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
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List of delegations:

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

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

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

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

Turning now to the matter at hand. “Hau nia Tasi, Hau nia Timor”. In Tetum, this translates to “My sea, My Timor”. While it is possible to translate this Tetum expression literally, words cannot convey the special relationship between the Timorese people and the sea.

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

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

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

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

Many Timorese depend on the oceans for their sustenance and livelihoods by fishing and harvesting marine species, such as tuna, snapper and seaweed. The rich coral reefs and steep underwater cliffs that surround Timor-Leste are part of a diverse
ecosystem, attracting scientists and tourists. Protection and preservation of the marine environment is therefore critical to protecting Timor-Leste’s way of life and economic development.

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

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

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

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

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

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

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
production and employment in every productive sector corresponds to that expected from an emerging economy".4

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

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

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

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

0.003 per cent of global emissions\(^9\) but suffer the consequences of the actions of others. While doing so, the Tribunal must consider, as States have agreed in the Paris Agreement, that developing countries, and specifically the least developed such as Timor-Leste, are afforded their basic rights to pursue their own sustainable economic development. Timor-Leste has the right to give its people a better life.

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

As our Prime Minister Xanana Gusmão has said:

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

Timor-Leste welcomes the opportunity to make submissions in this Tribunal’s advisory jurisdiction. This is not a fight amongst States. This is a fight for our oceans, our planet, our people, our development. Individually, we are one drop. Together, we are an ocean.\(^{10}\)

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

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

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

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

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

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

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\(^{10}\) Ryunosuke Satoro, Japanese poet.
First, that States have a right to develop their natural resources in accordance with their right to protect and preserve the marine environment. The Tribunal's interpretation of States' obligations under UNCLOS must not compromise that right.

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

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

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

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

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

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

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

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

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particularly around Timor-Leste and Indonesia. A decline of an order of 5 per cent to 10 per cent in local fisheries is expected by the year 2050. This presents serious food security implications, as Timor-Leste relies almost exclusively on ocean and coastal ecosystems for its domestic fish consumption.

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

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

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

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

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

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

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

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

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

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

There are various environmental, human rights and other international obligations 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.
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.
26 Vienna Convention on the Law of Treaties 1155 UNTS 331, article 30(3).
submissions, most relevant are the obligations and commitments of States, including Timor-Leste, under the Framework Convention on Climate Change\textsuperscript{27} and the Paris Agreement\textsuperscript{28}.

Article 237 of UNCLOS\textsuperscript{29} reflects the understanding that States will continue to develop the rules of international environmental law. UNCLOS is intended to apply in harmony with the specific environmental rights and obligations of States rather than undermining or superseding them. When it comes to the protection and preservation of the environment, the Framework Convention on Climate Change and the Paris Agreement are the operative special texts.\textsuperscript{30} Concluded after UNCLOS, their drafters – including many UNCLOS parties – were presumably aware of their obligations under UNCLOS when they adopted these texts.

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

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

Turning now to the specific questions put to the Tribunal.

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

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

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


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

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


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

Due diligence entails that a State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”. In considering the content of a “due diligence obligation”, the Seabed Disputes Chamber in its Advisory Opinion on Activities in the Area, concluded that a “due diligence” obligation required States to take affirmative measures within its legal system, consisting of “laws and regulations and administrative measures”. And it is to be recalled that the exercise of due diligence requires an addition to adopting rules and measures. There must be “a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators”. Importantly, this is a continuing obligation. The obligation evolves over time taking into account “new scientific or technological knowledge … [or] change[s] in relation to the risks involved in the activity”.

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

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

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

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

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

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

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

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

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

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

43 A/RES/77/170, Ensuring access to affordable, reliable, sustainable and modern energy for all (14 December 2022), article 9.
responsibilities and respective capabilities, in light of different national circumstances.

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

Closely related to States’ right to develop their natural resources is the right to development. This is an “inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized” as recognized in the Declaration on the Right to Development Resolution.

Importantly, States bear the primary responsibility for the “creation of national and international conditions favourable to the realization of the right to development.”

During the first session of the Intergovernmental Negotiating Committee, Working Group I considered the impacts of the Framework Convention on Climate Change on living standards and the right to development. The Working Group recognized “developing countries have as their main priority alleviating poverty and achieving social and economic development and that their net emissions must follow from their, as yet, relatively low energy consumption to accommodate their development needs.” The Working Group further recognized the right to development as an “inalienable human right.”

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

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Since the Framework Convention on Climate Change, every major climate
commmitment, including the Paris Agreement, the Glasgow Climate Pact and the
Sharm-el-Sheikh Implementation Plan, has expressly acknowledged the right to
development in its preamble.

