

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2023

Public sitting

held on Wednesday, 20 September 2023, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Albert J. Hoffmann presiding

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF
SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW**

(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE TRIBUNAL)

Verbatim Record

Uncorrected

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

List of delegations:

STATES PARTIES

Timor-Leste

Ms Elizabeth Exposto, Chief of Staff to the Prime Minister; Chief Executive Officer, Land and Maritime Boundary Office

Mr John Middleton AM KC, Senior Advisor, DLA Piper; Former Judge, Federal Court of Australia

Mr Eran Sthoeger, Legal Counsel

Mr Simon Fenby, Principal Legal Advisor, Land and Maritime Boundary Office

Ms Ana Catarina Sereto Antunes, Senior Policy and Strategy Advisor, Land and Maritime Boundary Office

Ms Adelsia Coelho da Silva, Junior Legal Advisor, Land and Maritime Boundary Office

Ms Ines Fatima da Luz, Third Secretary, Embassy to the Kingdom of Belgium and the European Union

Mr Stephen Webb, Partner, Head of Energy Asia-Pacific, DLA Piper

Ms Gitanjali Bajaj, Partner, Co-Head for International Arbitration Asia-Pacific, DLA Piper

Ms Claire Robertson, Solicitor, DLA Piper

Ms Austyn Campbell, Solicitor, DLA Piper

Ms Lee Hale, Support Executive, DLA Piper

European Union

Mr André Bouquet, Legal Adviser, Legal Service, European Commission

Ms Margherita Bruti Liberati, Member, Legal Service, European Commission

Mr Bernhard Hofstötter, Member, Legal Service, European Commission

Ms Klára Talabér-Ritz, Legal Adviser, Legal Service, European Commission

Ms Christina Pichel, Legal Officer, Directorate-General for Maritime Affairs and Fisheries, European Commission

Viet Nam

Ms Le Duc Hanh, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs

Mr Chu Tuan Duc, Minister Counselor, Embassy of the Socialist Republic of Viet Nam, Germany

Ms Nguyen Thi Tuong Van, Assistant to Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs

1 **THE PRESIDENT:** Please be seated. Good morning. Today the Tribunal will
2 continue the hearing in the *Request for an Advisory Opinion submitted by the*
3 *Commission of Small Island States on Climate Change and International Law*. This
4 morning we will hear oral statements from Timor-Leste, the European Union and
5 Viet Nam.

6
7 I now invite the representative of Timor-Leste, Ms Exposto, to make her statement.
8 You have the floor, Madam.

9
10 **MS EXPOSTO:** Mr President, members of the Tribunal, it is an honour to appear
11 before the Tribunal in these historic advisory proceedings as Representative of the
12 Government of the Democratic Republic of Timor-Leste, in my position as Chief of
13 Staff to His Excellency, the Prime Minister Kay Rala Xanana Gusmão, and Chief
14 Executive Officer of Timor-Leste's Land and Maritime Boundary Office. I appear with
15 our legal counsel, the Honourable Former Justice John Middleton AM KC and
16 Eran Sthoeger, Esquire.

17
18 We thank the Commission of Small Island States for the request for this advisory
19 opinion. As a small island State, Timor-Leste is supportive of small States utilizing
20 international law to have their voices heard and to contribute to peace and social
21 justice.

22
23 Turning now to the matter at hand. "*Hau nia Tasi, Hau nia Timor*". In Tetum, this
24 translates to "My sea, My Timor". While it is possible to translate this Tetum
25 expression literally, words cannot convey the special relationship between the
26 Timorese people and the sea.

27
28 Timor-Leste may be a small island nation, but we have a complex, vibrant culture.
29 A culture in which our very identity is anchored in the sea.

30
31 The ocean has forged Timor-Leste's past and is central to our vision for the future.
32 For the people of Timor-Leste, the ocean is critical to our way of life. The seas have
33 spiritual significance for the Timorese people. According to legend, the Timorese are
34 grandchildren of the crocodile – upon its death, its body became the land of Timor,
35 the ridges on its back became the mountains and the valleys, and the oceans its final
36 resting place.

37
38 As the saying goes, a rising tide lifts all boats. That said, as developed countries
39 pursue economic growth while generating substantial greenhouse gas emissions,
40 sea-level rise risks submerging small island States.

41
42 As such, we want to add our voices, and most importantly our actions, to those
43 committed to defending the ocean on which we all depend. Even though we are not
44 all equally responsible for the pressures placed on the environment, particularly our
45 oceans, we will all suffer from these pressures. And some of us suffer
46 disproportionately compared to the little we contributed to the problem.

47
48 Many Timorese depend on the oceans for their sustenance and livelihoods by fishing
49 and harvesting marine species, such as tuna, snapper and seaweed. The rich coral
50 reefs and steep underwater cliffs that surround Timor-Leste are part of a diverse

1 ecosystem, attracting scientists and tourists. Protection and preservation of the
2 marine environment is therefore critical to protecting Timor-Leste's way of life and
3 economic development.

4
5 As an island, we have access to the broad and rich biological, geological, mineral
6 and geostrategic resources of the sea. Our development and the sea are
7 inseparable. This interdependency must be managed in a way that is balanced and,
8 most importantly, sustainable. This is why our communities follow *Tara Bandu*, an
9 ancestral practice that respects and protects our nature, which is sacred to us. This
10 traditional custom seeks both to manage our natural resources sustainably as well
11 as to contribute to the development of our communities.

12
13 The request before the Tribunal raises important issues for Timor-Leste regarding
14 the protection and preservation of our marine environment, alongside our rights as a
15 developing State to pursue economic development, particularly via our natural
16 resources. Although Timor-Leste has proved its resilience time and time again, we
17 are living in a time where climate change threatens our very survival. Timor-Leste is
18 recognized as highly vulnerable to climate change impacts.¹

19
20 A key contributor to our vulnerability to the impacts of climate change is Timor-
21 Leste's status as a Least Developed Country and Small Island Developing State.² As
22 a new nation, just 21 years old, we have faced many challenges arising from our
23 history of colonization, conflict and occupation.

24
25 Timor-Leste has limited avenues to generate revenue to support its people. At the
26 time of our independence, Timor-Leste had nothing. To build an independent State,
27 we faced numerous challenges: scarce human and financial resources, non-existent
28 infrastructure, reduced access to education, technology and know-how.³ Today, we
29 have overcome many of those challenges, providing security and stability to our
30 people, moving us forward as a democratic nation.

31
32 For years Timor-Leste fought hard to secure sovereignty over its seas to achieve a
33 permanent maritime boundary with Australia, which included the allocation of certain
34 proved resource rights in the Timor Sea. Timor-Leste is now in a position where it
35 wishes to develop those resources and to do so in an environmentally responsible
36 way, to deliver long-term social and economic benefits to our people.

37
38 Timor-Leste has recently formed its IXth Constitutional Government. Our Prime
39 Minister, Kay Rala Xanana Gusmão, in his address at the swearing-in ceremony of
40 the IXth Government set a clear vision for Timor-Leste, and I quote: "*Our vision is*
41 *that of a nation with a prosperous, healthy, educated, skilled, innovative and dynamic*
42 *society, with comprehensive access to essential goods and services, and where*

¹ University of Notre Dame (2021), *Notre Dame Global Adaptation Initiative*, available at:
<https://gain.nd.edu/our-work/country-index/>

² United Nations Conference on Trade and Development, *UN list of least developed countries* (online,
2021), available at: <https://unctad.org/topic/least-developed-countries/list>

³ Address by His Excellency the Minister for Planning and Strategic Investment and Chief Negotiator
on Maritime Boundaries, Kay Rala Xanana Gusmão, at the Compulsory Conciliation Proceedings at
the Peace Palace at The Hague (29 August 2016), pp. 5 – 6, available at: <https://www.gfm.tl/wp-content/uploads/2021/01/Conciliation-Open-Hearing-Minister-Xanana.pdf>

1 *production and employment in every productive sector corresponds to that expected*
2 *from an emerging economy”.*⁴

3
4 The Government wants to transform Timor-Leste’s natural wealth derived from its
5 soils or seas, into food security, health, productivity and job opportunities. This
6 includes developing infrastructure, the private sector and encouraging economic
7 diversification and job creation.⁵

8
9 Our independence came late and at a high price. Many Timorese people have fought
10 and died for our sovereignty.⁶ Our people deserve the same opportunities that were
11 afforded to developed countries to fund basic services and combat poverty. While
12 our people are still poor, Timor-Leste is relatively rich in natural resources. It is this
13 wealth that we must use to progress the development of our country.⁷ After so much
14 suffering, after enduring so much sacrifice, States like Timor-Leste cannot be
15 expected to bear a disproportionate share of the brunt of solving a problem to which
16 we did not contribute.

17
18 The Government will continue implementing the *Hau nia Tasi, Hau nia Timor – My*
19 *Sea, My Timor* – awareness campaign. Timor-Leste is also prioritizing the
20 development of a Timor-Leste Blue Economy Policy for the sustainable growth of the
21 Nation, including the preservation, conservation and sustainable use of our ocean
22 resources, and the promotion of initiatives and programmes aimed at environmental,
23 economic and social sustainability. This approach will also reinforce our strategy of
24 preserving and valorizing natural resources, our biodiversity, and safeguarding, in
25 general, the environment, land and sea for the sustainable development of the
26 economy.⁸

27
28 States must have clear guidance on their obligations under international law to
29 manage their greenhouse gas emissions to reduce potential impacts on the marine
30 environment and limit the effects of climate change, for current and future
31 generations. This is true for the world’s major emitters, as well as States like Timor-
32 Leste which contribute the most miniscule amount of greenhouse gases, just

⁴ Speech by His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the swearing-in ceremony of the IX Constitutional Government (1 July 2023), p. 4, available at: http://timor-leste.gov.tl/wp-content/uploads/2023/07/EN-Discurso_Tomada-de-Posse_01_07_2023.pdf

⁵ Speech by His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the swearing-in ceremony of the IX Constitutional Government (1 July 2023), p. 7, available at: http://timor-leste.gov.tl/wp-content/uploads/2023/07/EN-Discurso_Tomada-de-Posse_01_07_2023.pdf

⁶ Address by His Excellency the Minister for Planning and Strategic Investment and Chief Negotiator on Maritime Boundaries, Kay Rala Xanana Gusmão, at the Compulsory Conciliation Proceedings at the Peace Palace at The Hague (29 August 2016), p. 9, available at: <https://www.gfm.tl/wp-content/uploads/2021/01/Conciliation-Open-Hearing-Minister-Xanana.pdf>

⁷ Keynote Address by His Excellency Kay Rala Xanana Gusmão on Economic Diversification in the Region: “Sustainable Best Practices and Business Models: Lessons learned by Timor-Leste,” at the Atlantic Council Global Energy Forum (13 January 2018), p. 4, available at: https://www.gfm.tl/wp-content/uploads/2021/01/Xanana-speech-Eng-ver-Timor-Leste-Economic-Diversification_17.1.2018.pdf

⁸ Speech of His Excellency the Prime Minister Kay Rala Xanana Gusmão on the occasion of the presentation of the programme of the IX Constitutional Government to the National Parliament (18 July 2023), p. 12, available at: <http://timor-leste.gov.tl/wp-content/uploads/2023/07/2023-07-18-Presentation-Programme-9th-Government-National-Parliament-.pdf>

1 0.003 per cent of global emissions⁹ but suffer the consequences of the actions of
2 others. While doing so, the Tribunal must consider, as States have agreed in the
3 Paris Agreement, that developing countries, and specifically the least developed
4 such as Timor-Leste, are afforded their basic rights to pursue their own sustainable
5 economic development. Timor-Leste has the right to give its people a better life.
6

7 Just as we fought so hard and suffered so much for our independence, we will not
8 rest until we have lifted our people out of poverty and secured our nation's future
9 economic development, whilst also protecting our oceans.

10
11 As our Prime Minister Xanana Gusmão has said:

12
13 People never fight for their independence alone. They do not fight for a flag,
14 an anthem, a president, their own government or periodic elections. There are
15 other dreams that come together around the ideal of independence, such as
16 enabling the development and progress of both country and people.
17

18 Timor-Leste welcomes the opportunity to make submissions in this Tribunal's
19 advisory jurisdiction. This is not a fight amongst States. This is a fight for our oceans,
20 our planet, our people, our development. Individually, we are one drop. Together, we
21 are an ocean.¹⁰
22

23 Mr President, members of the Tribunal, thank you for your attention.
24

25 I now ask that the Tribunal please invite the Honourable Former Justice John
26 Middleton AM KC to continue Timor-Leste's submissions.
27

28 **THE PRESIDENT:** Thank you, Ms Exposto. I now give the floor to Mr Middleton to
29 make his statement. You have the floor, Sir.
30

31 **MR MIDDLETON:** Mr President, honourable members of the Tribunal, you have as
32 recently as Monday been taken to the mythical times of Sisyphus and the
33 punishment imposed on him by the god Zeus to endlessly push a boulder uphill. And
34 you have also been taken to outer space to view from afar our blue ocean dominated
35 planet.
36

37 I am going to ask you to transport yourselves outside this splendid building and
38 outside this beautiful town of Hamburg. I am asking you to place yourselves in the
39 present time by reflecting on the future and to travel to Timor-Leste and to place
40 yourself in the position of its inhabitants.
41

42 With that prelude, and at this stage of the proceedings, we will not repeat many
43 points that have already been made, that have been addressed by other
44 submissions and interventions. In answering the important questions before the
45 Tribunal, Timor-Leste will emphasize three points.
46

⁹ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, p. 1, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

¹⁰ Ryunosuke Satoro, Japanese poet.

1 *First*, that States have a right to develop their natural resources in accordance with
2 their right to protect and preserve the marine environment. The Tribunal's
3 interpretation of States' obligations under UNCLOS must not compromise that right.

4
5 *Second*, States, especially the least developed, have a right to development. The
6 Tribunal's interpretation of a State's obligations under UNCLOS must not
7 compromise that right either.

8
9 *And third*, the Tribunal must apply the principle of common but differentiated
10 responsibilities to the relevant obligations of States under UNCLOS.

11
12 I will be addressing the first two points and question (b) put to the Tribunal.
13 Mr Sthoeger will speak to the third point on common but differentiated
14 responsibilities and answer question (a) put to the Tribunal.

15
16 Before turning to the law, let me first very quickly summarize the significant impacts
17 of greenhouse gas emissions on Timor-Leste's marine environment. It is important to
18 note, at the outset, that there is very limited data as to the effects of climate change
19 on Timor-Leste. As such, it is difficult to comprehensively report and monitor the
20 impacts of climate change on its marine environment. The unavailability of such
21 information stresses the importance of protecting and preserving global marine
22 resources, particularly for Small Island Developing States.

23
24 The available data does demonstrate the continued increase in greenhouse gas
25 emissions has a significant impact on Timor-Leste in three major areas: first, on its
26 coral and marine ecosystems; second, on its fisheries sector; and, third, on its
27 coastal communities and sea-level rise.

28
29 As to Timor-Leste's coral and marine ecosystems, Asia supports approximately
30 40 per cent of the world's coral reef area, mostly in Southeast Asia. The world's most
31 diverse reef communities are in the "Coral Triangle",¹¹ in which Timor-Leste is
32 located. The Coral Triangle is a high biodiversity hotspot comprising several globally
33 significant ecosystems and endemic species. Due to the omission of greenhouse
34 gasses, ocean acidification of Timor-Leste's waters has increased in recent decades.

