hope that the Tribunal will seize this
5 opportunity and provide valuable guidance for the future by elaborating on this
6 matter.

7
8 Turning now to applicable law, I note that the Tribunal has already had occasion to
9 recognize that in exercising its advisory jurisdiction, it “contribute[s] to the
10 implementation of the Convention.”⁷¹ The terms employed in the Agreement for the
11 Establishment of the Commission,⁷² and also in the questions put to the Tribunal by
12 the Commission, likewise suggest that the present case concerns specific
13 obligations under the Convention, in particular its Part XII.

14
15 This does not mean that the Tribunal is not able to refer to or take into account other
16 rules of international law not incompatible with the Convention, including those in
17 agreements concluded in furtherance of the general principles set forth in the
18 Convention. In our written statement we drew attention to articles 237 and 311 of the
19 Convention, which may well come into play in assessing the scope of relevant
20 obligations under the Convention that pertain to climate change.

21
22 As some States Parties rightly pointed out, however, the Tribunal should not seek to
23 determine obligations that do not fall within the scope of the Convention or to read
24 into the Convention obligations that are not properly anchored in it.

25
26 Mr President, let me now make some general observations on the relationship
27 between the Convention and climate change.

28
29 The Convention does not expressly refer to climate change. This is hardly surprising,
30 bearing in mind that the first treaty to address climate change, the UN Framework
31 Convention on Climate Change, was adopted a decade after the Convention was
32 concluded. However, we agree with the Commission, and with other States Parties,
33 that the UN Convention on the Law of the Sea is very relevant to climate change.
34 This is easily justified by the scientifically proven fact that climate change has a
35 significant and far-reaching impact on the marine environment, causing, among
36 others, ocean warming, ocean acidification and sea-level rise. It is important
37 therefore to recognize, and to give effect to, the way in which the law of the sea as
38 set out in the Convention bears upon the issue of climate change.

39
40 Above all, we share the view that the definition of “pollution of the marine
41 environment” in article 1, paragraph (1)(4) of the Convention is to be interpreted as
42 encompassing deleterious effects resulting from anthropogenic greenhouse gas
43 emissions. The definition in article 1 does not specify sources of deleterious effects,
44 and the expression “introduction by man, directly or indirectly, of substances or
45 energy” may not have been adopted at the time of its drafting in reference to the
46 absorption by the oceans of greenhouse gases emitted into the atmosphere. But

⁷¹ *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).

⁷² See article 2(2).

1 anthropogenic greenhouse gas emissions at least indirectly introduce a substance,
2 that is carbon, and energy, that is heat, into the marine environment.

3
4 There is moreover nothing that prevents an interpretation covering such sources of
5 marine pollution, whether in the text of the Convention or *travaux préparatoires*, or
6 indeed in any other element of the rules on treaty interpretation reflected in the
7 Vienna Convention on the Law of Treaties. Indeed, an interpretation by which
8 anthropogenic greenhouse gas emissions are found to fall under the definition of
9 “pollution of the marine environment” would ensure an application of the Convention
10 that would be effective in terms of its object and purpose. Mention may be made in
11 this regard of the significance of the Convention as, and here I quote from the
12 Preamble, “an important contribution to the maintenance of peace, justice and
13 progress for all peoples of the world”. One other stated goal is the conservation of
14 the living resources of the seas and oceans.⁷³

15
16 As a framework agreement, the Convention can very much accommodate
17 development of the law of the sea. It allows, and indeed calls for, the development of
18 the law through further international agreements. Such agreements, of which the
19 UNFCCC and Paris Agreement form a very welcome and very important part,
20 constitute *lex specialis* and *lex posterior* for the parties thereto. I am saying this not
21 to support prevalence of one agreement over another, but to emphasize that they
22 can play an important and appropriate role in interpreting the obligations laid down in
23 the Convention.

24
25 Part XII of the Convention, which is dedicated to the protection and preservation of
26 the marine environment, contains several provisions stipulating general obligations
27 that are pertinent to the matter under consideration. Central to these are article 192
28 and article 194 of the Convention. Both provisions are located in Section 1 of
29 Part XII, which is entitled “General Provisions”. The two questions contained in the
30 request for an advisory opinion made by the Commission closely follow the language
31 of these provisions.

32
33 Article 192 lays down, as its title suggests, a “general obligation” to protect and
34 preserve the marine environment. Considering the wide range of harmful impacts
35 caused to the marine environment by climate change, this provision can be
36 understood as stipulating a general obligation to protect and preserve the marine
37 environment from deleterious effects that result or are likely to result from climate
38 change. It entails a positive obligation to protect the marine environment from future
39 damage and to preserve it by maintaining or improving its condition; it also entails a
40 negative obligation not to degrade the marine environment.⁷⁴

41
42 Article 194 of the Convention provides in paragraph 1 that States Parties must “take,
43 individually or jointly as appropriate, all measures consistent with this Convention
44 that are necessary to prevent, reduce and control pollution of the marine
45 environment from any source.” Paragraph 3 of the article refers to “all sources of
46 pollution”. Since pollution of the marine environment encompasses deleterious
47 effects resulting from anthropogenic greenhouse gas emissions, it may be said that

⁷³ Preamble, paras. 2, 4.