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

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

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

Respect for the right of self-determination is also one of the purposes of the United
Nations. As already explained by Chile and Nauru, the right to self-
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:
58 Oral submissions of Nauru (14 September 2023, ITLOS/PV.23/C31/8), page 29, available at:
(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).  

The General Assembly’s Declaration on Friendly Relations, adopted unanimously in 1970, considered to reflect customary international law, states that: “all peoples have the right freely to determine, without external influence, their political status and to pursue their economic, social and cultural development”.

The International Court of Justice has also emphasized that the proper exercise of self-determination pays regard to the express free will of peoples. As Nauru emphasized, self-determination is unfilled when people are deprived of their “own means of subsistence”. Contemporary international law considers self-determination as a jus cogens right, from which no derogation is permitted.

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

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

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

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

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

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59 ICCPR, ICESCR, article 1.
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
transition to a low carbon economy. In that sense, Timor-Leste’s contribution to global emissions is already minimal and miniscule. In 2021, Timor-Leste’s per capita energy consumption was 1,615 kilowatt hours. As the Representative for Timor-Leste noted, Timor-Leste only contributes to 0.003 per cent of global emissions.

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

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

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

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

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

As enumerated in the Paris Agreement, States’ obligations must “reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”. This extends to obligate developed States to provide developing States with the financial resources to assist them in mitigation and adaptation efforts, as well as other forms of assistance.

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

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

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

THE PRESIDENT: Thank you, Mr Middleton. I now give the floor to Mr Sthoeger to make his statement. You have the floor, Sir.

MR STHOEGER: It is an honour to appear before this distinguished body once again, and on behalf of Timor-Leste.

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

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

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

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

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70 South China Sea Arbitration (Philippines v China) (Award), PCA Case No 2013-19, 12 July 2016, par. 942.
subjective assessment does not change its nature as conduct-based. I would add that, as a practical matter, a result-based obligation will tend to limit, rather than expand, the conduct required of States, as time progresses, and that these distinctions are not academic. They can have ramifications.

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

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

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

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

As the late Professor Boyle notes, these agreements are the _lex specialis_ with respect to climate change.75 Not all participants in these proceedings agree on this point. But Timor-Leste believes this is evident.

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

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

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

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

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

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

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

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

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

This leads me to the principle of “common but differentiated responsibilities” (CBDR), as already highlighted by others, such as Guatemala and Sierra Leone.\textsuperscript{82} The principle is embodied in Principle 7 of the Rio Declaration\textsuperscript{83} and reflected in UNFCCC\textsuperscript{84} and the Paris Agreement,\textsuperscript{85} among other treaties. It is a central principle of international environmental law.\textsuperscript{86}

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

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

and, second, concerning the need to take into account different national circumstances’. In particular, each State’s contribution to the creation of a particular environmental problem and each State’s ability to prevent, reduce and control the threat.\textsuperscript{87}

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

\textsuperscript{81} International Law Association, Study Group on Due Diligence in International Law, Second Report (2016), pp. 3, 16.
\textsuperscript{82} Oral submission of Sierra Leone (19 September 2019).
\textsuperscript{84} United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, article 3(1).
\textsuperscript{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).
\textsuperscript{86} Ellen Hey, Sophia Paulini, Common but Differentiated Responsibilities, Max Planck Encyclopaedia of Public International Law (2021), para. 19.
\textsuperscript{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.
It is important that the obligations in Part XII are interpreted coherently with the principle of CBDR. Otherwise, certain standards may be inappropriate, and of unwarranted economic and social cost to some States, in particular developing States.90 For States with limited means, imposing the same level of commitment would ultimately compromise their right to pursue sustainable and inclusive development.

To address this disparity, UNCLOS, the UNFCCC, and the Paris Agreement place an obligation on developed States to provide technical and financial assistance to developing States. Such assistance is designed to support, in the words of UNCLOS article 202, “the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution”.91 Articles 202 and 203 of UNCLOS reflect the unique position of developing States in trying to balance their development and the protection of the marine environment. Article 202 calls on States Parties to promote programmes of “scientific, educational, technical and other assistance” to developing States and contains an open-ended list of specific forms of assistance.

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

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

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

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94 United Nations Climate Change, Nationally Determined Contributions Registry – Timor-Leste (online), available at: https://unfccc.int/NDCREG?gclid=Cj0KCQjw84anBhCtARIsAISl-xfLPsfrA6mPdAIznR8fr95R6xlcCQeggRKjBwd-C2nMLFfx7Bq3ywaAhetEALw_wcB
establish a robust National Greenhouse-Gas (GHG) Inventory to support its ability to report to the UNFCCC and comply with the requirements of the Paris Agreement”. 95

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

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

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

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

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

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

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

99 Oral submissions of the Commission of Small Island States (12 September 2023, ITLOS/PV.23/C31/4), page 25, available at:
UNCLOS parties, must act to address this intergenerational emergency. It is for States to take the best available science, such as the conclusions of the IPCC, and agree on further legal commitments. In doing so, the community of States cannot leave developing States behind. Developing States deserve the same opportunities that have been afforded to developed States, to develop their resources for the benefit of their people.