35
36 Climate modelling projects this to continue. This will impact the ecosystem's health
37 alongside other pressures, which we all know of, including storm damage, coral
38 bleaching, and fishing pressure. Continuation of current trends in sea surface
39 temperatures and ocean acidification would result in large declines in coral-
40 dominated reefs in the region by mid-century.¹²

41
42 Tied to its marine ecosystems is Timor-Leste's fisheries sector. Fish production is a
43 vital component of regional livelihoods. The limited studies into the future climate
44 impact on local fisheries available suggest that climate change may lead to a
45 massive redistribution of fisheries' catch potential, with large declines in the tropics,

¹¹ IPCC Fifth Assessment Report, Chapter 24 "Asia", available at:
https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

¹² IPCC Fifth Assessment Report, Chapter 24 "Asia", available at:
https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

1 particularly around Timor-Leste and Indonesia.¹³ A decline of an order of 5 per cent
2 to 10 per cent in local fisheries is expected by the year 2050.¹⁴ This presents serious
3 food security implications, as Timor-Leste relies almost exclusively on ocean and
4 coastal ecosystems for its domestic fish consumption.¹⁵

5
6 Finally, as a Small Island Developing State, Timor-Leste's communities are coastal
7 communities that will be heavily impacted by sea-level rise. The Intergovernmental
8 Panel on Climate Change's Fifth Assessment Report notes sea-level rise will be the
9 key issue for many coastal areas in Asia, particularly if combined with changes in
10 cyclone frequency or intensity.¹⁶

11
12 Approximately 66 per cent of Timor-Leste's population lives in coastal areas and
13 lowlands below 500 metres. Timor-Leste's capital, Dili, is particularly vulnerable to
14 coastal flooding, situated only a few metres above sea level.¹⁷ Natural resources
15 available in the coastal zone are vital for the economy of coastal populations.¹⁸ Mean
16 sea levels in Timor-Leste are projected to rise throughout the 21st century.¹⁹ When
17 combined with other changes, this sea-level rise will increase the impact of storm
18 surges and coastal flooding.

19
20 So the science is clear as to the link between the health of the marine environment
21 and ecosystems and greenhouse gas emissions, as has already been established by
22 other statements.²⁰

23
24 Before answering the questions put to the Tribunal, let me briefly address two
25 preliminary points. And these have been gone over quite a great deal by other
26 participants.

27
28 On jurisdiction, we submit the conditions for the Tribunal to exercise its advisory
29 jurisdiction are satisfied. Furthermore, there are no "compelling reasons" for the
30 Tribunal not to exercise that jurisdiction. In this context, we note that to the extent the
31 Tribunal refers to rules of international law external to UNCLOS is to inform its

¹³ IPCC Fifth Assessment Report, Chapter 24 "Asia", available at:

https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1345.

¹⁴ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 17, available at:

<https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

¹⁵ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 17, available at:

<https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

¹⁶ IPCC Fifth Assessment Report Chapter 24 "Asia", available at:

https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap24_FINAL.pdf, p. 1342.

¹⁷ World Bank Group, *Climate Risk Country Profile: Timor-Leste* (2021), p. 15, available at:

<https://www.adb.org/sites/default/files/publication/751241/climate-risk-country-profile-timor-leste.pdf>.

¹⁸ Government of the Democratic Republic of Timor-Leste, National Adaptation Plan, p. 30, available at: <https://www4.unfccc.int/sites/NAPC/Documents/Parties/Timor%20Leste%20NAP.pdf>.

¹⁹ Australian Bureau of Meteorology and CSIRO (2014), *Climate Variability, Extremes and Change in the Western Tropical Pacific: New Science and Updated Country Reports, Pacific-Australia Climate Change Science and Adaptation Planning Program Technical Report, Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organization, Melbourne, Australia*, available at: https://www.pacificclimatechangescience.org/wp-content/uploads/2014/07/PACCSAP_CountryReports2014_WEB_140710.pdf.

²⁰ See for example oral submissions of the Commission of Small Island States, (11 September 2023, ITLOS/PV.23/C31/2), available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_2_E.pdf

1 interpretation of the latter. There is a clear distinction between applicable law and
2 jurisdiction. As the Tribunal itself has noted, the applicable law “*may not be used to*
3 *extend the jurisdiction of the Tribunal*”.²¹ Applicable laws are limited to the
4 interpretation of rights and obligations under UNCLOS. This point was made in the
5 written submissions of France. We further agree with the position advanced by
6 Guatemala, for example, as to issues of jurisdiction and admissibility.

7
8 Further, as a preliminary point, a small number of participants have raised the issue
9 of the effects of sea-level rise on basepoints and maritime entitlements. Whilst these
10 are very important issues, Timor-Leste is of the view that these are not at the crux of
11 these proceedings. The focus of these proceedings should, however, be on the
12 environmental issues that are at the core of the questions and which most States
13 have expressed views upon.

14
15 This brings me to my next point. Timor-Leste submits the interpretation of UNCLOS
16 is informed by other rules of international law. The customary rules of treaty
17 interpretation, as reflected in articles 31 to 33 of the Vienna Convention on the Law
18 of Treaties, sets that out.²² Article 31(3)(c) particularly prescribes that when
19 interpreting a treaty, “*any relevant rules of international law applicable in the relation*
20 *between the [States]*” be taken into account together with its context.²³

21
22 As the Tribunal well knows, this approach is considered “*well established*” by
23 international courts and tribunals, including, specifically, with respect to the content
24 of article 192 of UNCLOS, which is informed by “*other applicable rules of*
25 *international law*”.²⁴

26
27 Relatedly, not only may the Tribunal apply “*other rules of international law not*
28 *incompatible*” with UNCLOS, in the words of article 293, it should furthermore adopt
29 an interpretation of UNCLOS that coincides with other applicable obligations of
30 States Parties “*to the extent possible*”, over an interpretation that creates conflicting
31 obligations for States. This is often a principle referred to as “*harmonization*” or
32 “*harmonious interpretation*”.²⁵ If harmonization is not possible, the law of treaties
33 dictates that between two treaties on the same subject matter at least, the later
34 treaty prevails.²⁶

35
36 There are various environmental, human rights and other international obligations
37 that may be relevant for the correct interpretation of UNCLOS. As noted by many

²¹ ITLOS, Judgment, 10 April 2019, The M/V “Norstar” Case (Panama v. Italy), ITLOS Reports 2019, p. 47, para. 136; see also Written Submission of France, para. 18.

²² Vienna Convention on the Law of Treaties 1155 UNTS 331; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Reports 43, p. 110, par. 160; *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (1 February 2011)* [2011] ITLOS Reports 10, p. 27, par. 57.

²³ Vienna Convention on the Law of Treaties 1155 UNTS 331, article 31(3).

²⁴ *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941.

²⁵ See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 178.

²⁶ Vienna Convention on the Law of Treaties 1155 UNTS 331, article 30(3).

1 submissions, most relevant are the obligations and commitments of States, including
2 Timor-Leste, under the Framework Convention on Climate Change²⁷ and the Paris
3 Agreement.²⁸

4
5 Article 237 of UNCLOS²⁹ reflects the understanding that States will continue to
6 develop the rules of international environmental law. UNCLOS is intended to apply in
7 harmony with the specific environmental rights and obligations of States rather than
8 undermining or superseding them. When it comes to the protection and preservation
9 of the environment, the Framework Convention on Climate Change and the Paris
10 Agreement are the operative special texts.³⁰ Concluded after UNCLOS, their drafters
11 – including many UNCLOS parties – were presumably aware of their obligations
12 under UNCLOS when they adopted these texts.

13
14 Rights and obligations in UNCLOS, particularly those in Part XII, should therefore be
15 without prejudice to the rights and obligations of States contained in other
16 international agreements which protect and preserve the marine environment,
17 regulate greenhouse gas emissions and allow for negotiations between States on
18 climate change.

19
20 Certain international rights are also other relevant and will be explained later: the
21 right to development and the right to self-determination.

22
23 Turning now to the specific questions put to the Tribunal.

24
25 Mr President, honourable members of the Tribunal, I propose to address question (b)
26 first, which relates to the general obligation placed on all States to protect and
27 preserve the marine environment.

28
29 In its recent judgment in *Alleged Violations of Sovereign Rights and Maritime Spaces*
30 *in the Caribbean Sea*, the International Court of Justice acknowledged, “*all States*
31 *have the obligation under customary international law to protect and preserve the*
32 *marine environment*”.³¹ In UNCLOS, that obligation is articulated in article 192.

33
34 As a preliminary point, we wish to echo the sentiments expressed by Guatemala as
35 to how the Tribunal should interpret articles 192 and 194 of UNCLOS. In particular,
36 that any specific obligations found to exist under Part XII are without prejudice to the
37 specific obligations agreed by States under the Framework Convention on Climate
38 Change and the Paris Agreement.

27 United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

28 The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015).

29 Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, article 237.

30 Alan Boyle, Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in *The Law of the Sea and Climate Change: Solutions and Constraints* (Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen, eds., 2021) 81-103, at pp. 93-94.

31 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, par. 95, <https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf>.

1 Article 192 requires States to “protect” the marine environment from future damage,
2 whilst also taking actions to “preserve” or maintain and improve the marine
3 environment’s present condition.³² Therefore, the obligation in article 192 extends to
4 the restoration of parts of the marine environment or ecosystems that have
5 experienced degradation.³³ These obligations, as with many other obligations related
6 to the environment in UNCLOS, is of a “due diligence” character. Not only must
7 States refrain from certain actions, but they are also required to positively take action
8 to meet their obligations.

9
10 Due diligence entails that a State is “*obliged to use all the means at its disposal in
11 order to avoid activities which take place in its territory, or in any area under its
12 jurisdiction, causing significant damage to the environment of another State*”.³⁴

13
14 In considering the content of a “due diligence obligation”, the Seabed Disputes
15 Chamber in its Advisory Opinion on *Activities in the Area*, concluded that a “due
16 diligence” obligation required States to take affirmative measures within its legal
17 system, consisting of “*laws and regulations and administrative measures*”.³⁵

18
19 And it is to be recalled that the exercise of due diligence requires an addition to
20 adopting rules and measures. There must be “*a certain level of vigilance in their
21 enforcement and the exercise of administrative control applicable to public and
22 private operators, such as the monitoring of activities undertaken by such
23 operators*”.³⁶ Importantly, this is a continuing obligation.³⁷ The obligation evolves
24 over time taking into account “*new scientific or technological knowledge ... [or]
25 change[s] in relation to the risks involved in the activity*”.³⁸

26
27 The general obligation to protect and preserve the environment is informed by, and
28 does not negate, other rights and obligations of States Parties. Immediately following
29 article 192, article 193 provides that, “*States have the sovereign right to exploit their
30 natural resources pursuant to their environmental policies and in accordance with
31 their duty to protect and preserve the marine environment*”. Principle 21 of the United
32 Nations Declaration on the Human Environment also recognizes this right.³⁹

33
34 As is stated in the Virginia commentary, “[i]t is clear from the Convention as a whole
35 (and not merely from Part XII), that the obligation of article 192 (and with it the right

³² *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941; see also United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol I, pp. 39-40.

³³ United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol I, pp. 39-40.

³⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment [2010] ICJ Reports 14, p. 56, par. 101.

³⁵ See also *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (1 February 2011)* [2011] ITLOS Reports 10, 74.

³⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 ICJ Rep. 14 (20 April), par. 197.

³⁷ *Trail Smelter (United States / Canada)*, Award, III RIAA 1905 (11 March 1941), p. 1963.

³⁸ *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion) (1 February 2011)* [2011] ITLOS Reports 10, par. 117.

³⁹ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, A/CONF.48/14/Rev.1 (United Nations publication, Sales No. E.73.II.A.14), p. 5, principle 21.

1 of article 193) is always subject to the specific rights and duties laid down in the
2 Convention".⁴⁰

3
4 During the negotiations of UNCLOS, the discussions in the Third Committee
5 acknowledged that the potential resources of the sea "offered developing States a
6 genuine opportunity to improve their living standards".⁴¹

7
8 UNCLOS recognizes the exploitation of a State's natural resources is not mutually
9 exclusive from the protection and preservation of the marine environment.

10
11 Timor-Leste believes in the inalienable sovereign right of Small Island Developing
12 States to exploit their natural resources but in an environmentally responsible way.
13 The rights and obligations of States in this regard must complement each other. This
14 has been the position recognized by the Working Groups during the negotiation of
15 the Framework Convention on Climate Change and is expressly recognized in the
16 text of article 4(10).

17
18 I will read it out, even though it is rather longer than most matter I would normally
19 read out to a court, but it is worthy of attention in what it says:

20
21 The Parties shall, in accordance with article 10, take into consideration in the
22 implementation of the commitments of the Convention the situation of Parties,
23 particularly developing country Parties, with economies that are vulnerable to
24 the adverse effects of the implementation of measures to respond to climate
25 change. This applies notably to Parties with economies that are highly
26 dependent on income generated from the production, processing and export,
27 and/or consumption of fossil fuels and associated energy-intensive products
28 and/or the use of fossil fuels for which such Parties have serious difficulties in
29 switching to alternatives.⁴²

30
31 In seeking to provide a harmonious interpretation of UNCLOS, article 193 should be
32 read having regard to the commitments made in article 4(10) of the Framework
33 Convention on Climate Change, which I have just read out. This is further supported
34 by the United Nations General Assembly resolution on ensuring access to
35 affordable, reliable, sustainable, and modern energy for all, which was adopted by
36 consensus in 2022.⁴³

37
38 Developing States should not be placed in a position where they are forced to
39 choose between the protection of the global marine environment, and the protection
40 and advancement of its nation and people. The rights and obligations of States, in
41 this regard, should account for various factors. This includes the level of
42 development of each nation in accordance with their common but differentiated

⁴⁰ United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol I, p. 43.

⁴¹ Third United Nations Conference on the Law of the Sea, Third Committee, A/CONF.62/C.3/SR.7, par. 30, available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c3_sr7.pdf

⁴² United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, article 4(10).

⁴³ A/RES/77/170, *Ensuring access to affordable, reliable, sustainable and modern energy for all* (14 December 2022), article 9.

1 responsibilities and respective capabilities, in light of different national
2 circumstances.

3
4 Therefore, article 193 should be seen as representing a balance between the
5 interests of individual States in their economic development and the universal
6 interests in the protection and preservation of the marine environment.⁴⁴ The correct
7 interpretation of article 192 must be read in tandem with the subsequent article which
8 expressly refers to its content.

9
10 Closely related to States' right to develop their natural resources is the right to
11 development. This is an "*inalienable human right by virtue of which every human*
12 *person and all peoples are entitled to participate in, contribute to, and enjoy*
13 *economic, social, cultural and political development, in which all human rights and*
14 *fundamental freedoms can be fully realized*" as recognized in the Declaration on the
15 Right to Development Resolution.⁴⁵

16
17 Importantly, States bear the primary responsibility for the "*creation of national and*
18 *international conditions favourable to the realization of the right to development*".⁴⁶

19
20 During the first session of the Intergovernmental Negotiating Committee, Working
21 Group I considered the impacts of the Framework Convention on Climate Change on
22 living standards and the right to development. The Working Group recognized
23 "*developing countries have as their main priority alleviating poverty and achieving*
24 *social and economic development and that their net emissions must follow from*
25 *their, as yet, relatively low energy consumption to accommodate their development*
26 *needs*".⁴⁷ The Working Group further recognized the right to development as an
27 "*inalienable human right*".⁴⁸

28
29 It is true that the express wording of the "right to development" was not included in
30 the final text of the Framework Convention on Climate Change. However, its
31 preamble clearly recognizes that, "*per capita emissions in developing countries are*
32 *still relatively low and that the share of global emissions originating in developing*
33 *countries will grow to meet their social and development needs*".⁴⁹

34

⁴⁴ United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol IV, p. 49.