⁷⁴ See also the *South China Sea Arbitration*, PCA Case N° 2013-19, Award of 12 July 2016, para. 941.

1 article 194 imposes upon States Parties an obligation to take measures to prevent,
2 reduce and control pollution of the marine environment from impacts of climate
3 change.

4
5 Significantly, articles 192 and 194 give rise to an obligation of due diligence. As
6 clarified by this Tribunal, and in the case law of the International Court of Justice and
7 arbitral tribunals, this is an obligation of conduct to exercise best possible efforts and
8 deploy adequate measures, not an obligation to ensure a certain result. As we
9 explained in our written statement by reference to previous case law, this due
10 diligence obligation requires a State to use all means at its disposal in order to avoid
11 activities which take place in its territory, or in any area under its jurisdiction, causing
12 significant damage to the environment. It requires, as the ICJ clarified and this
13 Tribunal accepted, “not only the adoption of appropriate rules and measures, but
14 also a certain level of vigilance in their enforcement.”⁷⁵

15
16 Overall, it may be said that articles 192 and 194 provide for general due diligence
17 obligations to exercise best possible efforts to protect and preserve the marine
18 environment, particularly by taking all measures necessary to prevent, reduce and
19 control pollution of the marine environment caused by climate change. The most
20 crucial measures in this context would be those aimed at mitigating greenhouse gas
21 emissions. In this regard a primary standard for assessing due diligence is found in
22 the UN climate change regime, including the Paris Agreement, which is a critical
23 international instrument in the fight against the climate crisis.

24
25 It is difficult to say that articles 192 and 194 of the Convention create in themselves a
26 specific legal obligation to implement obligations undertaken under other specialized
27 agreements. As some States have pointed out, the Convention does not create more
28 stringent obligations or commitments than those agreed or laid down in such other
29 agreements. Article 193, which is located between these two general provisions,
30 needs to be borne in mind as well.

31
32 Mr President, Section 1 of Part XII of the Convention provides limited specificity in
33 terms of the obligations of States Parties in addressing climate change and its
34 impact on the marine environment. However, Sections 2 to 6 of Part XII contain more
35 specific obligations that can be applied to the protection and preservation of the
36 marine environment from deleterious effects that result or are likely to result from
37 climate change. To some of these specific obligations I now turn.

38
39 Sections 5 and 6 of Part XII are particularly significant, in that they impose upon
40 States Parties the specific obligations to adopt and to enforce laws and regulations
41 to prevent, reduce and control pollution of the marine environment. Such laws and
42 regulations are to be adopted, *inter alia*, taking into account “internationally agreed
43 rules, standards and recommended practices and procedures”. There is no doubt
44 that the UN climate change regime, including the Paris Agreement, constitutes the
45 most important rules and standards in terms of the impact of climate change on the
46 marine environment.

47

⁷⁵ *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.

1 In our written statement, we provided examples of possible requirements of such
2 domestic laws and regulations. We observed that the relevant provisions of
3 Sections 5 and 6 may give rise to a specific obligation on the part of States Parties to
4 manage, implement and monitor their overall efforts to protect and preserve the
5 marine environment in relation to climate change as part of a comprehensive
6 strategy or plan to address climate change.

7
8 On the part of the Republic of Korea, we adopted the first Basic Plan for Carbon
9 Neutrality and Green Growth in April this year. This Basic Plan includes reduction
10 road maps by year as well as by sector, in line with our National Strategy for Carbon
11 Neutrality and Green Growth of October 2022, which is based on our “Basic Law on
12 Carbon Neutrality”. Both the Plan and Strategy include measures to protect and
13 preserve the marine environment in terms of mitigation as well as adaptation.

14
15 Other specific obligations under the Convention that merit particular emphasis in the
16 present context are found in Sections 2 to 4 of Part XII. We lay particular stress in
17 this regard on the obligations of cooperation under Section 2, and of technical
18 assistance under Section 3.

19
20 Section 2 sets out an obligation to cooperate on a global or regional basis in
21 formulating and elaborating international rules, standards and recommended
22 practices and procedures consistent with the Convention. It is true that there is no
23 specific international legal instrument directly addressing the relationship between
24 climate change and the marine environment. It is noteworthy that the newly adopted
25 agreement on the conservation and sustainable use of marine biological diversity of
26 areas beyond national jurisdiction, the BBNJ Treaty, contains express references to
27 climate change, although the general objective of the agreement is not to regulate
28 impacts of climate change on the marine environment.

29
30 The obligation under article 197 of the Convention requires States Parties to the
31 Convention to continue to cooperate in the present context in exploring the need for
32 formulating and elaborating additional rules, standards, and recommended practices
33 and procedures. This underscores the importance of negotiations among States to
34 address normative gaps in the protection of the marine environment from deleterious
35 effects that result or are likely to result from climate change.

36
37 The obligation of cooperation is of course anchored in Part XII more generally, as the
38 Tribunal has confirmed on several occasions. This obligation requires States Parties
39 to engage in consultations as may be necessary to the protection and preservation
40 of the marine environment. The Republic of Korea agrees with the Tribunal that, and
41 I quote, “the duty to cooperate is a fundamental principle in the prevention of
42 pollution of the marine environment under Part XII of the Convention and general
43 international law.”⁷⁶ We believe it is applicable to the present matter.