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

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

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

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

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

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


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

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

In particular, the reports from the sixth assessment cycle and the Special Report on the Oceans and Cryosphere in a Changing Climate\(^\text{102}\) reflect the current scientific knowledge on the implementation of international obligations regarding climate change and oceans.

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

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

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

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

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

\(^{102}\) 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.
assistance to developing States to tackle climate change. According to the latest OECD report (2022), the EU and its 27 Member States are, indeed, the largest contributors to international public climate finance, contributing over €23.04 billion – which is equivalent to US$ 26 billion in 2021 – to the collective US$ 100 billion aim, with almost 40 per cent of the EU’s contribution targeting climate adaptation.

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

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

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

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

Now, in the following presentation, the European Union will proceed in five steps: first, I will make a remark in connection to the nature of the Tribunal’s advisory function (in order not to confuse it with adversarial procedures); second, I will address the question of the applicable law; third, I will turn to the general obligations of articles 192 and 194 of UNCLOS and their nature as obligations of conduct; fourth, I will update the Tribunal on the high ambition implementation of its obligations by the European Union; and, fifth, my co-agent will briefly address the two questions, in the order posed by COSIS.

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

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

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

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

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

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

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

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

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

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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*
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.
The law applicable by this Tribunal is identified in article 293 of UNCLOS in:

(1) UNCLOS itself; and (2) other rules of international law not incompatible with UNCLOS.

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

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

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

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

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

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

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

In the present case, no argument has been made that any specific provision of the UNFCCC or of the Paris Agreement would go against an obligation under UNCLOS Part XII. Indeed, the regime of the UNFCCC has put in place certain specific
obligations with regard to climate change, but it has not lowered the threshold of the obligations under Part XII of UNCLOS. Rather, the UNFCCC and the Paris Agreement could even be considered as concluded in furtherance of the general principles set forth in UNCLOS for the purposes of its article 237 UNCLOS.

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

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

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

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

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

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

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

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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.
112 PCA, 12 July 2016, *South China Sea Award (Republic of the Philippines/People’s Republic of China)*.
The obligation of conduct also takes into account the capability of the State concerned. This has certain similarities with the principle of common but differentiated responsibilities and respective capabilities under the UNFCCC and the Paris Agreement, whereby account is taken of the different national circumstances, which can evolve over time and whereby the capabilities of certain States can improve.

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

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

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

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

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

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

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

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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.

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

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

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

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

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

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

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

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

In her last State of the Union Speech last week, the European Commission’s President has also announced the launch of the “European Wind Power package”.
And, finally, the BBNJ\(^{115}\) Agreement will be signed by the European Union, and by other States, later today almost as we speak. The BBNJ Agreement will be crucial in addressing the triple planetary crisis of climate change, biodiversity loss and pollution. The BBNJ Agreement will reinforce the rules on, notably, environment impact assessments (which is based on a customary law obligation), on area-based management of marine areas, and it will also include cooperative tools to share expertise and assist developing States to protect the marine environment beyond areas of national jurisdiction.

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

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

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

(Short break)

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

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

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

I will consider question (a) first.

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

To delineate the EU’s proposed answer to this question, I will proceed in this order: first, I will briefly recall the nature of the obligations under article 194 of UNCLOS specifically to address certain arguments made by other participants in this case; second, I will delineate the content of the obligations under article 194 of UNCLOS, and, to this effect, I will:

first, consider the definition of “pollution” laid down in article 1(1)(4) of UNCLOS;

second, discuss the elements which inform the content of the obligations under article 194 of UNCLOS, including in relation to the deleterious effects of climate change; third, and based on the foregoing, I will outline the specific actions required by States under article 194(1) and (2) to prevent, reduce and control greenhouse gas emissions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As to the legal factors determining the content of the obligations under article 194, the arbitral tribunal in the South China Sea Arbitration\(^\text{128}\) found that article 192 of UNCLOS is to be informed by the other provisions of Part XII and by other applicable rules of international law. The EU submits that the same finding must apply to article 194 of UNCLOS.

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

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

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

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

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

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

\(^{128}\) PCA, 12 July 2016, South China Sea Award (Republic of the Philippines/People’s Republic of China), paras. 941-942.
operators\textsuperscript{129} is required in the enforcement of the laws and regulations adopted pursuant to article 207 and 212 of UNCLOS.