⁴⁵ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 1(1).

⁴⁶ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 3.

⁴⁷ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part III.B.4, and 1.

⁴⁸ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part III.B.3.

⁴⁹ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble.

1 Since the Framework Convention on Climate Change, every major climate
2 commitment, including the Paris Agreement,⁵⁰ the Glasgow Climate Pact⁵¹ and the
3 Sharm-el-Sheikh Implementation Plan,⁵² has expressly acknowledged the right to
4 development in its preamble.

5
6 Since 2018, the United Nations General Assembly has adopted annual resolutions in
7 respect of the right to development. In its most recent 2022 resolution, the United
8 Nations General Assembly has acknowledged “*the negative impact on the realization*
9 *of the right to development owing to the further aggravation of the economic and*
10 *social situation, in particular of developing countries, as a result of the effects of*
11 *international energy, food and financial crises, as well as the increasing challenges*
12 *posed by global climate change and the loss of biodiversity*”.⁵³

13
14 The right to development reflects the realities of the decolonization process and the
15 quest for newly and developing States to gain economic independence and control
16 over their natural resources.⁵⁴ Timor-Leste is a nation that is just 21 years old, as
17 you have heard. An interpretation of UNCLOS should be read taking into account the
18 right to development and that developing countries have, as their main priority,
19 alleviating poverty and achieving social and economic development.

20
21 Then, this right to development is closely interlinked to the full realization of the right
22 of peoples to self-determination. According to the *Declaration on the Right to*
23 *Development* this includes “*the exercise of their inalienable right to full sovereignty*
24 *over all their natural wealth and resources*”.⁵⁵

25
26 Respect for the right of self-determination is also one of the purposes of the United
27 Nations.⁵⁶ As already explained by Chile⁵⁷ and Nauru,⁵⁸ the right to self-
28 determination is found in the International Covenant on Civil and Political Rights

⁵⁰ The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015).

⁵¹ The Glasgow Climate Pact, Decision 1/CP.26 contained in FCCC/CP/2021/12/Add.1 (13 November 2021).

⁵² The Sharm el-Sheikh Implementation Plan, Decision 1/CP.27 contained in FCCC/CP/2022/10/Add.1 (20 November 2022).

⁵³ United Nations General Assembly, *The right to development: resolution / adopted by the General Assembly*, 15 December 2022, A/RES/77/212, par. 29.

⁵⁴ Roman Girma Teshome, ‘The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?’ (2022) 22(2) *Human Rights Law Review* 1, 9 see also Nicolaas Schrijver, ‘Self-determination of Peoples and Sovereignty over Natural Wealth and Resources’ in the United Nations, *Realizing the Right to Development* (Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development), (2013) HR/PUB/12/4 <https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en>.

⁵⁵ United Nations General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128, article 1(2).

⁵⁶ UN Charter, article 1.

⁵⁷ Oral submissions of Chile (14 September 2023, ITLOS/PV.23/C31/7), page 12, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_7_E.pdf

⁵⁸ Oral submissions of Nauru (14 September 2023, ITLOS/PV.23/C31/8), page 29, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf

1 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights
2 (ICESCR).⁵⁹

3
4 The General Assembly's Declaration on Friendly Relations, adopted unanimously in
5 1970, considered to reflect customary international law, states that: "*all peoples have*
6 *the right freely to determine, without external influence, their political status and to*
7 *pursue their economic, social and cultural development*".

8
9 The International Court of Justice has also emphasized that the proper exercise of
10 self-determination pays regard to the express free will of peoples.⁶⁰ As Nauru
11 emphasized, self-determination is unfilled when people are deprived of their "own
12 means of subsistence".⁶¹ Contemporary international law considers self-
13 determination as a *jus cogens* right, from which no derogation is permitted.⁶²

14
15 Mr President, it is impossible to disconnect the reality of States that have fought in
16 fulfilment of their right to self-determination, from the current topic under discussion.
17 Timor-Leste, as you have heard, fought hard to secure its sovereign rights over its
18 seas to achieve a permanent maritime boundary with Australia. This included the
19 allocation of significant resource rights in the Timor Sea that had historically been
20 exploited with disregard for Timor-Leste's entitlements under international law.

21
22 It has been 21 years since the restoration of Timor-Leste's independence. Timor-
23 Leste has made significant progress in managing its overall development and
24 securing its future. While Timor-Leste has made this remarkable progress, this new
25 nation continues to face challenges in recovering from its recent history of
26 colonization, conflict and occupation. It remains a Least Developed Country.⁶³
27 Remaining challenges include widespread poverty and high levels of unemployment.

28
29 Timor-Leste has limited avenues to generate revenue to support its people. The
30 reality is that for the Timorese people to freely pursue their economic, social and
31 cultural development – to fulfil their right to self-determination – they must be able to
32 pursue their right to development and exercise their sovereign right to exploit their
33 natural resources. Without the ability to develop its natural resources, Timor-Leste's
34 development will be challenged. Its people will be deprived of their "own means of
35 subsistence".

36
37 Mr President, with these important rights and considerations in mind, I turn to the
38 States' obligations to protect and preserve the marine environment under article 192.

39
40 The primary means of avoiding the impacts of climate change on the marine
41 environment is to reduce and minimize greenhouse gas emissions through a

⁵⁹ ICCPR, ICESCR, article 1.

⁶⁰ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, par. 55; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, par. 157.*

⁶¹ Written Statement of Nauru, pars. 62-66.

⁶² It is listed in the annex to the ILC's draft conclusions on *Identification and legal consequences of peremptory norms of general international law (jus cogens)*, adopted on second and final reading in 2022.

⁶³ United Nations Conference on Trade and Development, *UN list of least developed countries* (online, 2021), available at: <https://unctad.org/topic/least-developed-countries/list>

1 transition to a low carbon economy.⁶⁴ In that sense, Timor-Leste's contribution to
2 global emissions is already minimal and miniscule. In 2021, Timor-Leste's per capita
3 energy consumption was 1,615 kilowatt hours.⁶⁵ As the Representative for Timor-
4 Leste noted, Timor-Leste only contributes to 0.003 per cent of global emissions.⁶⁶

5
6 Since Timor-Leste's independence, it has maintained similar levels of negligible
7 energy consumption despite taking significant steps to towards the development of
8 the nation.

9
10 Despite Timor-Leste's negligible emissions, Timor-Leste intends to undertake the
11 development of its natural resources in an environmentally responsible manner that
12 complies with its obligations under international law.

13
14 The transition to net zero will not happen overnight. While Timor-Leste's emissions
15 may increase in the short term as it continues its nation-building path, the reality is
16 that its energy consumption needs remain minimal compared to other States.
17 Importantly, Timor-Leste recognizes that it must also do so taking into account its
18 obligations under international law.

19
20 Through the exploitation of Timor-Leste's natural resources it will be able to satisfy
21 its negligible energy needs. The revenue received from such will be employed to
22 deliver short- and long-term social and economic benefits to its people. This includes
23 transition and investment to green energy sources. This in turn will provide Timor-
24 Leste with the foundations it needs to graduate from its status as a Least Developed
25 Country.⁶⁷

26
27 As a Small Island Developing State, the balance between pursuing effective and
28 sustainable economic and social development against the need to decrease global
29 greenhouse emissions and protect the marine environment must be considered.

30
31 As enumerated in the Paris Agreement, States' obligations must "*reflect equity and*
32 *the principle of common but differentiated responsibilities and respective capabilities,*
33 *in the light of different national circumstances*". This extends to obligate developed
34 States to provide developing States with the financial resources to assist them in
35 mitigation and adaptation efforts, as well as other forms of assistance.⁶⁸

36
37 In addition to being subject to other rights enshrined under UNCLOS, such as
38 article 193, this interpretation of the general obligation in article 192 is in light of its
39 context, and is informed by other related international obligations of States.⁶⁹ It has

⁶⁴ Oceans and the law of the sea, on the theme "The impacts of ocean acidification on the marine environment", Report of the Secretary-General, A/68/71 (8 April 2013), par. 93.

⁶⁵ Our World in Data, *Energy use per person (Timor-Leste)* (online, 2021), available at: <https://ourworldindata.org/grapher/per-capita-energy-use?tab=chart&country=~TLS>

⁶⁶ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, p. 1, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

⁶⁷ United Nations Conference on Trade and Development, *UN list of least developed countries* (online, 2021), available at: <https://unctad.org/topic/least-developed-countries/list>

⁶⁸ Paris Agreement articles 2(2), 9-11.

⁶⁹ *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 941.

1 been recognized, and it is worth keeping in mind, that the content “*of the general*
2 *obligation in article 192 is further detailed in the subsequent provisions of Part XII,*
3 *including article 194, as well as by reference to specific obligations set out in other*
4 *international agreements, as envisaged by article 237 of the Convention*”.⁷⁰

5
6 Mr President, honourable members, I thank you for your attention. I would now ask
7 the Tribunal to invite Mr Stoeger to address the Tribunal on part (a) of the question
8 for the Tribunal regarding States’ obligations and to make some observations on the
9 principle of common but differentiated responsibilities and to make some concluding
10 remarks. I thank you.

11
12 **THE PRESIDENT:** Thank you, Mr Middleton. I now give the floor to Mr Stoeger to
13 make his statement. You have the floor, Sir.

14
15 **MR STOEGER:** It is an honour to appear before this distinguished body once
16 again, and on behalf of Timor-Leste.

17
18 My presentation will be in three parts: first, I will answer question (a) put to the
19 Tribunal; second, I will say a few words about the principle of common but
20 differentiated responsibilities; and, third, I will provide Timor-Leste’s concluding
21 remarks.

22
23 Turning to question (a), Mr President, article 194(1) obligates States “*to prevent,*
24 *reduce and control pollution of the marine environment from any source, using for*
25 *this purpose the best practicable means at their disposal and in accordance with*
26 *their capabilities*”. As already stated by many participants, the definition of “pollution
27 of the marine environment” in UNCLOS article 1(1)(4), applies to anthropogenic
28 greenhouse gases.

29
30 These participants further explained that the obligation in article 194 is an obligation
31 of conduct, not result. The conduct in question requires the exercise of due diligence,
32 and Mr Middleton has already addressed the concept of “due diligence”, which
33 similarly applies to the obligation in article 194.

34
35 Mr President, as an obligation “of conduct”, due diligence cannot be measured by
36 achieving a specific outcome, measured in degrees or “temperature goals”.⁷¹ Nor
37 can one assess the standard of conduct, by analogy to a State’s obligation to
38 achieve a certain result by means of its own choosing, as some have effectively
39 suggested.⁷² Furthermore, whether a due diligence obligation is for objective or

⁷⁰ *South China Sea Arbitration (Philippines v China) (Award)*, PCA Case No 2013-19, 12 July 2016, par. 942.

⁷¹ Oral submissions of Australia, (13 September 2023, ITLOS/PV.23/C31/5), page 10, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_5_E.pdf

⁷² Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/3), pages 18-19, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf

1 subjective assessment does not change its nature as conduct-based.⁷³ I would add
2 that, as a practical matter, a result-based obligation will tend to limit, rather than
3 expand, the conduct required of States, as time progresses, and that these
4 distinctions are not academic. They can have ramifications.

5
6 So how should the Tribunal identify the relevant standard of conduct? Several of Part
7 XII's provisions – such as 207 and 212 – refer to the adoption and existence of
8 international rules and standards, external to UNCLOS. The standard of conduct is,
9 therefore, informed by those rules. Furthermore, article 237 states that UNCLOS is
10 “without prejudice” to the specific rights and obligations of States, in “*international*
11 *agreements related to the protection and preservation of the marine environment*”.

12
13 In the context of climate change, the relevant agreements are first and foremost the
14 UNFCCC and the Paris Agreement. What are the legal obligations therein? As one
15 author puts it, “*The Paris Agreement contains a mix of hard, soft and non-obligations*
16 *between which there is dynamic interplay... The combination of elements in each*
17 *provision is a reflection of the demands of the relevant issue area*”.⁷⁴

18
19 This so-called “mix” was a result of hard-fought negotiations. It is a delicate balance
20 of obligations that States, including all UNCLOS parties, were willing to take upon
21 themselves. But equally, what obligations they were not.

22
23 Mr President, for UNCLOS article 237, as well as for the principle of harmonious
24 treaty interpretation, as explained by Mr Middleton, to have any meaning, the correct
25 interpretation of the more general UNCLOS obligations cannot be to negate and
26 override the agreements of States found in the UNFCCC and the Paris Agreement.
27 These nuanced and carefully negotiated texts are later in time relative to UNCLOS,
28 and UNCLOS parties should not be assumed to have taken upon themselves
29 conflicting obligations.

30
31 As the late Professor Boyle notes, these agreements are the *lex specialis* with
32 respect to climate change.⁷⁵ Not all participants in these proceedings agree on this
33 point. But Timor-Leste believes this is evident.

34
35 *First*, environmental protections under UNCLOS are found Part XII of the 17 parts
36 and annexes of UNCLOS. The UNFCCC and Paris Agreements, on the other hand,
37 address climate change exclusively.

38
39 *Second*, it is not contested that UNCLOS is a framework agreement containing
40 obligations of a more general nature.

41

⁷³ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/3), pages 11-12, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf

⁷⁴ Lavanya Rajamani, The 2015 Paris Agreement, 28(2) Journal of Environmental Law, pp. 337-358(2016), at 352.

⁷⁵ Alan Boyle, Protecting the Marine Environment from Climate Change: The LOSC Part XII Regime, in The Law of the Sea and Climate Change: Solutions and Constraints (Elise Johansen, Signe Veierud Busch and Ingvild Ulrikke Jakobsen, eds., 2021) 81-103, at pp. 93-94.

1 *Third*, it has been pointed out that greenhouse gas emissions are but one of many
2 forms of pollution covered by UNCLOS.⁷⁶ The UNFCCC and Paris Agreements
3 apply only to one form of pollution. Indeed, it is revealing that even those that
4 disagree on this point, refer to these agreements as the “climate change regime” or
5 “specialized conventions”.⁷⁷

6
7 Of course, that the UNFCCC and Paris Agreement are *lex specialis* does not mean
8 that UNCLOS is inapplicable or identical to them. As New Zealand has pointed out,
9 the relationship concerns coherence, not prevalence.⁷⁸ What *lex specialis* entails, is
10 that UNCLOS’ application must be appreciated through the prism of the specialized
11 regime.

12
13 Others have suggested that the relationship is that of complementarity.⁷⁹ If so, true
14 complementarity entails a role for both treaty regimes. It entails a role for the
15 obligations contained in UNCLOS Part XII in the context of these proceedings. At the
16 same time, it also entails that UNCLOS cannot overtake later agreements and
17 render their mix of obligations and non-obligations redundant. A result-based legal
18 standard, not found in the Paris Agreement or elsewhere, does just that. True
19 complementarity, Mr President, is where both bodies of law are to play their part, to
20 form a coherent normative framework.

21
22 Now, none of this changes the dire reality presented by COSIS, based on the best
23 available science. Each increase in global temperatures, even incremental, can and
24 will have devastating effects. The current legal framework has proven insufficient.

25
26 Others have pointed out that, with respect to other environmental issues related to
27 the law of the sea, States have come together to address existing gaps in the law.⁸⁰
28 Here too, Timor-Leste calls on States to urgently agree on further necessary action
29 to mitigate and adapt to climate change.