⁷⁶ *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.

1 Mr President, the Republic of Korea agrees with the Commission and other States
2 Parties that Section 3 of Part XII, concerning scientific and technical assistance to
3 developing States, applies to the issue of climate change as well. In accordance with
4 article 202, States are required to promote programmes of scientific, educational,
5 technical and other assistance to developing States for the protection and
6 preservation of the marine environment and the prevention, reduction and control of
7 marine pollution.

8
9 This provision is related to capacity-building programmes for developing States,
10 including small island States specially affected by sea-level rise and other serious
11 impacts of climate change. Enabling developing States, including small island
12 States, to have the necessary infrastructure and to engage in more effective
13 mitigation and adaptation efforts, is in our view one of the most significant aspects of
14 addressing climate change under the Convention.

15
16 Consistent with this provision as well as other bilateral and multilateral commitments,
17 the Republic of Korea has been engaging in various programmes for scientific and
18 technical assistance. I mention, by way of example, the establishment of a liaison
19 office of the Climate Technology Centre and Network (“CTCN”), which carries out
20 capacity-building activities with developing countries; our contribution to the UN’s
21 “Rising Nations Initiative” programme in support of the Pacific Atoll countries; and
22 our recent commitment to additional contribution to the Green Climate Fund to assist
23 developing countries with their reduction and adaptation efforts.

24
25 Mr President, I wish to conclude my statement with a few words about the
26 implications of these advisory proceedings and the contribution that may be made by
27 the Tribunal.

28
29 There can be no doubt that climate change is one of the most critical challenges ever
30 faced by humanity. It raises a host of questions of international law that are of great
31 importance to all States, and particularly small island States. That is why the
32 Republic of Korea supports the 2021 Declaration, of the Pacific Islands Forum, on
33 Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise.

34
35 In the same vein, we consider the request for an advisory opinion brought before you
36 by the Commission as providing an important opportunity for this Tribunal, and for
37 States Parties to the Convention, to engage in a discussion on the critically important
38 matter of the application of the Convention to climate change. We already mentioned
39 that the obligation of cooperation set out by the Convention indicates that States
40 Parties should continue to negotiate in order to meet the challenges and to fill
41 normative gaps as circumstances change over time.

42
43 For this to succeed, States Parties, and the international community more broadly,
44 need to be informed of the scope and limits of the *lex lata*. In this respect, the
45 Tribunal may render a great service by identifying in the present case the current
46 state of law under the Convention in regard to the protection and preservation of the
47 marine environment from climate change. This will not only clarify for States Parties
48 what their respective obligations are in this context, but also point to where we
49 should focus international efforts for any new international law-making and
50 agreement.

1 Mr President, distinguished members of the Tribunal, that concludes my remarks
2 today. I thank you very much for your attention.

3
4 **THE PRESIDENT:** Thank you, Mr Hwang. We have now reached 4:15 pm. At this
5 stage, the Tribunal will withdraw for a break of 30 minutes. We will continue the
6 hearing at 4:45, a quarter to five.

7
8 *(Short break)*
9

10 **THE CLERK OF THE TRIBUNAL:** All rise.

11
12 **THE PRESIDENT:** Please be seated. I now give the floor to the representative of the
13 People's Republic of China, Mr Ma. You have the floor, Sir.

14
15 **MR MA:** Mr President, distinguished members of the Tribunal, it is a great honour
16 and privilege for me to appear before you on behalf of China. China attaches great
17 importance to the role of the Tribunal in the interpretation and application of the
18 UNCLOS, and recognizes the important contribution made by the Tribunal to the
19 peaceful settlement of maritime disputes. China is a staunch defender of the
20 international rule of law and supports the Tribunal in performing its functions in
21 accordance with UNCLOS.

22
23 Climate change is a common concern for all humankind. Addressing climate change
24 and its adverse impacts bears on human survival and sustainable development. It
25 concerns equitable access to the climate system by all countries, and it has profound
26 implications for advancing global governance and the practice of multilateralism. We
27 live in a global village. As a member of developing countries, China fully empathizes
28 with the practical difficulties faced by many developing countries, including island
29 States, in coping with climate change.

30
31 China submitted its written statement to the Tribunal on 15 June 2023, setting out its
32 position on the matter of jurisdiction. My oral statement has two parts: first, I will
33 address the question of jurisdiction; then, I will address several legal issues relating
34 to the request for an advisory opinion.

35
36 Mr President, I will now move to address the matter of jurisdiction. I will start with
37 reiterating the view of China that the full Tribunal does not have advisory
38 competence. The competence of the Tribunal derives from the consent of States as
39 reflected in the authorization given by the Tribunal's constituent documents. As a
40 matter of fact, UNCLOS and its Annexes, including the Statute of ITLOS ("Statute"),
41 do not confer advisory jurisdiction on the full Tribunal. There are four main reasons:

42
43 first, neither article 288 of UNCLOS nor article 21 of the Statute provides the legal
44 basis for the advisory competence of the full Tribunal;

45
46 second, articles 159 and 191 of UNCLOS, as well as article 40 of the Statute, relate
47 to the advisory competence of the Seabed Disputes Chamber of the Tribunal only,
48 which are unrelated to the advisory competence of the full Tribunal;

1 third, article 138 of the Rules of the Tribunal goes beyond the authorization of
2 UNCLOS, including the Statute;

3
4 fourth, the Tribunal cannot establish advisory jurisdiction on the basis of “implied
5 powers”.