⁷⁶ Oral submissions of Australia (13 September 2019, ITLOS/PV.23/C31/5), page 8-9, available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_5_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_5_E.pdf)

⁷⁷ Oral submissions of Guatemala (14 September 2023, ITLOS/PV.23/C31/8), available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf)

⁷⁸ Oral submissions of New Zealand (15 September 2023, ITLOS/PV.23/C31/1), page 5, available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_10_E.p
pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_10_E.pdf)

⁷⁹ Oral submissions of the Commission of Small Island States (11 September 2023,
ITLOS/PV.23/C31/2), page 30, available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_2_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_2_E.pdf); Oral submissions of the Commission of Small Island States (12 September 2023,

ITLOS/PV.23/C31/3), page 24, available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf); Oral submissions of Guatemala (14 September 2023, ITLOS/PV.23/C31/8), page 11, available at:

[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_8_E.pdf)

⁸⁰ Oral statement of the Federated States of Micronesia (15 September 2023, ITLOS/PV.23/C31/9),
available at:
[https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_9_E.p
df](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_9_E.pdf)

1 Furthermore, the obligation of States under article 194(1) is qualified by the “*best*
2 *practicable means at their disposal and in accordance with their capabilities*”. In
3 other words, a State’s capabilities and level of development influences the nature of
4 the obligation imposed.⁸¹

5
6 This reflects the concern of developing States that these obligations could impose an
7 excessive burden in circumstances where they: first, lack the necessary capabilities
8 and technology; and, second, are necessarily focused on improving the economic
9 well-being of their own peoples.

10
11 This leads me to the principle of “common but differentiated responsibilities” (CBDR),
12 as already highlighted by others, such as Guatemala and Sierra Leone.⁸² The
13 principle is embodied in Principle 7 of the Rio Declaration⁸³ and reflected in
14 UNFCCC⁸⁴ and the Paris Agreement,⁸⁵ among other treaties. It is a central principle
15 of international environmental law.⁸⁶

16
17 The principle of CBDR is understood as consisting of two elements.

18
19 First, concerning the common responsibilities of States for the protection of the
20 environment, individually and collectively, including in the regulation of
21 anthropogenic greenhouse gas emission;

22
23 and, second, concerning the need to take into account different national
24 circumstances’. In particular, each State’s contribution to the creation of a particular
25 environmental problem and each State’s ability to prevent, reduce and control the
26 threat.⁸⁷

27
28 During the first session of the Intergovernmental Negotiating Committee for the
29 UNFCCC, Working Group I noted that ⁸⁸ “[d]eveloped countries are the main
30 contributors of GHGs and thus should take the lead and shoulder the main
31 responsibility to stabilize and limit the greenhouse gas emissions”,⁸⁹. This
32 understanding is reflected in the texts of the UNFCCC and the Paris Agreement.
33

⁸¹ International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 3, 16.

⁸² Oral submission of Sierra Leone (19 September 2019).

⁸³ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

⁸⁴ United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, article 3(1).

⁸⁵ The Paris Agreement, Decision 1/CP.21 contained in FCCC/CP/2015/10/Add.1 (13 December 2015), preamble, articles 2(2), 4(3), and 4(19).

⁸⁶ Ellen Hey, Sophia Paulini, Common but Differentiated Responsibilities, Max Planck Encyclopaedia of Public International Law (2021), para. 19.

⁸⁷ P Sands, *Principles of International Environmental Law*, “General Principles and Rules”, Cambridge University Press, 2012, p. 233.

⁸⁸ Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its First session, held at Washington, D.C. from 4 to 14 February 1991 (A/AC.237/6), p. 24.

⁸⁹ First session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Compilation of texts related to principles, submitted by the Bureau of Working Group I (A/AC.237/Misc.6), 13 August 1991, Part I.E.7.

1 It is important that the obligations in Part XII are interpreted coherently with the
2 principle of CBDR. Otherwise, certain standards may be inappropriate, and of
3 unwarranted economic and social cost to some States, in particular developing
4 States.⁹⁰ For States with limited means, imposing the same level of commitment
5 would ultimately compromise their right to pursue sustainable and inclusive
6 development.

7
8 To address this disparity, UNCLOS, the UNFCCC, and the Paris Agreement place
9 an obligation on developed States to provide technical and financial assistance to
10 developing States. Such assistance is designed to support, in the words of UNCLOS
11 article 202, “*the protection and preservation of the marine environment and the*
12 *prevention, reduction and control of marine pollution*”.⁹¹

13
14 Articles 202 and 203 of UNCLOS reflect the unique position of developing States in
15 trying to balance their development and the protection of the marine environment.
16 Article 202 calls on States Parties to promote programmes of “scientific, educational,
17 technical and other assistance” to developing States and contains an open-ended list
18 of specific forms of assistance.

19
20 Article 203 seeks to provide preferential treatment for developing States in the
21 allocation of funds and technical assistance from international organizations. Both
22 articles 202 and 203 seek to level the playing field and “*ease the burden which the*
23 *law could impose upon States not adequately equipped to meet those obligations*”.⁹²
24 Similarly, article 9 of the Paris Agreement aims to reinforce this support. It calls on
25 developed States to “*provide financial resources to assist developing country Parties*
26 *with respect to both mitigation and adaptation*”.

27
28 With a GDP per capita of just over US\$ 2,300,⁹³ and little to no climate-related
29 technical or financial assistance from high-emitting States, the challenge for Timor-
30 Leste to protect the marine environment without compromising the social security of
31 its people, is immense.

32
33 Notwithstanding Timor-Leste’s status as a Least Developed Country and an as
34 island State, Timor-Leste continues to uphold its obligations under the Paris
35 Agreement. In accordance with article 4(6) of the Paris Agreement, Timor-Leste has
36 submitted two Nationally Determined Contributions (or NDCs), the latest in
37 November 2022.⁹⁴ Importantly, Timor-Leste’s NDC includes a section which sets out
38 the means of implementing these priority areas. This section states: “*The*
39 *Government of Timor-Leste requires urgent technical support and financing to*

⁹⁰ Malgosia A. Fitzmaurice, *International Protection of the Environment* (Hague Academy of International Law), p. 65.

⁹¹ United Nations Convention on the Law of the Sea, article 202.

⁹² United Nations Convention on the Law of the Sea (Myron H. Nordquist et al. eds. 2013), vol I, p. 107.

⁹³ The World Bank, GDP per capita (current US\$) – Timor-Leste (online, 2022), available at: <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=TL>

⁹⁴ United Nations Climate Change, *Nationally Determined Contributions Registry – Timor-Leste* (online), available at: https://unfccc.int/NDCREG?gclid=Cj0KCQjw84anBhCtARIsAISI-xfLPsfirA6mPdAlznR8tr95R6xlcCQeggRKjBwd-C2nMLFfx7Bq3ywaAhetEALw_wcB

1 *establish a robust National Greenhouse-Gas (GHG) Inventory to support its ability to*
2 *report to the UNFCCC and comply with the requirements of the Paris Agreement’.*⁹⁵

3
4 Timor-Leste’s NDC identifies specific priorities for capacity building, finance and
5 technology transfer.⁹⁶

6
7 At the end of the day, States like Timor-Leste are reliant on support from the
8 international community to help it fulfil its obligations in respect of climate change.

9
10 Mr President, Timor-Leste is a staunch supporter of international law. It has relied on
11 it time and time again to support its most important battles on the world stage. As a
12 member of the international community, Timor-Leste has carried out its obligations
13 under the UNFCCC and UNCLOS. On the other hand, at COP27 last November, it
14 was again acknowledged that the world’s largest and wealthiest economies have
15 failed to deliver on their commitments to provide US\$ 100 billion per year in climate
16 funding for developing countries.⁹⁷ And, Sustainable Development Goal 14 (that is,
17 Life Below Water) remains the most underfunded development goal.⁹⁸ Developed
18 States and high-emitting States have not upheld their end of the deal.

19
20 Mr President, we’ve reached a tipping point. We must see meaningful cooperation
21 between high-emitting States and low-emitting States to meet our shared, but
22 ultimately differentiated, obligations; both under UNCLOS, to protect the marine
23 environment, and under the UNFCCC to manage and reduce emissions.

24
25 In this context, UNCLOS article 197 also recognizes that the duty to cooperate, to
26 formulate international standards to protect the environment, must take “*into account*
27 *regional features*”. Accordingly, specially affected regions and States with lesser
28 capacities require assistance from developed States to cooperate in the
29 development of mitigation and adaptation standards.

30
31 Timor-Leste submits that in light of the principle of CBDR, UNCLOS places a higher
32 responsibility on developed and industrialized nations to reduce anthropogenic
33 greenhouse gas emissions that may contribute to global pollution and damage
34 marine ecosystems.

35
36 Mr President, members of the Tribunal, allow me to conclude on behalf of Timor-
37 Leste. We stand at a critical juncture. As was noted by Professor Lowe, we’re facing
38 a matter of “*extreme gravity and urgency*”.⁹⁹ The international community, including

⁹⁵ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, pp. 45, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

⁹⁶ Government of Timor-Leste, *Nationally Determined Contribution Timor-Leste 2022 – 2030*, pp. 46, available at: https://unfccc.int/sites/default/files/NDC/2022-11/Timor_Leste%20Updated%20NDC%202022_2030.pdf

⁹⁷ Glasgow Climate Pact, Decision 1/CP.26 contained in FCCC/CP/2021/12/Add.1 (13 November 2021), par. 26 – 27, available at: https://unfccc.int/sites/default/files/resource/cp2021_12_add1_adv.pdf

⁹⁸ IISD, *Summary report, 27 June – 1 July 2022 – 2022 UN Ocean Conference* (online), available at: <https://enb.iisd.org/2022-un-ocean-conference-summary#brief-analysis-second-un-ocean-conference>

⁹⁹ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/4), page 25, available at:

1 UNCLOS parties, must act to address this intergenerational emergency.¹⁰⁰ It is for
2 States to take the best available science, such as the conclusions of the IPCC, and
3 agree on further legal commitments. In doing so, the community of States cannot
4 leave developing States behind. Developing States deserve the same opportunities
5 that have been afforded to developed States, to develop their resources for the
6 benefit of their people.

7

8 Timor-Leste is grateful that COSIS has brought the defining issue of our time before
9 you, supported by a youth-led movement. The Tribunal has been given a very
10 important task: It must elucidate on the rights and obligations of States Parties
11 relating to climate change, as well as existing gaps in the law. In doing so, it must
12 also leave sufficient room for States to further develop the legal framework through
13 the political process under the UNFCCC. The Tribunal should bear in mind that “(too
14 much) coercion kills all noble, voluntary devotion.”¹⁰¹

15

16 Mr President, members of the Tribunal, that concludes the submissions for Timor-
17 Leste, thank you for your kind attention.

18

19 **THE PRESIDENT:** Thank you, Mr Sthoeger. I now invite the representative of the
20 European Union, Mr Bouquet, to make his statement. You have the floor, Sir.

21

22 **MR BOUQUET:** On behalf of the European Union, hereinafter also referred to as the
23 “EU”, I have the honour to address this Tribunal on the two important questions that
24 have been submitted to it by the Commission of Small Island States on Climate
25 Change (COSIS). In this context, we would take stock of a number of points made by
26 other delegations in these proceedings and which show a certain degree of
27 convergence on most of the key points.

28

29 But let me first, from the outset, warmly compliment the COSIS, which is formed by
30 small island States that are significantly impacted or at risk by the effects of climate
31 change, for this commendable initiative to bring these fundamental legal questions to
32 the Tribunal, and stress that the European Union considers that it is scientifically
33 well-established that the anthropogenic emissions of greenhouse gases are leading
34 to climate change, bringing with it significant deleterious effect to the environment
35 and in particular to the oceans (ocean warming, ocean acidification with
36 consequential adverse impacts on marine biodiversity and also reduced absorption
37 of heat and greenhouse gases, and, of course, sea-level rise).

38

39 These risks are existential, and this explains why the UN Secretary-General has
40 recently said the climate crisis is a “code red for humanity”, and the EU

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_4_E.pdf

¹⁰⁰ Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/4), page 22, available at:

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_4_E.pdf

¹⁰¹ Maurus Wollensak, The Precautionary Principle/Approach and the United Nations Convention on the Law of the Sea: Management of Living Resources, in The Environmental Rule of Law for Oceans designing legal solutions (Froukje Maria Platjouw, Alla Pozdnakova, eds., 2023), pp. 136-148, at. 148, quoting Knigge, A. F., Über den Umgang mit Menschen (Leipzig: Reclam, 1878), 126.

1 Commission’s President referred to “a boiling planet” in her speech on the State of
2 the European Union last week, echoing thereby the Secretary-General of the United
3 Nations.

4
5 Most participants in this case agree that the scientific reports of the
6 Intergovernmental Panel on Climate Change (IPCC), while lacking legally binding
7 value by themselves, do reflect the global consensus of the scientific community on
8 climate change.

9
10 In particular, the reports from the sixth assessment cycle and the Special Report on
11 the Oceans and Cryosphere in a Changing Climate¹⁰² reflect the current scientific
12 knowledge on the implementation of international obligations regarding climate
13 change and oceans.

14
15 As such, these scientific reports constitute an important contextual element which is
16 relevant in the interpretation of the obligations incumbent on States Parties. Most
17 participants in these proceedings agree on this point. In this regard, the EU invites
18 the Tribunal to take the current scientific evidence on the effects of climate change
19 on the marine environment as a fact, following an approach already deployed by the
20 International Law Commission in its work on “Sea-level rise in relation to
21 international law”,¹⁰³ which will examine the law of the sea aspects, statehood and
22 right of affected persons.

23
24 The European Union considers, thus, that greenhouse gas emissions constitute a
25 major global existential concern for the entire planet, and that this issue calls for
26 global answers by the international community.

27
28 In order to find global answers, international cooperation, which is a general duty, is
29 indispensable. The duty to cooperate is codified in article 197 of the United Nations
30 Convention on the Law of the Sea (UNCLOS) and, as stated by this Tribunal in the
31 *Mox Plant* case,¹⁰⁴ is a fundamental principle underpinning the whole of Part XII of
32 UNCLOS.

33
34 As COSIS has highlighted, three main components of this due diligence obligation
35 can be identified: obligations to harmonize laws, policies and procedures; obligations
36 to take cooperative action through international organizations; and obligations to
37 grant assistance to developing States – with a view to prevent, reduce and control
38 pollution of the marine environment, including in the form of greenhouse gas
39 emissions.

40
41 The European Union has taken a leading role in the implementation of these
42 obligations. Not only has it significantly harmonized its laws and policies for the
43 protection of the marine environment from the effects of climate change with other
44 UNCLOS States Parties, notably through the conclusion of the Paris Agreement and
45 the recent adoption of the BBNJ Agreement, but it has also provided meaningful

¹⁰² Special Report on the Ocean and Cryosphere in a Changing Climate, available at:
<https://www.ipcc.ch/srocc/>.

¹⁰³ See A/76/10, Chapter IX Sea-level rise in relation to international law, para. 263.

¹⁰⁴ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 110, para. 82.

1 assistance to developing States to tackle climate change. According to the latest
2 OECD report (2022), the EU and its 27 Member States are, indeed, the largest
3 contributors to international public climate finance, contributing over €23.04 billion –
4 which is equivalent to US\$ 26 billion in 2021 – to the collective US\$ 100 billion aim,
5 with almost 40 per cent of the EU's contribution targeting climate adaptation.
6

7 In another legal context, partly overlapping questions have been raised by the UN
8 General Assembly in a consensus resolution requesting an advisory opinion from the
9 International Court of Justice (ICJ). The main distinction between the two requests is
10 the particular focus of the present case on the marine environment, and the broader
11 scope, including the fundamental rights angle and the intergenerational aspect, of
12 the ICJ case.
13

14 UNCLOS, which is generally considered to be the “constitution of the oceans”, sets
15 out the legal framework within which all the activities in the oceans and seas must be
16 carried out, and this has also implications for activities on land with effects on the
17 oceans and seas.
18

19 As has been recognized in almost all the written statements, UNCLOS is a living
20 instrument which is capable, without compromising its integrity (which is essential for
21 the European Union), to adapt to new realities as well as to address major new
22 challenges which are related to the protection and preservation of the marine
23 environment, such as climate change.
24

25 As stated by Judge Paik, here present, “[t]he challenge facing the Tribunal is ... how
26 to make the Convention relevant in an area in which law and realities have changed
27 rapidly and will continue to do so.”¹⁰⁵
28

29 Now, in the following presentation, the European Union will proceed in five steps:
30 first, I will make a remark in connection to the nature of the Tribunal's advisory
31 function (in order not to confuse it with adversarial procedures);
32

33 second, I will address the question of the applicable law;
34

35 third, I will turn to the general obligations of articles 192 and 194 of UNCLOS and
36 their nature as obligations of conduct;
37

38 fourth, I will update the Tribunal on the high ambition implementation of its
39 obligations by the European Union;
40

41 and, fifth, my co-agent will briefly address the two questions, in the order posed by
42 COSIS.
43

44 Now, in this statement on behalf of the European Union, we will not address the
45 issue of jurisdiction of the Tribunal. The written statement of the European Union
46 was made without prejudice to the question of the jurisdiction of the Tribunal to

¹⁰⁵ 2018 WMU Global Ocean Conference; Statement by Judge Jin-Hyun Paik, then President of ITLOS, Building Transformative Partnerships for Ocean Sustainability: The Role of ITLOS. See to this effect: Law of the Sea -UNCLOS as a Living Treaty, 2016, edited by Jill Barrett and Richard Barnes.

1 examine the request for an advisory opinion in respect of questions put to it, and we
2 will follow the same here today.

3
4 But this being so, we would wish to underline that this case is a request for an
5 advisory opinion. In the 1950 Advisory Opinion on the *Interpretation of the Peace*
6 *Treaties with Bulgaria, Hungary and Romania*, the ICJ referred to a dispute as “a
7 *situation in which the two sides hold clearly opposite views concerning the question*
8 *of the performance or non-performance of certain treaty obligations*”.¹⁰⁶

9
10 The present case does not concern a dispute between opposing parties or groups of
11 opposing parties. By their very nature, advisory opinions are designed to contribute
12 to the clarification of international law as it stands, including the explanation of all
13 existing international legal obligations of States and international organizations, such
14 as the European Union, in the implementation of UNCLOS.

15
16 Likewise, an advisory opinion is not well suited to adjudicate possible breaches of
17 these international obligations or to indicate which remedies should be considered
18 for such possible breaches. Notably, the questions before this Tribunal concern the
19 primary rules of international law and, therefore, are not focused on secondary
20 obligations, which are admittedly provided for under article 235 of UNCLOS.

21
22 Hence, it is not by way of an advisory opinion that the Tribunal could “hold
23 accountable” certain States or groups of States for possible breaches. In its oral
24 statement, COSIS stated that this case “*the Tribunal is called upon to provide*
25 *guidance on questions of international law; not to settle a dispute*”.¹⁰⁷ Therefore, it
26 has to be stressed that the questions on whether compensation is available in this
27 context is out of the scope of the present request for an advisory opinion.¹⁰⁸ It is also
28 in that logic that advisory opinions have no binding force.

29
30 Also, as highlighted by most other participants in this case, it is not the task of the
31 Tribunal to create new legal rules.

32
33 Now, these observations, of course, do not take away the eminent influence of
34 advisory opinions which this Tribunal, as well as the ICJ, are called upon to give in
35 this matter. And in this case, the Tribunal is being called to pronounce first.

36
37 Now, turning now to the applicable law, the questions, which are focusing on the
38 marine environment and pollution by greenhouse gases, are clearly to be assessed
39 under UNCLOS, and in particular its part XII.

¹⁰⁶ *Interpretation of Peace Treaties*, Advisory Opinion: I.C. J. Reports 1950, p. 65; at page 13.

¹⁰⁷ Public sitting held on Tuesday, 11 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C31/1/Corr.1, Verbatim Record, page 24, at 33-34.

¹⁰⁸ Public sitting held on Tuesday, 12 September 2023, at 3 p.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, ITLOS/PV.23/C31/4, page 25, at 27-32.

1 The law applicable by this Tribunal is identified in article 293 of UNCLOS in:
2 (1) UNCLOS itself; and (2) other rules of international law not incompatible with
3 UNCLOS.

4
5 Moreover, article 237 of UNCLOS, the final provision of Part XII, refers to specific
6 obligations assumed by States under special conventions and agreements
7 concluded previously which relate to the protection and preservation of the marine
8 environment and to agreements which may be concluded in furtherance of the
9 general principles set forth in UNCLOS. Part XII of UNCLOS is without prejudice to
10 these special obligations.

11
12 In addition, in a number of specific UNCLOS provisions, and not only in Part XII,
13 reference is made to “*generally recognized international rules and standards*”, like
14 those relating to shipping, to navigation, to marine pollution, that may inform
15 particular provisions of UNCLOS, and this with a different degree of intensity,
16 ranging from just taking into account, to ensuring at least a same protection. I refer
17 here to articles 207 and 212 UNCLOS.

18
19 These provisions reflect that architecture of the UNCLOS is not one of an isolated
20 regime, but is a treaty interacting with other rules and principles of international law.
21 Even if not all parties have always been citing the same international instruments
22 and rules as the most relevant ones for answering the questions addressed to the
23 Tribunal, there is a clear convergence as regards this interplay of UNCLOS with
24 other rules of international law.

25
26 As the questions raised in the present case relate to climate change and the marine
27 environment, most of the written submissions recognize that the United Nations
28 Framework Convention on Climate Change (UNFCCC) and the Paris Agreement
29 constitute the primary legal instruments informing UNCLOS obligations in this
30 context.

31
32 Delegations have provided also pertinent examples of other legal instruments,
33 conventions, agreements, generally recognized rules and standards, rules of
34 reference, such as the regulations adopted in the context of the International
35 Maritime Organization (IMO), the Convention on Biological Diversity (CBD), or the
36 Convention for the Protection of the Marine Environment of the North-East Atlantic
37 (the “OSPAR Convention”).

38
39 Consequently, the two questions addressed to the Tribunal are to be assessed
40 under UNCLOS, and notably Part XII, taking into account also the UNFCCC, the
41 Paris Agreement and certain specific rules of the IMO, the CBD and the OSPAR
42 Convention. And this, by virtue of articles 293 and 237 UNCLOS, is in line with
43 article 31, paragraph 3, of the Vienna Convention on the Law of Treaties.

44
45 Now, this, however, should not lead to a debate on the *lex specialis* principle
46 because that principle is a conflict rule.

47
48 In the present case, no argument has been made that any specific provision of the
49 UNFCCC or of the Paris Agreement would go against an obligation under UNCLOS
50 Part XII. Indeed, the regime of the UNFCCC has put in place certain specific

1 obligations with regard to climate change, but it has not lowered the threshold of the
2 obligations under Part XII of UNCLOS. Rather, the UNFCCC and the Paris
3 Agreement could even be considered as concluded in furtherance of the general
4 principles set forth in UNCLOS for the purposes of its article 237 UNCLOS.

5
6 Therefore, the different legal regimes are to be applied in conjunction, and, in the
7 European Union's view, there is no conflict between them, which, alone, could lead
8 to a possible discussion on the application of the *lex specialis* principle in order to
9 resolve such conflict.

10
11 Now, as to the general obligations and their nature: as is submitted in most of the
12 written submissions, the general obligations of the States to preserve and protect the
13 marine environment and to prevent, control and reduce pollution of the marine
14 environment in relation to the deleterious effects of climate change, as well as to
15 cooperate internationally, are a set of due diligence obligations rather than
16 obligations of result.

17
18 Some statements have been made to the effect that certain of these obligations may
19 be obligations of result because of the severity of the risks, as assessed by science.

20
21 We noted, in this context, the questions put by Judge Kittichaisaree – I hope I
22 pronounce well – to COSIS and to the International Union for the Conservation of
23 Nature.

24
25 For the European Union, we would still submit that the obligations of Part XII of
26 UNCLOS, as well as those stemming from the other relevant instruments such as
27 the UNFCCC and Paris Agreement, as discussed in questions (a) and (b), are, by
28 their nature, obligations of conduct. At the same time, this is not to say that such
29 obligations would be entirely discretionary, or weak or even just symbolic obligations.

30
31 This interpretation finds support in the jurisprudence of this Tribunal, in Case
32 No. 17¹⁰⁹ (*Seabed* case – decided by the Seabed Disputes Chamber) and Case
33 No. 21¹¹⁰ (*Illegal Fishing* case), as well as in the jurisprudence of the ICJ (notably in
34 the *Pulp Mills* case¹¹¹) and in the case law of certain UNCLOS arbitral tribunals
35 (*South China Sea Arbitration*¹¹²).

36
37 It emerges from that case law that the obligation of conduct is an obligation to take
38 best possible efforts, to do the utmost to take all the measures which are necessary
39 based on reasonableness, non-arbitrariness and good faith (so it is, thus, not just a
40 symbolic effort). These measures may include, beyond measures binding upon
41 activities in the own territory, also certain conditions upon imports in order to induce
42 producers of importing goods to observe certain minimum standards in relation to the
43 greenhouse gas footprint.

¹⁰⁹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 25.

¹¹⁰ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.

¹¹¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.

¹¹² PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People's Republic of China)*.

1 The obligation of conduct also takes into account the capability of the State
2 concerned. This has certain similarities with the principle of common but
3 differentiated responsibilities and respective capabilities under the UNFCCC and the
4 Paris Agreement, whereby account is taken of the different national circumstances,
5 which can evolve over time and whereby the capabilities of certain States can
6 improve.

7
8 Here, the European Union would like to echo COSIS's concern expressed in its oral
9 statement,¹¹³ that the differentiation should not become a pretext for certain high
10 emitting States – even if generally still considered as developing States – to escape
11 their obligations of conduct because in the past they may not have contributed
12 significantly to greenhouse gas emissions, allowing them somehow to “harvest” an
13 alleged entitlement to catch up with old industrialized countries and to emit high
14 share of greenhouse gases.

15
16 Such an approach would push very far in the future the greenhouse gas “peaking”,
17 with long-time overshooting and possibly irreversible adverse effects on the marine
18 environment. Such an extensive interpretation of the differentiation would simply
19 render impossible to collectively achieve the results aimed at by the relevant
20 obligations of conduct, and this would thus be fundamentally inconsistent with the
21 obligation of conduct under UNCLOS Part XII and the other relevant instruments.

22
23 In this regard, it is also worth recalling that the International Law Commission
24 considered, in the context of the draft articles on the prevention on transboundary
25 harm, that “*while the economic level of States is one of the factors to be taken into*
26 *account in determining whether a State has complied with its obligation of due*
27 *diligence*”, it “*cannot be used to dispense the State from its obligation[s]*”.¹¹⁴

28
29 The obligation of conduct is also an evolutive one, which increases in intensity when
30 the risk becomes clearer over time (as is shown by consensus in science).

31
32 And, finally, the obligation of conduct also entails a duty of vigilance and of
33 enforcement of the measures taken.

34
35 Here, a confusion should be avoided, which is to consider that when a particular
36 result is mentioned in the relevant provisions, quantified or not, like the reduction or
37 prevention of pollution, or the limitation of the warming due to anthropogenic
38 emissions of greenhouse gases to a maximum, that this would necessarily turn the
39 obligations into an obligation of result, meaning into a positive legal obligation to
40 achieve that result (and then with only *force majeure* as an excuse).

41
42 Here, the European Union would not see solid legal grounds to change the nature of
43 these obligations of reduction or prevention of pollution by greenhouse gases or of
44 limiting the temperature increase into obligations of result. It is also noted that no

¹¹³ Public sitting held on Tuesday, 12 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C31/3, Verbatim Records, Page 4 at 8.

¹¹⁴ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (13), p. 155.

1 serious claim has been made that there would be a collective obligation on States
2 and international organizations, like the European Union, to succeed in preventing all
3 pollution by greenhouse gases and in limiting the temperature increase to 1.5°C.
4

5 This being so, the European Union considers that the obligations of conduct which
6 are at stake in the present case are not undetermined obligations, but are serious
7 obligations which are qualified by a rather high standard of due diligence, and it has,
8 for its part, taken it very seriously.
9

10 This brings me to the steps taken by the European Union itself, which have been
11 spelled out in detail in Section E of Chapter III of our written submission. Since the
12 time of that submission, the following actions have been taken, which I will mention:
13

14 First, the European Parliament and the Council of the European Union have now
15 formally adopted all essential elements of the legislative framework necessary to
16 implement the ambitious “Fit for 55” package, which was proposed by the
17 Commission, to implement the climate target for 2030 and was laid down in the
18 European Climate Law – being a net domestic reduction of at least 55 per cent in
19 greenhouse gas emissions by 2030 compared to 1990. The adopted legislation has
20 now been published in the Official Journal of the European Union and has entered
21 into force.
22

23 Second, the EU is continuing to participate fully and actively in the First Global
24 Stocktake under the Paris Agreement at all levels, including in the ministerial
25 roundtables next week in New York. The EU will be pointing to what science says
26 and what is increasingly part of every global citizen’s lived experience.
27

28 Further, the EU will be calling on all Parties to follow the lead the EU has set out in
29 the European Climate Law and to respond to the Global Stocktake by committing to
30 come forward, by 2025, with NDCs for the post-2030 period that are aligned with the
31 Paris Agreement goals of avoiding 1.5°C global average temperature rise and
32 achieving climate neutrality by 2050.
33

34 Still, in the fourth quarter of 2023, the Commission plans to adopt the Climate Action
35 Progress Report. In addition to annual reporting on the progress towards the EU and
36 Member States greenhouse gas reduction targets, this year the report will also
37 include the assessments required by the Climate Law on progress made and the
38 consistency of policies with respect to the climate-neutrality and adaptation
39 objectives contained in that law.
40

41 Third, the EU is also actively working on the implementation of the Kunming-
42 Montreal Global Biodiversity Framework adopted at COP15 of the Convention on
43 Biological Diversity, including its goals and targets relevant for the marine
44 biodiversity.
45

46 In her last State of the Union Speech last week, the European Commission’s
47 President has also announced the launch of the “European Wind Power package”.
48

1 And, finally, the BBNJ¹¹⁵ Agreement will be signed by the European Union, and by
2 other States, later today almost as we speak. The BBNJ Agreement will be crucial in
3 addressing the triple planetary crisis of climate change, biodiversity loss and
4 pollution. The BBNJ Agreement will reinforce the rules on, notably, environment
5 impact assessments (which is based on a customary law obligation), on area-based
6 management of marine areas, and it will also include cooperative tools to share
7 expertise and assist developing States to protect the marine environment beyond
8 areas of national jurisdiction.

9
10 It is to be underlined that the BBNJ Agreement contains a provision on the advisory
11 jurisdiction of ITLOS. This UNCLOS implementing agreement will thereby contribute
12 to the achievement of the aims of the provisions of Part XII of UNCLOS as well as of
13 other relevant instruments. The European Union encourages States to sign and ratify
14 the BBNJ Agreement as soon as possible.