6
7 China notes that some States in their written statements mention that, as UNCLOS
8 States Parties approved the report with which the Tribunal notified the adoption of its
9 Rules of Procedure (“Rules”) without objection and did not provide sufficient
10 response to the exercise of the advisory jurisdiction by the Tribunal in Case No. 21, it
11 implied that the States Parties have “implicitly consented” to the advisory jurisdiction
12 of the full Tribunal and claimed that such has been reaffirmed by the BBNJ
13 Agreement. China is of the view that these arguments are open to question. I will
14 offer three short observations.

15
16 As the starting point, the Meeting of States Parties to UNCLOS did not “approve” nor
17 tacitly agree to the Rules. The report of the Meeting of States Parties in 1998 only
18 records the fact that the President of the Tribunal informed the Meeting of the
19 adoption of the Rules by the Tribunal.⁷⁷ The fact that the Meeting did not take a
20 position on the issue cannot be seen as an implicit manifestation of consent of the
21 States Parties to the Rules.

22
23 Second, States Parties have never reached a subsequent agreement on the
24 advisory competence of the full Tribunal.⁷⁸ There is a clear, specific and repeated
25 practice in this regard. Case No. 21 is the first case in which the full Tribunal dealt
26 with a request for an advisory opinion. In that case, nine States expressly objected to
27 advisory jurisdiction of the full Tribunal. Following the issuance of the advisory
28 opinion by the Tribunal, there were still objections from States. Among the written
29 statements submitted in the present case, some States have expressly disagreed
30 with the Tribunal’s interpretation of article 21 of the Statute and objected to the
31 advisory competence of the full Tribunal, and some others maintain their previous
32 objections.

33
34 Third, the newly adopted BBNJ Agreement states that its Conference of the Parties
35 may request the full Tribunal to give an advisory opinion on particular legal
36 questions. This Agreement is the first universal legal instrument that provides for the
37 advisory competence of the full Tribunal. Its negotiations were open to all Member
38 States of the United Nations and all States Parties to UNCLOS. The Agreement was
39 adopted by consensus in line with the principle of State consent; this can be seen as
40 a development of the competence of the Tribunal. At the same time, I would like to
41 emphasize that the relevant Parties to the BBNJ Agreement only confer on the full
42 Tribunal the competence to give advisory opinions on particular legal issues for a
43 request made by the Conference of the Parties to the BBNJ Agreement, and nothing
44 else.

⁷⁷ SPLOS/31, para. 9-14.

⁷⁸ 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.”

1 China also notes that the rules and practices of the global judicial institutions, such
2 as the ICJ and Seabed Disputes Chamber of the Tribunal, provide that the advisory
3 competence is authorized by their respective constituent instruments. There are
4 clear procedures for requesting advisory opinions, and the eligible subjects of the
5 request are limited to the decision-making organs of the particular international
6 organizations and other specific bodies being duly authorized.⁷⁹

7
8 The scope of the jurisdiction *ratione materiae* is limited to the scope of the functions
9 or activities of the relevant international bodies. The legal effect of these advisory
10 opinions does not affect the rights and obligations of a third State. Advisory
11 procedures are not dispute-settlement procedures. Advisory opinions should not,
12 I quote, “*have the effect of circumventing the principle that a State is not obliged to*
13 *allow its disputes to be submitted to judicial settlement without its consent*”.⁸⁰

14
15 China would like to stress that having jurisdiction is a prerequisite to deciding on the
16 merits. Without advisory competence, there is no way to address substantive
17 questions.

18
19 Mr President, I will now move to address the legal issues relating to the request for
20 an advisory opinion and declare that the following statements are without prejudice
21 to China’s position that the full Tribunal does not have advisory competence. Before
22 going into the details of legal issues, I will elaborate on the legal nature of the
23 present request for an advisory opinion.

24
25 China submits that the questions raised in the request centre around the deleterious
26 effects of anthropogenic greenhouse gas emissions on the marine environment,
27 which, in essence, is a legal issue concerning the regulation of such emissions. It
28 mainly concerns international climate change law and also involves the law of the
29 sea. In this regard, international climate change law is the foundation and has
30 primacy in dealing with climate change and its adverse effects, while UNCLOS may
31 play a subsidiary role in protecting and preserving the marine environment from the
32 adverse effects of climate change. I will make some observations on these two legal
33 issues respectively.

34
35 Now, I turn to the first legal issue: international climate change law is the foundation
36 and has primacy in dealing with climate change and its adverse effects. Numerous
37 resolutions of the UN General Assembly confirm the UNFCCC, its Kyoto Protocol

⁷⁹ 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 Judgments 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 1 1 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.**”

⁸⁰ *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.”