15
16 Now I would like to invite the Tribunal to call my co-agent Ms Bruti Liberati to
17 address briefly the two questions before or after the break.

18
19 **PRESIDENT:** Thank you, Mr Bouquet. We have now reached almost 11:30. At this
20 stage, the Tribunal will withdraw for a break of 30 minutes and will continue the
21 hearing at 12:00 when I will give the floor to Ms Bruti Liberati.

22
23 *(Short break)*
24

25 **PRESIDENT:** Please be seated. I now give the floor to Ms Bruti Liberati to make her
26 statement on behalf of the European Union. You have the floor, Madam.

27
28 **MS BRUTI LIBERATI:** Mr President, honourable members of the Tribunal, it is my
29 honour to address you today on behalf of the European Union.

30
31 In my intervention, I will outline the main elements that, in the view of the European
32 Union, this Tribunal should consider when replying to the specific questions referred
33 to it by COSIS.

34
35 I will consider question (a) first.

36
37 As recognized by most written submissions in this case, the wording of this question
38 reflects the text of article 194 of UNCLOS.

39
40 To delineate the EU's proposed answer to this question, I will proceed in this order:

41
42 first, I will briefly recall the *nature* of the obligations under article 194 of UNCLOS
43 specifically to address certain arguments made by other participants in this case;

44
45 second, I will delineate the *content* of the obligations under article 194 of UNCLOS,
46 and, to this effect, I will:
47

¹¹⁵ Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

1 first, consider the definition of “pollution” laid down in article 1(1)(4) of UNCLOS;
2
3 second, discuss the elements which inform the content of the obligations under
4 article 194 of UNCLOS, including in relation to the deleterious effects of climate
5 change; third, and based on the foregoing, I will outline the specific actions required
6 by States under article 194(1) and (2) to prevent, reduce and control greenhouse gas
7 emissions.

8
9 As concerns the *nature* of the obligations referred to in question (a), my colleague
10 has already mentioned that, according to settled case law, the general obligations
11 under articles 192 and 194 paragraph 2 of UNCLOS are obligations of due diligence.
12 That is, obligations of conduct, qualified by the duty to exercise a certain level of
13 care.

14
15 While this Tribunal has not yet pronounced itself on the nature of the obligations
16 under article 194(1) of UNCLOS, it is clear that also this provision entails an
17 obligation of due diligence. In the view of the EU, this stems notably from the findings
18 of the ICJ in the *Pulp Mills* case, where the Court has unequivocally found that “[a]n
19 obligation to adopt regulatory or administrative measures” – which is precisely the
20 prescription under article 194 paragraph 1 – “is an obligation of conduct”.¹¹⁶

21
22 Further, article 194, paragraph 1, can be considered an expression of the customary
23 international law principle of prevention of transboundary harm which, according to
24 the International Law Commission, entails an obligation of due diligence.¹¹⁷

25
26 According to the jurisprudence of this Tribunal,¹¹⁸ the precise *level of due diligence* is
27 context-dependent, changing notably in function of the current scientific and
28 technological knowledge, and of the risks at stake, so that an activity scientifically
29 known to entail severe risks would require a higher degree of diligence. In principle,
30 it is possible that the combination of these contextual factors leaves virtually no
31 doubt as to the precise measures to be taken.

32
33 In this sense one may argue, as some participants in this case do, that the required
34 standard of diligence is *objectively determined*. However, no matter how “objective”,
35 no matter how stringent the standard of due diligence is, the *nature* of such
36 obligation could not be transformed from one of conduct to one of result. Arguments
37 relating to the standard of due diligence indeed concern the requisite attributes of a
38 certain prescribed conduct but have nothing to do with the *objective* that that conduct
39 aims to achieve.
40

¹¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at 187.

¹¹⁷ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (7), page 154: “the obligation to take preventive or minimization measures is one of due diligence”.

¹¹⁸ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 132, citing: *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 43, para. 117.

1 This conclusion is reinforced by the fact that, as mentioned by my colleague, this
2 Tribunal has interpreted the duty of due diligence as requiring a *highly stringent*
3 *standard, a maximum duty of care, namely “to exercise best possible efforts, to do*
4 *the utmost”*.¹¹⁹

5
6 In this regard, I shall make a clarification in relation to the judgment of the ICJ in the
7 case on the *Jurisdictional Immunities of the State*.¹²⁰ Reference to this judgment has
8 been made during the present oral proceedings to substantiate that “*the duty under*
9 *article 194(1) is a direct and immediate duty, which is to reach a precise result that is*
10 *neither materially impossible nor out of proportion”*.¹²¹

11
12 However, the EU respectfully submits that this reference is squarely out of context
13 here. In that case, the Court did no more than literally applying article 35 of the
14 International Law Commission’s Draft Articles on the Responsibility of States for
15 Internationally Wrongful Acts,¹²² according to which:

16
17 A State responsible for an internationally wrongful act is under an obligation to
18 make restitution, that is, to re-establish the situation which existed before the
19 wrongful act was committed, provided and to the extent that restitution: (a) is
20 not materially impossible; (b) does not involve a burden out of all proportion to
21 the benefit deriving from restitution instead of compensation.

22
23 Besides departing from the parameters already identified by this Tribunal precisely in
24 relation to the general obligations under UNCLOS, the conditions set out in article 35
25 of the Draft Articles concern “secondary rules of State responsibility”; that is to say,
26 in the words of the International Law Commission, “*the general conditions under*
27 *international law for the State to be considered responsible for wrongful actions or*
28 *omissions, and the legal consequences which flow therefrom”*. On the other hand,
29 the draft articles “*do not attempt to define the content of the international obligations,*
30 *the breach of which gives rise to responsibility. This is the function of the primary*
31 *rules”*.¹²³

32
33 The EU, therefore, fails to see how the parameters considered and the conclusion
34 drawn in the case on the *Jurisdictional Immunities of States* would be relevant in the
35 interpretation of the obligation to prevent, reduce and control pollution of the marine
36 environment under article 194 of UNCLOS. It is, in fact, unquestionable that this
37 provision lays down primary rules of international law.
38

¹¹⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 128, citing *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 110.

¹²⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

¹²¹ Public sitting held on Tuesday, 12 September 2023, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, ITLOS/PV.23/C31/3, Verbatim Record, page 18, at 9-25.

¹²² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

¹²³ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, 2001, General Commentary, paragraph (1), page 31.

1 Having clarified the *nature* of the obligations under article 194 of UNCLOS, I will now
2 turn to their precise *content*, particularly in relation to the deleterious effects of
3 climate change. I will focus to this effect on paragraphs 1 and 2 of article 194.
4

5 Virtually all States and international organizations participating in this case agree that
6 greenhouse gas emissions fall under the definition of “pollution of the marine
7 environment” under article 1(1)(4) of UNCLOS. Indeed, science clearly shows that
8 greenhouse gas emissions constitute substances which, when introduced in the
9 marine environment, result or are likely to result in deleterious effects such as harm
10 to living resources and marine life, hazards to human health, hindrance to marine
11 activities, including fishing and other legitimate uses of the sea, impairment of quality
12 for use of seawater and reduction of amenities.
13

14 It follows that paragraph 1 of article 194 requires States to take all measures,
15 consistent with UNCLOS, that are necessary to prevent, reduce and control
16 greenhouse gas emissions from any source. Such efforts to reduce or prevent
17 greenhouse gas emissions are usually referred to as “climate mitigation measures”.
18

19 Second, as already mentioned, the identification of the “necessary” measures to be
20 taken in this respect depend on a number of factual and legal elements.
21

22 As to the factual elements, article 194 itself mentions “the best practicable means at
23 the disposal [of a State]” and “its capabilities” as factors determining the measures to
24 be taken. These requirements have a certain similarity with the principle of Common
25 but Differentiated Responsibilities and respective capabilities (in the light of different
26 national circumstances) as laid down in the UNFCCC and in the Paris Agreement,
27 but, crucially, do not render this principle legally binding by virtue of UNCLOS.
28

29 Further, in the *Seabed* case, it was established that the due diligence duty is
30 informed by: (1) the current scientific or technological knowledge; and (2) the risks
31 involved in the activity (so that the standard of due diligence has to be appropriate
32 and proportional to the degree of risk involved). This Tribunal also supported this
33 conclusion in the *Illegal Fishing* case.¹²⁴
34

35 Additional factors are identified in the Draft Articles of the International Law
36 Commission on the prevention of transboundary harm from hazardous activities, in
37 the severity and foreseeability of the harm¹²⁵ and in the economic level of a State.¹²⁶
38

39 The role of science and of factual developments more generally is, likewise,
40 considered a relevant factor by the ICJ, which in the *Gabčíkovo-Nagymaros Project*
41 case stated that the impacts of a certain activity on the environment, as evidenced in
42 scientific reports, are a key issue in the interpretation of States’ environmental
43 obligations. The Court also found that a requirement to take into account *current*
44 standards existed insofar as the relevant treaty provision established “continuing –

¹²⁴ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 132.

¹²⁵ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, *inter alia* Commentary to Article 3, paragraph (18), page 155.

¹²⁶ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 3, paragraph (13), page 155.

1 and thus necessarily evolving – obligations”.¹²⁷ As other participants in this case
2 have noted, this is definitely the case for the general obligations under UNCLOS
3 Part XII.

4
5 As to the legal factors determining the content of the obligations under article 194,
6 the arbitral tribunal in the *South China Sea Arbitration*¹²⁸ found that article 192 of
7 UNCLOS is to be informed by the other provisions of Part XII and by other applicable
8 rules of international law. The EU submits that the same finding must apply to article
9 194 of UNCLOS.

10
11 As agreed by most participants in this case, the UNFCCC and the Paris Agreement
12 contain the most relevant international rules to be taken into account when
13 interpreting article 194 of UNCLOS. However, this conclusion does not mean that
14 States Parties to UNCLOS have an obligation to comply with the Paris Agreement or
15 with any other international rule applicable to the interpretation of UNCLOS as a
16 matter of UNCLOS itself. In other words, these external rules do not become binding
17 by virtue of UNCLOS but are simply to be taken into account in accordance with
18 articles 293 and 237 of the Convention.

19
20 Even less would this harmonious interpretation result in an UNCLOS obligation to
21 *achieve* the temperature goal established under the Paris Agreement, as the Paris
22 Agreement itself does not provide for such an obligation of result.

23
24 Finally, the due diligence obligation under article 194 is further specified by other
25 obligations of Part XII of UNCLOS, and notably by those under Section 5 of Part XII,
26 which regulate the different sources of pollution of the marine environment.

27
28 The EU submits that greenhouse gas emissions fall primarily within the categories of
29 pollution from land-based sources, regulated by articles 207 and 213 (and which
30 may also consist in plastic materials discharged in the ocean from land); and of
31 pollution from or through the atmosphere, regulated by articles 212 and 222 of
32 UNCLOS.

33
34 In relation to the deleterious effects of climate change, articles 207 and 212, *inter*
35 *alia*, require States to adopt laws, regulations and other necessary measures to
36 prevent, reduce and control greenhouse gas emissions, *taking into account*
37 *internationally agreed rules, standards and recommended practices and procedures*.
38 While these requirements make explicit UNCLOS’ openness to other legal regimes,
39 they do not render the referred external rules and standards binding on States
40 Parties to UNCLOS, but merely establish a minimum standard of conduct.

41
42 Articles 207 and 212 are completed, respectively, by articles 213 and 222 which deal
43 with the enforcement in relation to, respectively, pollution from land-based sources
44 and pollution from or through the atmosphere. In light of States’ duty of due diligence
45 as interpreted by both this Tribunal and by the ICJ, “*a certain level of vigilance and*
46 *the exercise of administrative control applicable to the public and private*

¹²⁷ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7, para 140.

¹²⁸ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, paras. 941-942.

1 operators¹²⁹ is required in the enforcement of the laws and regulations adopted
2 pursuant to article 207 and 212 of UNCLOS.

3
4 Besides developing the general obligations of articles 192 and 194, articles 207, 212,
5 213 and 222 of UNCLOS reflect the obligation of international cooperation which,
6 according to this Tribunal,¹³⁰ constitutes a “fundamental principle” for the protection
7 of the marine environment underpinning the whole Part XII of UNCLOS.

8
9 I now turn to the second paragraph of article 194. In this regard, the EU would limit
10 itself to two clarifications at this stage. First, as already mentioned, the due diligence
11 nature of this provision was already established in the Seabed case. Those findings
12 are fully relevant in the present case for the following reasons:

13
14 (a) In that case, the Seabed Disputes Chamber did not limit its analysis to the
15 expression “to ensure” under article 139 of UNCLOS, but also considered the
16 expression “taking all measures necessary to ensure” under article 153(4) UNCLOS.
17 This is exactly the same expression used in article 194(2);

18
19 (b) Further, in that case, the Seabed Disputes Chamber dealt with the duties of
20 States in relation to the conduct of entities operating under their control. Again, this is
21 exactly the same scenario dealt with by article 194(2);

22
23 (c) Finally, having defined the obligations “to ensure” as obligations of due diligence,
24 the Seabed Disputes Chamber referred precisely to article 194(2) as an example of
25 such obligations, which give rise to liability not for any violation thereof but for the
26 failure to adopt a certain duty of care.

27
28 This Tribunal also upheld these clarifications on the meaning of the expression
29 “responsibility to ensure” and on the interrelationship between the notions of
30 obligations “of due diligence” and obligations “of conduct” in its advisory opinion in
31 the *Illegal Fishing* case.¹³¹

32
33 The second clarification concerned the concept of “damage by pollution”. Under
34 article 194(2), it should be interpreted to mean *significant* damage or *significant*
35 harm. This is indeed the threshold characterizing the customary law principle of
36 prevention of transboundary harm,¹³² which article 194(2) reflects.

¹²⁹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 131, citing the Seabed Disputes Chamber in ITLOS case No. 17, , *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, in turn citing the ICJ in the ‘*Pulp Mills*’ case.

¹³⁰ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 110, para. 82.

¹³¹ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 125.

¹³² See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 101. According to the ICJ, States are obliged “to use all the means at [their] disposal in order to avoid activities which take place in [their] territory, or in any area under [their] jurisdiction, causing **significant damage** to the environment of another State”; and Award of the Arbitral Tribunal, *Iron Rhine Arbitration (Belgium/Netherlands)*, 24 May 2005, para 59, according to which the duty to “prevent, or at least mitigate”, significant harm to the environment has become a principle of general international law.

1 As to the precise meaning of “significant” harm, in its Draft Articles on Prevention of
2 Transboundary Harm from Hazardous Activities, the International Law Commission
3 explained that the threshold “*significant*” is something more than “*detectable*”, but
4 need not be at the level of “*serious*” or “*substantial*” and needs to be assessed based
5 on the combined effects of the risk and the harm involved in the concerned
6 activity.¹³³

7
8 The EU submits that also article 195 of UNCLOS is an expression of the customary
9 principle of prevention of transboundary harm and, as such, is an obligation of due
10 diligence.

11
12 Mr President, I am now coming to my last point in relation to question (a) before this
13 Tribunal; that is, the specific actions required by States under article 194(1) and (2)
14 to prevent, reduce and control greenhouse gas emissions.

15
16 Based on the foregoing considerations, the EU submits that article 194 requires
17 UNCLOS States Parties to do their utmost, to exercise their best efforts to prevent,
18 reduce and control their greenhouse gas emissions, based on the best available
19 science and taking into account relevant international rules and standards, using for
20 this purpose the best practicable means at their disposal, in accordance with their
21 capabilities, and in a manner proportional to the level of risk and to the foreseeable
22 harm involved in the concrete activities at stake.