1 and the Paris Agreement as the primary channel in combating climate change and
2 its adverse effects.⁸¹

3
4 International climate change law is the specialized law that regulates the rights and
5 obligations of States in controlling GHG emissions and combating climate change
6 and its adverse effects. International climate change law is based on the UNFCCC,
7 its Kyoto Protocol and the Paris Agreement. It is guided by the principles of
8 sustainable development, equity, common but differentiated responsibilities and
9 respective capabilities, State sovereignty and international cooperation. The law
10 focuses on mitigation, adaptation, financial and technical assistance and capacity-
11 building through both national and collective actions. It is supported by a facilitative,
12 non-confrontational and non-punitive compliance mechanism. These aspects
13 collectively form a comprehensive and a unique legal regime characterized by the
14 following five key features.

15
16 First, sustainable development for all humankind is the fundamental objective of
17 addressing climate change and its adverse effects. Climate change is closely related
18 to States' economic and social development, ecology and environment, as well as
19 people's well-being. It is not only an environmental issue but also a developmental
20 one. However, at the fundamental level, it is a developmental issue, which must be
21 solved by sustainable development. The UNFCCC regime confirms the principle of
22 sustainable development. Under this principle, economic and social development is
23 crucial in addressing climate change.⁸²

24
25 Parties should actively deal with climate change and promote sustainable
26 development.⁸³ They should advance social and economic development and climate
27 change in an integrated and coordinated manner, and avoid taking climate actions
28 that adversely affect economic and social development. Moreover, they should give
29 full consideration to the legitimate priority needs of developing countries for the
30 achievement of sustained economic growth and the eradication of poverty.⁸⁴

31
32 Put simply, the principle of sustainable development requires States to strike a
33 reasonable balance between economic and social development and protecting the
34 climate system. States should promote development while addressing climate
35 change and should actively respond to climate change while developing.

36
37 Second, equity is a fundamental value pursued in global climate governance. The
38 climate system is a global resource that involves the common interests of all
39 humanity as well as the interests of the present and future generations. The system
40 should be protected and utilized in an equitable and reasonable manner. According
41 to the UNFCCC regime, Parties should protect the climate system on the basis of
42 equity and for the benefit of the present and the future generations of humankind.
43 The present generation of developing countries has the right of equitable access to
44 sustainable development. The share of developing countries in global emissions will
45 increase in order to meet their social and developmental needs, and it is consistent

⁸¹ See, for instance, UNGA Resolutions A/RES/74/21 and A/RES/76/205.

⁸² UNFCCC, article 3(4),(5).

⁸³ UNFCCC, article 3(3),(4).

⁸⁴ UNFCCC, Preamble.

1 with the principles of equity to allow developing countries a longer time to achieve
2 carbon peaking.

3

4 Third, the principles of CBDR and respective capabilities are the cornerstone of
5 global climate governance. These principles are the manifestation of the principle of
6 equity in global climate governance. The UNFCCC regime sets up a unique system
7 of responsibilities and obligations. These principles were first established by the
8 UNFCCC and later confirmed by both Kyoto Protocol and Paris Agreement.

9

10 Traditional international treaties normally set out obligations that apply equally to all
11 the States. In contrast, the UNFCCC regime focuses on equity and sets out CBDR
12 for developed and developing States in addressing climate change and its adverse
13 effects, in accordance with their differences in respective share of historical
14 emissions, development stages, national conditions and capabilities.

15

16 States should contribute to the protection of the climate system in accordance with
17 the principle of CBDR. All Parties bear the common obligation to address climate
18 change. The UNFCCC sets up the overall objective of stabilizing GHG
19 concentrations in the atmosphere. The Paris Agreement further sets up the dual
20 temperature goals and obliges its Parties to submit Nationally Determined
21 Contributions, and to formulate and implement measures to reduce emissions,
22 enhance sinks and reservoirs of GHGs, and adapt to the adverse effects of climate
23 change.

24

25 At the same time, the UNFCCC regime confirms that developed and developing
26 countries bear different obligations and responsibilities in addressing climate change
27 and its adverse effects. Climate change is mainly caused by the uncontrolled
28 emission of GHGs by developed countries since the Industrial Revolution. Thus,
29 developed countries should bear their historical responsibilities in addressing climate
30 change and take the lead by undertaking economy-wide absolute emission reduction
31 targets. Developed countries should be obligated to assist developing countries and
32 support them in finance, technology and capacity-building to enhance the latter's
33 capacity in addressing climate change.⁸⁵

34

35 To this end, developed countries should at first fulfil the commitment to provide
36 US\$ 100 billion per year to developing countries by 2020.⁸⁶

37

38 GHG emissions are closely related to human production and life. The right to
39 development of developing countries and their entitlement to GHG emissions for
40 development purposes should be guaranteed. Developing countries should be
41 encouraged to, I quote, "*continue enhancing their mitigation efforts, and are*
42 *encouraged to move over time towards economy-wide emission reduction or*
43 *limitation targets in the light of different national circumstances*",⁸⁷ end of quote.

⁸⁵ 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.

⁸⁶ "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.

⁸⁷ Paris Agreement, article 4(4).