23
24 The current best available science, reflected in the IPCC reports, shows that limiting
25 temperature rise to 1.5°C is necessary to avoid even more significant deleterious
26 effects of climate change, including on the oceans. For instance, the most recent
27 Assessment Report of the IPCC on climate change, in its Summary for policy-
28 makers, states that: “*Overshooting 1.5°C will result in irreversible adverse impacts*
29 *on certain ecosystems with low resilience, such as polar, mountain, and coastal*
30 *ecosystems, impacted by ice-sheet melt, glacier melt, or by accelerating and higher*
31 *committed sea-level rise*”¹³⁴. At the same time, the report also states that limiting
32 warming to 1.5°C with no or limited overshoot, involve “*rapid and deep*” greenhouse
33 gas emission reductions”.¹³⁵

34
35 Both article 2 of the Paris Agreement and the later decisions of the Conference of its
36 Parties reflect this scientific awareness, recognizing that “*limiting the temperature*
37 *increase to 1.5 °C above pre-industrial levels ... would significantly reduce the risks*
38 *and impacts of climate change*”.¹³⁶

¹³³ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, International Law Commission, 2001, Commentary to Article 2, paragraph (4), page 152.

¹³⁴ IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001, page 23, B.7.2.

¹³⁵ Ibid, page 20, B.6.

¹³⁶ See Paris Agreement, article 2(1)(a). See also Decision 1/CMA.3, Glasgow Climate Pact, para 21: “[The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement] Recognizes that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and resolves to pursue efforts to limit the temperature increase to 1.5 °C”.

1 On this basis, the EU submits that the measures to be taken by States to comply
2 with article 194 of UNCLOS must include measures for the reduction of greenhouse
3 gas emissions in line with the temperature objective under the Paris Agreement.
4 These measures are to include the adoption of laws and regulations, as well as the
5 exercise of vigilance in the enforcement of such rules and the exercise of
6 administrative control on public and private operators in that respect.

7
8 Further, they are to cover efforts to establish new international rules and standards
9 for the prevention and minimization of greenhouse gas emissions, and reflect the
10 best efforts of States to prevent and minimize significant damage by greenhouse gas
11 emissions to other States. As such, they also include carrying out environmental
12 impact assessments in accordance with the provisions of the BBNJ Agreement once
13 it has entered into force.

14
15 The precautionary principle is also to be applied in taking these measures, so that, in
16 the words of the Seabed Disputes Chamber, where scientific evidence concerning
17 the scope and potential negative impact of the activity in question is insufficient but
18 where there are plausible indications of potential risks, a State would not meet its
19 obligation of due diligence if it disregarded those risks.¹³⁷

20
21 Mr President, I will now address question (b) referred to this Tribunal.

22
23 In the *Illegal Fishing* case, this Tribunal has clarified not only the due diligence
24 nature of article 192 of UNCLOS, but also its *content*. First, it has provided guidance
25 on the meaning of the concept of “marine environment”, which is not defined in
26 UNCLOS, explaining that this concept also covers “*living resources and marine*
27 *life*”.¹³⁸ This finding is in line with the ICJ’s Advisory Opinion on the *Legality of the*
28 *Threat or Use of Nuclear Weapons*, according to which “*the environment is not an*
29 *abstraction but represents the living space, the quality of life and the very health of*
30 *human beings, including generations unborn*”.¹³⁹

31
32 Second, this Tribunal clarified that the obligations under article 192 are not
33 constrained *ratione loci* as “*article 192 applies to all maritime areas, including those*
34 *encompassed by exclusive economic zones*”.¹⁴⁰ This interpretation was echoed in
35 the *South China Sea Arbitration*,¹⁴¹ when the arbitral tribunal also found that

¹³⁷ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*,
1 February 2011, ITLOS Reports 2011, p. 10, para. 131

¹³⁸ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory*
Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 216.

¹³⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226,
para. 29.

¹⁴⁰ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory*
Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 120.

¹⁴¹ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of*
China), para. 940. The Arbitral tribunal when it concluded that: “*the obligations in Part XII apply to all*
States with respect to the marine environment in all maritime areas, both inside the national
jurisdiction of States and beyond it” and that, accordingly, “*questions of sovereignty are irrelevant to*
the application of Part XII of the Convention”.

1 article 192 reflects the principle of prevention of transboundary harm which
2 constitutes a principle of customary international law.¹⁴²

3
4 I have already mentioned that the obligations under article 194 of UNCLOS to
5 prevent, reduce and control pollution of the marine environment in the form of
6 greenhouse gas emissions require States to take mitigation measures. This
7 requirement is also a component of the broader obligation under article 192 of
8 UNCLOS.

9
10 However, article 192 goes well beyond the issue of pollution of the marine
11 environment. In the above-mentioned *South China Sea Arbitration*, the arbitral
12 tribunal found that article 192, read together with article 194(5) of UNCLOS, imposes
13 a due diligence obligation to take those measures “*necessary to protect and*
14 *preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or*
15 *endangered species and other forms of marine life.*”¹⁴³

16
17 According to the arbitral tribunal, such obligation “*extends both to ‘protection’ of the*
18 *marine environment from future damage and to ‘preservation’ in the sense of*
19 *maintaining or improving its present condition” and “thus entails both the positive*
20 *obligation to take active measures to protect and preserve”*¹⁴⁴ the marine
21 environment and, by logical implication, also the negative obligation not to degrade
22 it.

23
24 The EU therefore agrees with the COSIS¹⁴⁵ that under article 192 of UNCLOS,
25 States must take also adaptation measures, to increase the resilience of marine
26 ecosystems *vis-a-vis* the deleterious effects of climate change, and protect natural
27 ocean-based carbon sinks. Following the IPCC “Special Report on the Ocean and
28 Cryosphere in a Changing Climate”, this may require, for instance, the “*protection,*
29 *restoration, precautionary ecosystem-based management of renewable resource*
30 *use, and the reduction of pollution and other stressors” as well as “integrated water*
31 *management and ecosystem-based adaptation approaches”.*¹⁴⁶

32
33 Further, the content of article 192 is informed and further detailed by the subsequent
34 provisions of Part XII, as well as by reference to specific obligations set out in other
35 international agreements.¹⁴⁷ In the context of the protection from deleterious effects
36 of climate change, relevant international provisions to be taken into account include:

¹⁴² Ibid, para. 941: “*The corpus of international law relating to the environment, which informs the content of the general obligation in article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”*” citing: *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 at pp. 240-242, para. 29.

¹⁴³ Ibid, para. 983.

¹⁴⁴ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 941.

¹⁴⁵ See Public sitting held on Tuesday, 12 September 2023, at 3 p.m., at the International Tribunal for the Law of the Sea, Hamburg, President Albert J. Hoffmann presiding, ITLOS/PV.23/C31/4, Verbatim Record, page 3 at 7-9.

¹⁴⁶ IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–35. <https://doi.org/10.1017/9781009157964.001>, page 30, C2.

¹⁴⁷ See in this regard: PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 941-941.

1 the requirement under the Paris Agreement to engage, *inter alia*, in the
2 implementation of adaptation measures; in the assessment of climate change
3 impacts and vulnerability; in the monitoring and evaluation of adaptation actions; and
4 in building the resilience of socioeconomic and ecological systems.¹⁴⁸

5
6 They also include the requirement under the UNFCCC to promote sustainable
7 management, to cooperate in the conservation and enhancement of sinks and
8 reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including
9 oceans and coastal and marine ecosystems, and in preparing for adaptation to the
10 impacts of climate change; and to develop appropriate and integrated plans for
11 coastal zone management and water resources.¹⁴⁹

12
13 Finally, they include the requirement under the Convention on Biological Diversity,
14 which was explicitly considered by the arbitral tribunal when interpreting
15 article 194(5) in the *South China Sea Arbitration*,¹⁵⁰ to establish a system of
16 protected areas; regulate or manage biological resources important for the
17 conservation of biological diversity; rehabilitate and restore degraded ecosystems;
18 and promote the recovery of threatened species.¹⁵¹

19
20 A further international agreement which will need to be taken into account in the
21 interpretation and implementation of article 192 UNCLOS, once entered into force,
22 will be the BBNJ Agreement. As previously mentioned, this agreement is an example
23 of international cooperation that strengthens the framework for the protection and
24 preservation of the marine environment and that will also help in addressing climate
25 change.

26
27 In particular, the general objective of the BBNJ Agreement is “to ensure the
28 conservation and sustainable use of marine biological diversity of areas beyond
29 national jurisdiction”.¹⁵² In order to achieve this objective, Parties shall be guided,
30 among others, by an “approach that builds ecosystem resilience, including to
31 adverse effects of climate change and ocean acidification, and also maintains and
32 restores ecosystem integrity, including the carbon cycling services that underpin the
33 role of the ocean in climate”.¹⁵³

34
35 The BBNJ Agreement also operationalizes existing environmental impact
36 assessment obligations in a concrete and robust way to ensure that activities which
37 may cause substantial pollution of, or significant and harmful changes to, the marine
38 environment are assessed and conducted to prevent, mitigate and manage
39 significant adverse impacts for the purpose of protecting and preserving the marine
40 environment.¹⁵⁴

¹⁴⁸ Paris Agreement, article 7(9). Ex article 5(1) parties to the Paris Agreement should also take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases.

¹⁴⁹ UNFCCC, article 4(1)(d) and (e).

¹⁵⁰ PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*, para. 945.

¹⁵¹ Convention on Biological Diversity, article 8 (a), (c) and (f).

¹⁵² Article 2 of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (certified true copy available at: [XXI-10 CTC \(un.org\)](https://www.un.org/XXI-10-CTC)).

¹⁵³ Ibid, article 7(h).

¹⁵⁴ See *ibid*, Part IV.

1 Mr President, the European Union invites this Tribunal to take all these
2 internationally agreed rules into account when determining the specific obligations
3 under UNCLOS to preserve and protect the marine environment in relation to the
4 deleterious effects of climate change. In the view of the European Union, such
5 international rules inform, together with the other parameters detailed in reply to
6 question (a), the duty of due diligence required under article 192 of UNCLOS in the
7 context of climate change deleterious effects.

8
9 Mr President, let me now conclude the oral statement of the European Union.

10
11 The European Union greatly welcomes the initiative by COSIS to seek clarification
12 by this Tribunal on States' obligations under UNCLOS concerning the protection of
13 the marine environment from the effects of climate change.

14
15 The European Union considers this case a meaningful opportunity to further
16 understand the interactions and synergies between the climate change and the law
17 of the sea regimes, notably based on the current scientific evidence, and thereby
18 foster the clarification of international law in those fields.

19
20 At the same time, the European Union invites the Tribunal to apply the *lex lata* and
21 hence to focus its opinion on the actual scope of the questions referred to it by
22 COSIS. These questions concern the content of *primary* – rather than secondary –
23 rules of international law *under* UNCLOS as regards the preservation and protection
24 of the marine environment in relation to the deleterious effects *of climate change*.

25
26 The EU also takes the opportunity to recall the fundamental distinction between
27 obligations of conduct and obligations of result, and invites the Tribunal to delineate
28 the exact contours of the due diligence obligations under Part XII in relation to the
29 deleterious effects of climate change.

30
31 Mr President, let me conclude by quoting the conclusions of the latest Report of the
32 UN Secretary-General on the Oceans and the law of the Sea, published this month:

33
34 With the arrival of the “era of global boiling”, addressing climate change
35 remains an urgent priority. Growing awareness of the ocean-climate-
36 sustainable development nexus will help to ramp up ambition in the ocean
37 space. Ocean-related responses will need to be sustainable and inclusive in
38 order to address the climate emergency and build more resilient societies. The
39 request for an advisory opinion from the Tribunal shows the importance and
40 relevance of the institutions established by the Convention in addressing
41 challenges such as climate change.¹⁵⁵

42
43 Mr President, honourable members of the Tribunal, we could not be more eagerly
44 looking forward to receiving your advisory opinion on this matter of planetary
45 urgency.

46
47 Thank you very much for your attention.

48

¹⁵⁵ Oceans and the law of the sea – Report of the Secretary-General, A/78/339, para. 93.

1 **THE PRESIDENT:** Thank you, Ms Bruti Liberati. I now invite the representative of
2 Viet Nam, Ms Hanh, to make her statement. You have the floor, Madam.

3
4 **MS HANH:** Mr President, distinguished members of the Tribunal, it is a great honour
5 for me to appear before the Tribunal today representing the Socialist Republic of
6 Viet Nam.

7
8 Viet Nam's statement consists of four parts:

9
10 (i) Viet Nam's overall perspectives related to climate change and marine
11 environment;

12
13 (ii) the jurisdiction of the Tribunal;

14
15 (iii) UNCLOS provisions, which, in our view, specifically address obligations of State
16 with regard to anthropogenic greenhouse gas emissions; and

17
18 (iv) the principle of common but differentiated responsibilities in the consideration
19 and determination of the respective obligations of States Parties to UNCLOS in the
20 protection and preservation of the marine environment from deleterious impacts
21 caused by greenhouse gas emissions.

22
23 Like a large majority of States affirmed in their written submissions to the Tribunal in
24 this procedure and as elaborated by previous speakers, climate change caused by
25 anthropogenic greenhouse gases emissions is one of the most pressing challenges
26 for the international community today. It is an existential threat to many low-lying
27 nations and small island countries. It is also affecting coastal areas in many
28 developing countries. However, anthropogenic emissions of greenhouse gases
29 continue to rise beyond the capacity of reabsorption and rebalancing of the Earth.

30
31 (*Interpretation from French*) Mr President, members of the Tribunal, Viet Nam is one
32 of the developing coastal States most vulnerable to the negative effects of climate
33 change and in particular to sea-level rise. According to our national report on climate
34 change for the year 2022, our marine environment and ecosystem have already
35 been seriously impacted by climate change.

36
37 Viet Nam is sparing no effort to adapt to these negative effects and to mitigating
38 them. Viet Nam is one of the countries that have committed to net "zero emissions".
39 Legislation and policies adopted by Viet Nam over the last decade highlight the
40 necessity to act against climate change and also underscore the link between
41 climate change and governance of the oceans. This is, for example, the case of the
42 law of 2012 on Viet Nam's maritime areas; the law of 2015 on the environment and
43 resources of coastal areas and islands; and the Maritime Code of 2015. Last year,
44 my country adopted its national strategy on climate change through to 2050.

45
46 There is no doubt whatsoever that the United Nations Convention on the Law of the
47 Sea, as a legal framework for all maritime activities, is far from being indifferent to
48 those vital health problems affecting both the seas and the oceans today.

49 Clarification of the obligations incumbent upon States under the Convention is
50 essential if one seeks to reinforce the efforts of the international community to

1 reduce the negative impact of climate change resulting from the anthropogenic
2 emissions of greenhouse gases, and these instant proceedings give the opportunity
3 to the Tribunal to contribute to this absolutely imperative cause.

4
5 (*Continued in English*) Mr President, members of the Tribunal, Viet Nam shares the
6 view of most States which submitted written statements that the Tribunal has
7 jurisdiction in this case and there are no compelling reasons for the Tribunal to
8 decline to exercise such jurisdiction.

9
10 As observed by the Tribunal in its Advisory Opinion on the *Request for an Advisory*
11 *Opinion submitted by the Sub-Regional Fisheries Commission (or Case 21)*,
12 “[a]rticle 21 of the Statute of this Tribunal and the ‘other agreement’ conferring
13 jurisdiction on the Tribunal are interconnected and constitute the substantive legal
14 basis of the advisory jurisdiction of the Tribunal.”