1 Meanwhile, international support shall be provided to developing countries in
2 implementing adaptation actions.⁸⁸ Parties other than developed countries may
3 provide financial support on a voluntary basis.

4
5 Fourth, global climate governance is based on a combination of nationally
6 determined actions and international cooperation, with mitigation and adaptation as
7 its main measures. Responding to climate change and its adverse effects relies on a
8 combination of national and a collective action.

9
10 On one hand, all States shall prepare NDCs. The UNFCCC regime recognizes the
11 principle of sovereignty of States, respecting domestic policies. It makes it clear that
12 international cooperation to address climate change should be implemented in a
13 manner respecting State sovereignty and avoiding undue burdens on the Parties.
14 States should set progressive targets for NDCs in accordance with their national
15 circumstances and take concrete actions to address climate change domestically.

16
17 On the other hand, the principle of international cooperation should be followed. The
18 UNFCCC regime recognizes climate change as a global concern, calling for the
19 widest possible cooperation by all countries by strengthening collective cooperation
20 internationally.⁸⁹ States should cooperate in mitigation, adaptation, scientific and
21 technological research, information exchange, education and training.⁹⁰

22
23 The major measures to address climate change and its adverse effects in
24 international climate governance are mitigation and adaptation. States concerned
25 should not only take measures to limit and reduce anthropogenic GHG emissions,
26 but should also enhance their capacity to adapt and minimize the adverse effects of
27 climate change. International cooperation is required, and financial, technological
28 and capacity-building support to developing States are needed.

29
30 Fifth, assistive measures are used as unique means of relief for loss and the
31 damage associated with climate change effects. According to existing international
32 law, the emission of anthropogenic GHGs does not constitute an internationally
33 wrongful act, and it is difficult to attribute adverse effects of anthropogenic GHGs to
34 specific States.

35
36 The system of State responsibility under international law cannot be invoked to
37 address loss and damage so caused. It is also difficult to establish any causal link
38 between loss and damage caused by climate change and any emission by any
39 specific State, such that States have no recourse to international liability for injurious
40 consequences arising out of acts not prohibited by international law.

41
42 Article 8 of the Paris Agreement articulates the loss and damage issues related to
43 the adverse effects of climate change for the first time. A profound system –
44 consisting of the Warsaw International Mechanism for Loss and Damage (WIM) as
45 the coordination mechanism, the Santiago Network (SNLD) as the technical
46 assistance mechanism, and a loss and damage fund and funding arrangement as

⁸⁸ See, for instance, UNFCCC, article 4(7); Kyoto Protocol, article 12(8); Paris Agreement, article 7(13).

⁸⁹ UNFCCC, Preamble Para. 6.

⁹⁰ UNFCCC, Art.4.1.

1 the support mechanism – has been gradually established. Resolution 1 of the UN
2 Climate Change Conference Paris 2015, I quote, “*agrees article 8 of the [Paris]*
3 *Agreement does not involve or provide a basis for any liability or compensation*,”⁹¹
4 end of quote. The above-mentioned mechanism is a unique form of relief which is
5 not based on States’ liability arising from loss and damage, nor involves any
6 compensation.

7
8 In conclusion, the principles, rules and spirit of international climate change law
9 should be fully respected by all Parties.

10
11 Mr President, I will now turn to address the second legal issue relating to the
12 subsidiary role of UNCLOS in protecting and preserving the marine environment
13 against the adverse effects of climate change.

14
15 UNCLOS does not explicitly lay down the specific obligations of States in dealing
16 with climate change issues. However, there is a growing international consensus that
17 climate change might lead to adverse effects on the marine environment.
18 Accordingly, UNCLOS might play a subsidiary role in protecting the marine
19 environment from the adverse effects of climate change. In this regard, I will make
20 some brief remarks on four points.

21
22 I will start with the first point concerning the relationship between the UNFCCC
23 regime and UNCLOS. The oceans are part of the “hydrosphere” of the climate
24 system and serve as a sink and reservoir of GHGs. The UNFCCC regime
25 underscores the relationship between climate change and the oceans, and its
26 Conferences of the Parties have integrated climate-ocean issues into the agenda of
27 its formal work.

28
29 The interpretation and application of UNCLOS shall be in harmony with the UNFCCC
30 regime. The International Law Commission took note of the Report on the Study
31 Group on the fragmentation of international law concerning “the principle of
32 harmonization”. The report’s conclusions stated, I quote, “[i]t is a generally accepted
33 principle that when several norms bear on a single issue, they should, to the extent
34 possible, be interpreted so as to give rise to a single set of compatible obligations,”⁹²
35 end of quote.

36
37 As mentioned above, international climate change law is the foundation and has
38 primacy in dealing with climate change and its adverse effects, while UNCLOS may
39 play a subsidiary role in protecting and preserving the marine environment from the
40 adverse effects of climate change. Therefore, with respect to addressing climate
41 change and its adverse effects on the marine environment, UNCLOS can apply to
42 the extent that its provisions are compatible with those of the UNFCCC regime, and
43 shall not impose any obligations relating to the reduction of GHG emissions, which
44 are incompatible with the UNFCCC regime on States Parties to UNCLOS. The
45 interpretation and application of UNCLOS shall fully respect the UNFCCC regime
46 and shall not affect the rights and obligations of the Parties under the said regime.