15
16 Article 138 of the Rules of the Tribunal sets out three prerequisites for the Tribunal to
17 exercise such advisory opinion.

18
19 First, there shall be an international agreement related to the purposes of the
20 Convention that specifically provides for the submission to the Tribunal of a request
21 for an advisory opinion. In this case, the COSIS Agreement is manifestly an
22 international agreement related to the purpose of UNCLOS, especially Part XII of
23 UNCLOS concerning the protection and preservation of the marine environment.

24
25 Second, with regard to the transmission of the request by an authorized body, the
26 request in this case has been transmitted by COSIS upon its decision pursuant to
27 article 2(2) of the COSIS Agreement.

28
29 Third, relating to the nature of the request submitted, the two questions submitted by
30 COSIS are clearly legal questions aimed at clarifying the legal obligations of States
31 under UNCLOS related to marine environment protection and preservation.

32
33 Under article 138 Rules of the Tribunal, the Tribunal “may give an advisory opinion”,
34 meaning that the Tribunal has a discretionary power to render an opinion. But in
35 Case 21, the Tribunal observed that “a request for an advisory opinion should not in
36 principle be refused except for ‘compelling reasons’.”¹⁵⁶ Like a large majority of
37 States which took part in these proceedings, Viet Nam does not see any compelling
38 reason for the Tribunal to refuse the request for an advisory opinion.

39
40 Mr President, members of the Tribunal, let me turn now to the substance of the
41 questions submitted by COSIS, namely, how UNCLOS regulates anthropogenic
42 greenhouse gas emissions. The second part of my presentation examines if
43 anthropogenic greenhouse gas emissions fall under the scope of the term “pollution”
44 under article 1(1) of UNCLOS.

45
46 Mr President, Viet Nam is of the opinion that the current understanding of
47 anthropogenic greenhouse gas emissions corresponds to the three elements of

¹⁵⁶ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14

1 pollution provided in the definition of that term in article 1(1)(4), namely, (i) the
2 indirect and direct introduction of substances or energy into the marine environment
3 by man; (ii) resulting or being likely to result in deleterious effects; and (iii) such
4 deleterious effects must be something as harm to living resources and marine life,
5 hazards to human health, hindrance to marine activities, including fishing and other
6 legitimate uses of the sea, impairment of quality for use of sea water and reduction
7 of amenities.

8
9 Anthropogenic greenhouse gas emissions indeed directly and indirectly introduce
10 substances and energy into the sea and ocean water column, which is the basic
11 element of “marine environment”. The ocean has directly absorbed greenhouse
12 gases such as carbon dioxide, methane and nitro oxide induced by human activities,
13 causing the increase of carbon dioxide level in the water.¹⁵⁷ Also, the increasing heat
14 trapped by greenhouse gases goes into the oceans, which causes the rise of ocean
15 temperature.¹⁵⁸

16
17 Furthermore, in application of the general rule of interpretation enshrined in
18 article 31(1) of the 1969 Vienna Convention on the Law of Treaties, requiring that the
19 provisions of a treaty be interpreted “in accordance with the ordinary meaning to be
20 given to the[ir] terms”, the notion of “marine environment” includes the air column
21 above the sea and ocean water column.

22
23 One can, for instance, refer in that sense to the International Seabed Authority
24 Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area,
25 according to which “[m]arine environment includes the physical, chemical, geological
26 and biological components, conditions and factors which interact and determine the
27 productivity, state, condition and quality of the marine ecosystem, the waters of the
28 seas and oceans *and the airspace above those waters* [...]”.¹⁵⁹

29
30 Interpreting the terms “marine environment” in the context of UNCLOS and in light of
31 its object and purpose leads to the same conclusion. Indeed, the pollution of the
32 marine environment from or through the atmosphere is explicitly mentioned and
33 regulated by article 212 of UNCLOS. Also, article 194(1) refers to “the release of ...
34 harmful ... substances ... from or through the atmosphere”.

35
36 Because of the ordinary meaning of the term “release”, the “releasing of substances
37 through the atmosphere” takes place at the moment the substances concerned leave
38 their source and get into the air, whether such substances do later get into the sea
39 water column or not. Wherever the place of emission is, the marine environment is
40 forced to receive “substances” through the process of anthropogenic greenhouse
41 gas emissions.

42
43 The fact that anthropogenic greenhouse gas emissions result in deleterious effects
44 for the marine environment is also clearly established. The warming of the

¹⁵⁷ <https://www.iaea.org/bulletin/how-carbon-emissions-acidify-our-ocean>

¹⁵⁸ <https://www.unep.org/news-and-stories/story/greenhouse-gases-are-depriving-our-oceans-oxygen>

¹⁵⁹ International Seabed Authority Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area, Annex to the Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area and related matters, 22 July 2013, Doc. ISBA/19/C/17; emphasis added.

1 atmosphere, oceans and land as a result of human activities has been scientifically
2 demonstrated by the United Nations Intergovernmental Panel on Climate Change (or
3 “IPCC”), the World Meteorological Organization and the United Nations Environment
4 Program, amongst others.¹⁶⁰

5
6 The last element in the definition of “pollution” under UNCLOS refers to the
7 seriousness of deleterious effects of the introduction of substance or energy in the
8 marine environment. “Harm” must be caused to living resources or marine life, or
9 “hindrance” must be occasioned to “marine activities, including fishing or other
10 legitimate uses of the sea”.

11
12 This last element is present in relation to marine environment due to the extremely
13 adverse effects of climate change caused by anthropogenic greenhouse gas
14 emissions, which have accumulated over the years. According to the 2023 report of
15 the IPCC, “human activities, principally through emissions of greenhouse gases,
16 have unequivocally caused global warming”.¹⁶¹ The report also mentions the
17 damages and harms resulting from global warming and climate change such as “the
18 hundreds of local losses of species”, “the increasing occurrence of climate-related
19 food-borne and water-borne diseases”, the adverse impact on “food production from
20 fisheries and shellfish aquaculture”, “severe water scarcity”, and “loss of livelihoods
21 and culture”.¹⁶²

22
23 Mr President, the third part of my presentation will be dedicated to the demonstration
24 that anthropogenic greenhouse gas emissions fall under article 194(3)(a) of
25 UNCLOS and, as a consequence, States are under due diligence obligations to
26 prevent, reduce and control such emissions.

27
28 Viet Nam agrees with a large majority of States that anthropogenic greenhouse gas
29 emissions come within the scope of article 194(3)(a), namely, (i) the release of toxic,
30 harmful or noxious substances, especially those which are persistent; (ii) from land-
31 based sources, from or through the atmosphere or by dumping.

32
33 Various scientific and legal sources have demonstrated beyond doubt the harmful
34 and noxious character of the now out-of-balance greenhouse gases presence in the
35 atmosphere. Anthropogenic greenhouse gases in the atmosphere are now harmful
36 because of the combined effect of their persistence in nature, their accumulation and
37 concentration as a result of centuries of industrialization and the present pace of
38 emissions which increasingly exceeds the re-absorbance capacity of the Earth.¹⁶³

39
40 As a consequence, Viet Nam submits that UNCLOS, especially Part XII, imposes
41 obligations on States to take all measures in accordance with the Convention that
42 are necessary to prevent, reduce and control anthropogenic greenhouse gas
43 emissions. Viet Nam emphasizes the obligation of States to use the best practicable
44 means at their disposal and in accordance with their capabilities to ensure that

¹⁶⁰<https://www.un.org/en/global-issues/climate-change>. See
also: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

¹⁶¹https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

¹⁶² *Ibid.*

¹⁶³<https://www.un.org/esa/sustdev/natlinfo/indicators/indisd/english/chapt9e.htm>;
<https://www.ohchr.org/en/calls-for-input/2023/call-inputs-toxic-impacts-some-climate-change-solutions>

1 activities under their jurisdiction or control are conducted so as not to cause damage
2 by anthropogenic greenhouse gas emissions to other States and their environment
3 and to minimize anthropogenic greenhouse gas emissions to the fullest extent.
4

5 It is well established by various UNCLOS dispute settlement bodies that article 194
6 of UNCLOS sets forth obligations not only in relation to activities directly undertaken
7 by States and their organs, but also in relation to activities that take place within their
8 jurisdiction and control; they have to ensure that all of these do not harm the marine
9 environment.¹⁶⁴ This “due diligence” obligation is an obligation of conduct, which
10 requires States not only to adopt appropriate rules and measures but also to
11 demonstrate a “certain level of vigilance in their enforcement and the exercise of
12 administrative control” to deal with all sources of pollution of the marine
13 environment.¹⁶⁵
14

15 Viet Nam joins many States in expressing a strong belief that due diligence
16 obligations have a wide scope of application in this area. In this regard, Viet Nam
17 expects the Tribunal to examine a specific aspect of due diligence obligations
18 relating to the transfer of those technologies which contribute to minimize
19 anthropogenic greenhouse gas emissions. Many countries which contribute the least
20 to climate change but suffer the most from it, including Viet Nam, have made strong
21 commitments to reduce anthropogenic greenhouse gas emissions.
22

23 Green technologies are crucial to the realization of these commitments and yet,
24 under the argument that technologies are mainly developed and owned by private
25 actors, very few measures, if any, were adopted by developed States to encourage
26 or facilitate the transfer of such technologies to other States, particularly States with
27 limited resources. As a result, technologies for the reduction of anthropogenic
28 greenhouse gas emissions will be sold at market prices, in accordance with mutually
29 agreed terms between the buyers and the sellers, even if the development of such
30 technologies were sponsored and financed by the government. Consequently, in
31 many instances, access to technologies reducing anthropogenic greenhouse gas
32 emissions is out of reach of countries which contribute the least to climate change
33 but suffer the most from it.
34

35 In Viet Nam’s opinion, due diligence obligations under Part XII, particularly
36 article 194 of UNCLOS require governments, especially governments of developed
37 countries, to adopt measures to encourage corporations under their jurisdiction to
38 transfer technologies reducing and minimizing anthropogenic greenhouse gas
39 emissions to countries with limited resources, including small islands States, least
40 developed countries and countries most vulnerable to climate change. The omission
41 to take such measures vis-à-vis industries under one’s control or jurisdiction, to
42 make appropriate technologies more accessible and affordable to relevant countries,

¹⁶⁴ *South China Sea Arbitration (Philippines v. China)*, Final Award, 12 July 2016 PCA Case No 2013-19, para. 944. Similar conclusions can be drawn from the Tribunal’s analysis in Advisory Opinion of 2 April 2015, requested by the Sub-regional Fisheries Commission, Case No 21, para. 124-128, citing the Seabed Disputes Chamber in its Advisory Opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

¹⁶⁵ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, para. 131; quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 79, para. 197.

1 is, in Viet Nam’s view, equivalent to non-compliance with the due diligence obligation
2 under UNCLOS.

3
4 Accordingly, States are under due diligence obligations, corresponding to their
5 historical contribution to the harm caused by the accumulation and concentration of
6 anthropogenic greenhouse gas emissions as a result of centuries of industrialization
7 and the present pace of emissions, to ensure that activities under their jurisdiction or
8 control are conducted so as to minimize to the fullest extent anthropogenic
9 greenhouse gas emissions and not to cause damage by anthropogenic greenhouse
10 gas emissions to other States and their environment, or to marine areas beyond
11 national jurisdiction.

12
13 Mr President, I now arrive at the last part of my presentation, concerning the
14 principle of common but differentiated responsibilities (CBDR). It is Viet Nam’s
15 position that this principle should imperatively be taken into account in the
16 consideration and determination of the respective obligations of States Parties to
17 UNCLOS in the protection and preservation of the marine environment from
18 deleterious impacts caused by anthropogenic greenhouse gas emissions.

19
20 According to generally accepted definitions, the principle of common but
21 differentiated responsibilities “entails that while pursuing a common goal [...], States
22 take on different obligations, depending on their socio-economic situation and their
23 historical contribution to the environmental problem at stake.”¹⁶⁶

24
25 In accordance with article 31(3)(c) of the 1969 Vienna Convention on the Law of
26 Treaties, in the process of interpretation of any treaty, “[t]here shall be taken into
27 account, together with the context”, “any relevant rules of international law applicable
28 in the relations between the parties.” In Viet Nam’s view, the principle of CBDR is a
29 relevant rule of international law applicable in the relations between the parties to
30 UNCLOS. The principle satisfies the requirements set out in article 31(3)(c), namely,
31 (1) it is a rule of international law; and (2) it is relevant and applicable in the relations
32 between the parties to UNCLOS.

33
34 First, the principle of CBDR is a rule of international law. Indeed, the principle of
35 common but differentiated responsibilities is reflected in several treaties. It is
36 enshrined in article 3(2) of the United Nations Framework Convention on Climate
37 Change (UNFCCC), article 10 of the Kyoto Protocol, the Preamble and article 2(2) of
38 the Paris Agreement, to name just a few. It has been noted in that respect that
39 “[w]ithin the climate change regime, the concept of common but differentiated
40 responsibilities qualifies as a legally binding principle given its explicit inclusion in
41 [the relevant] instruments.”¹⁶⁷

42
43 Second, it is applicable in the relations between the Parties. At the time of the
44 present proceedings, the UNFCCC, the Kyoto Protocol and the Paris Agreement
45 have achieved *quasi* universal participation. The vast majority of the Parties to
46 UNCLOS are also parties to these instruments. Therefore, the CBDR principle is
47 applicable in the relations between almost all States Parties to UNCLOS.

¹⁶⁶ E. Hey and S. Paulini, “Common but Differentiated Responsibilities”, MPEPIL
(<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568>).

¹⁶⁷ *Ibid.*

1 Third, the CBDR principle is a relevant rule of international law. This principle
2 underpins all treaties dealing with anthropogenic greenhouse gas emissions and
3 therefore must be considered “relevant” in the determination of the obligations of
4 States in the protection and preservation of the environment, including the marine
5 environment, from the deleterious impacts caused by anthropogenic greenhouse gas
6 emissions.

7
8 Mr President, members of the Tribunal, that brings me to the end of my presentation
9 today. Let me sum up the main points of Viet Nam’s argumentation.

10
11 First, it is the view of Viet Nam that the Tribunal has jurisdiction to give the advisory
12 opinion requested by COSIS and there are no compelling reasons for the Tribunal to
13 decline the exercise of such jurisdiction.

14
15 Second, anthropogenic greenhouse gas emissions meet the criteria to be a source
16 of pollution to the marine environment due to their nature and deleterious effects on
17 the marine environment. Viet Nam, as a low-lying coastal State, is fully conscious of
18 this.

19
20 Third, due diligence obligations to prevent, reduce and control pollution of the marine
21 environment under Part XII of UNCLOS apply to anthropogenic greenhouse gas
22 emissions.

23
24 Fourth, obligations of States Parties to UNCLOS in the protection and preservation
25 of the marine environment from deleterious impacts caused by anthropogenic
26 greenhouse gas emissions must be determined in light of the principle of common
27 but differentiated responsibilities.

28
29 Mr President, members of the Tribunal, with these conclusions, I complete the oral
30 statement of Viet Nam. I thank you for your kind attention.

31
32 **THE PRESIDENT:** Thank you, Ms Hanh. This brings us to the end of this morning’s
33 sitting. The hearing will be resumed at 3 p.m. when we will hear an oral statement
34 from the Pacific Community. The sitting is now closed.

35
36 **THE CLERK OF THE TRIBUNAL:** All rise.

37
38 *(Lunch adjournment)*