47

⁹¹ Resolution 1 paragraph 52: “agrees that article 8 of the Agreement does not involve or provide a basis for any liability or compensation”.

⁹² A/CN.4/SER.A/2006/Add.I (Part 2), p. 178, para. 251(4).

1 The second specific point is the identification of GHG emissions. On the question of
2 whether GHG emissions constitute the “pollution of the marine environment” under
3 UNCLOS, there are different views. China takes the view that identifying GHG
4 emissions as the “pollution of the marine environment” is groundless, both in fact and
5 in law, and lacks support from universal international practice. The main reasons are
6 as follows:

7
8 First, UNCLOS does not explicitly stipulate GHG emissions. There is no
9 authorization or intention to treat them as pollution. The full text of UNCLOS,
10 including 320 provisions and nine annexes, does not touch upon wording such as
11 “climate change”, “ocean acidification” or “greenhouse gases”.

12
13 UNCLOS was adopted in 1982 after nearly 10 years of negotiations. Climate change
14 had not yet become a prominent concern of the international community then, and
15 the connection between the oceans and climate change was not a topic of
16 discussion during the negotiations. As a matter of fact, climate change and its effects
17 had not been assessed specifically until 1988 when the IPCC was established.

18
19 Also, the relationship between climate change and oceans was only initially
20 established in 1992 when the UNFCCC was adopted. Obviously, the drafters of
21 UNCLOS did not have the intention to address climate change through UNCLOS.
22 Even when using an evolutionary interpretation approach, this interpretation should
23 not go beyond the original intention of the States Parties.

24
25 Second, GHG emissions are different from pollution in nature, and cannot simply be
26 identified as harmful activities. The scientific findings indicate that some of the main
27 types of GHG, such as carbon dioxide, are harmless in themselves, and are
28 indispensable for life and the ecosystem on the Earth. It is the historical
29 accumulation of excessive GHG emissions since the Industrial Revolution in the 18th
30 century that has enhanced the greenhouse effect, which resulted in climate change
31 and the potential indirect adverse effect on the marine environment.

32
33 The assertion that “*climate change resulting from GHG emissions has deleterious
34 effects on the marine environment*” ignores the indispensability of GHGs and their
35 emissions to the survival and development of humankind.

36
37 Third, the identification of GHG emissions as “*pollution of the marine environment*” is
38 inconsistent with the UNFCCC regime. This regime has never treated GHG
39 emissions as pollution. According to article 4(1)(d) of the UNFCCC, the oceans,
40 coastal and marine environment are the “*sinks and reservoirs of ... greenhouse
41 gases*”, and States are required to conserve and enhance them. Therefore, the
42 identification of GHG emissions as the “*pollution of the marine environment*” is
43 obviously incompatible with the functions of oceans as provided in this article.

44
45 Last but not least, treating GHG emissions as pollution lacks universal international
46 practice. In July 2011, the IMO adopted, by a majority vote, the revised Annex VI to
47 MARPOL, which regulates GHG emissions reduction from ships. However, this
48 revised Annex VI does not identify GHGs as air pollution. Instead, the negotiating
49 history of this revised Annex VI indicates that no consensus was reached by States
50 regarding the identification of GHGs. A thorough examination of State practice also

1 reveals that, currently only very few States have regulated GHGs as pollution in their
2 domestic law.

3
4 China holds that GHG emissions are different from pollution, and their adverse
5 effects on the marine environment are *sui generis*. Therefore, these emissions
6 cannot be simply characterized as “*pollution of the marine environment*”. The
7 relevant provisions on pollution of the marine environment under UNCLOS, including
8 article 194, do not apply to these emissions, which should be dealt with by means of
9 sustainable development under the framework of international climate change law.

10
11 I now turn to the third point: the subsidiary role of UNCLOS in protecting and
12 preserving the marine environment from the adverse effects of climate change.
13 While GHG emissions should not be considered as “*pollution of the marine*
14 *environment*”, from an objective point of view, excessive GHG emissions may have
15 adverse effects on the marine environment. Therefore, article 192, which provides
16 that States have the obligation to protect and preserve the marine environment, as
17 well as other relevant provisions of Part XII of UNCLOS, may be applicable in
18 addressing the relevant adverse effects on the marine environment.

19
20 Under article 192 of UNCLOS, States have the general obligation to protect and
21 preserve the marine environment, which includes not only the obligation to “protect”
22 the marine environment from future damage, but also the obligation to “preserve” the
23 current status of the marine environment. From another perspective, it includes both
24 the positive obligation to take actions and the negative obligation to refrain from
25 certain actions. It is an obligation of conduct, rather than an obligation of result. In
26 principle, article 192 applies to the protection and preservation of the marine
27 environment from the adverse effects of climate change.

28
29 When interpreting and applying the general obligation under article 192, it is
30 important to consider the context provided by other relevant provisions in Part XII of
31 UNCLOS. Accordingly, it is crucial to take into account the UNFCCC regime as part
32 of “any relevant rules of international law applicable in the relations between the
33 parties”. Article 192 serves as the foundation for Part XII of UNCLOS and, based on
34 this article and related provisions, the specific obligations for safeguarding the
35 marine environment from the adverse effects of climate change primarily encompass
36 the following four elements. Now, I turn briefly to address them individually.

37
38 The first refers to the obligation to take mitigation and adaptation measures for
39 protecting and preserving the marine environment. Pursuant to the UNFCCC regime
40 and article 192 of UNCLOS, States shall, based on the principle of CBDR, take all
41 necessary mitigation and adaptation measures, including preventing, controlling and
42 reducing the adverse effects of climate change on the marine environment.

43
44 The second concerns the obligation of international cooperation to protect and
45 preserve the marine environment from the adverse effects of climate change. States
46 have broad obligations to cooperate in protecting and preserving the marine
47 environment. Under article 197 of UNCLOS, States shall cooperate on a global or
48 regional basis, directly or through competent international organizations, in
49 formulating international rules and standards for the protection and preservation of
50 the marine environment. In light of this provision, in addressing marine

1 environmental issues caused by climate change, States shall cooperate mainly
2 through the UNFCCC regime.

3
4 The third is the obligation to provide scientific and technical assistance to developing
5 States. Under article 202 of UNCLOS, States shall, directly or through competent
6 international organizations, promote programmes of scientific, educational, technical
7 and other assistance to developing States for the protection and preservation of the
8 marine environment. In addressing the adverse effects of climate change on the
9 marine environment, States shall provide financial, technical and capacity-building
10 support to developing States in light of this article and the relevant provisions of the
11 UNFCCC regime.

12
13 The fourth refers to the obligation to assess the potential effects of planned activities
14 which may cause sufficient and harmful changes to the marine environment, and to
15 communicate reports of results of such assessment. Article 206 of UNCLOS
16 stipulates this environmental impact assessment obligation under specific
17 circumstances and, at the same time, stipulates that such assessment shall be
18 carried out “as far as practicable”. How to assess, scientifically, the adverse effects
19 of activities related to GHG emissions on the marine environment, and how to
20 implement relevant obligations are in need of further study.

21
22 China is of the view that the UNFCCC regime reflects internationally accepted norms
23 for regulating GHG emissions. The objectives, principles and the rules of the
24 UNFCCC regime should be respected, followed and promoted. The process of
25 global climate governance should not be disturbed. If States meet their obligations
26 and commitments under the UNFCCC regime, they also satisfy their obligations to
27 protect and preserve the marine environment under Part XII of UNCLOS.

28
29 Now, I turn to the final point: the question of State responsibility regarding climate
30 change. Several countries referred to State responsibility in their written statements,
31 which is inappropriate. As I mentioned earlier, China wishes to reiterate that,
32 according to the existing international law, the regime of responsibility of States for
33 internationally wrongful acts as well as the international liability for injurious
34 consequences arising out of acts not prohibited by international law cannot be
35 resorted to in addressing GHG emissions. Therefore, the relevant responsibility and
36 liability system under UNCLOS cannot be applied to these issues. There should be a
37 consensus that the UNFCCC regime is fundamental and primary in addressing
38 climate change and its adverse effects, and should be followed in this regard.⁹³

39
40 Mr President, China notices that some States mentioned the so-called *South China*
41 *Sea* arbitration awards in their written and oral statements. The position of China on
42 this issue is clear and consistent. The arbitral tribunal in the *South China Sea*
43 arbitration acted *ultra vires*, erred in fact finding, misinterpreted and perverted the
44 law in adjudication. The so-called “awards” are null and void and should not be
45 invoked as a legal basis.

⁹³ 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.”

1 Mr President, addressing climate change and its adverse impacts is a common
2 endeavour for all humankind. It is a task of great importance with a long way to go,
3 and the key lies in action. It requires all parties to keep their promises. Under the
4 guidance of Xi Jinping Thought on Ecological Civilization, China is ready to work with
5 the international community to tackle climate change, protect the marine
6 environment and collaborate in seeking harmonious co-existence between humanity
7 and nature.

8
9 Mr President, before concluding my statement, I would like to emphasize that China
10 respectfully requests the Tribunal to faithfully perform its duties in accordance with
11 UNCLOS, uphold the primacy of the UNFCCC regime in addressing climate change
12 issues, interpret and apply UNCLOS and the UNFCCC regime in good faith, avoid
13 the fragmentation of international law in relevant fields, and safeguard the healthy
14 development of global oceans and climate governance.

15
16 Mr President, distinguished members of the Tribunal, this concludes China's
17 statement. Thank you for your kind attention and thank you for the support provided
18 by the Registry and all the staff. I thank you all.

19
20 **THE PRESIDENT:** Thank you, Mr Ma. This brings us to the end of this afternoon's
21 sitting. The Tribunal will sit again on Monday, 18 September, at 10:00 a.m., when it
22 will hear oral statements made on behalf of Mozambique, Norway and Belize. I wish
23 you all a very good weekend. The sitting is now closed.

24
25 **THE CLERK OF THE TRIBUNAL:** All rise.

26
27 *(The sitting closed)*