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

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

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

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

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

This Tribunal also upheld these clarifications on the meaning of the expression “responsibility to ensure” and on the interrelationship between the notions of obligations “of due diligence” and obligations “of conduct” in in its advisory opinion in the Illegal Fishing case.\textsuperscript{131}

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

\textsuperscript{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.

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

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

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

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

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

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

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

Both article 2 of the Paris Agreement and the later decisions of the Conference of its Parties reflect this scientific awareness, recognizing that “limiting the temperature increase to 1.5 °C above pre-industrial levels …would significantly reduce the risks and impacts of climate change”.\textsuperscript{136}

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\textsuperscript{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.


\textsuperscript{135} Ibid, page 20, B.6.

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

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

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

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

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

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

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\(^{137}\) 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.


\(^{140}\) 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”.

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

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

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

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

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

Further, the content of article 192 is informed and further detailed by the subsequent provisions of Part XII, as well as by reference to specific obligations set out in other international agreements.147 In the context of the protection from deleterious effects 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.
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.
the requirement under the Paris Agreement to engage, *inter alia*, in the implementation of adaptation measures; in the assessment of climate change impacts and vulnerability; in the monitoring and evaluation of adaptation actions; and in building the resilience of socioeconomic and ecological systems.\(^{148}\)

They also include the requirement under the UNFCCC to promote sustainable management, to cooperate in the conservation and enhancement of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including oceans and coastal and marine ecosystems, and in preparing for adaptation to the impacts of climate change; and to develop appropriate and integrated plans for coastal zone management and water resources.\(^{149}\)

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

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

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

The BBNJ Agreement also operationalizes existing environmental impact assessment obligations in a concrete and robust way to ensure that activities which may cause substantial pollution of, or significant and harmful changes to, the marine environment are assessed and conducted to prevent, mitigate and manage significant adverse impacts for the purpose of protecting and preserving the marine 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://un.org)).

\(^{153}\) Ibid, article 7(h).

\(^{154}\) See ibid, Part IV.
Mr President, the European Union invites this Tribunal to take all these internationally agreed rules into account when determining the specific obligations under UNCLOS to preserve and protect the marine environment in relation to the deleterious effects of climate change. In the view of the European Union, such international rules inform, together with the other parameters detailed in reply to question (a), the duty of due diligence required under article 192 of UNCLOS in the context of climate change deleterious effects.

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

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

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

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

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

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

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

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

Thank you very much for your attention.

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

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

Viet Nam’s statement consists of four parts:

(i) Viet Nam’s overall perspectives related to climate change and marine environment;

(ii) the jurisdiction of the Tribunal;

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

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

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

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

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

There is no doubt whatsoever that the United Nations Convention on the Law of the Sea, as a legal framework for all maritime activities, is far from being indifferent to those vital health problems affecting both the seas and the oceans today. Clarification of the obligations incumbent upon States under the Convention is essential if one seeks to reinforce the efforts of the international community to
reduce the negative impact of climate change resulting from the anthropogenic
emissions of greenhouse gases, and these instant proceedings give the opportunity
to the Tribunal to contribute to this absolutely imperative cause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This last element is present in relation to marine environment due to the extremely
adverse effects of climate change caused by anthropogenic greenhouse gas
emissions, which have accumulated over the years. According to the 2023 report of
the IPCC, “human activities, principally through emissions of greenhouse gases,
have unequivocally caused global warming”.\footnote{\url{https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_Syr_SPM.pdf}} The report also mentions the
damages and harms resulting from global warming and climate change such as “the
hundreds of local losses of species”, “the increasing occurrence of climate-related
food-borne and water-borne diseases”, the adverse impact on “food production from
fisheries and shellfish aquaculture”, “severe water scarcity”, and “loss of livelihoods
and culture”.\footnote{Ibid.}

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

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

Various scientifical and legal sources have demonstrated beyond doubt the harmful
and noxious character of the now out-of-balance greenhouse gases presence in the
atmosphere. Anthropogenic greenhouse gases in the atmosphere are now harmful
because of the combined effect of their persistence in nature, their accumulation and
concentration as a result of centuries of industrialization and the present pace of
emissions which increasingly exceeds the re-absorbance capacity of the Earth.\footnote{\url{https://www.un.org/esa/sustdev/natlinfo/indicators/indisd/english/chapt9e.htm};

As a consequence, Viet Nam submits that UNCLOS, especially Part XII, imposes
obligations on States to take all measures in accordance with the Convention that
are necessary to prevent, reduce and control anthropogenic greenhouse gas
emissions. Viet Nam emphasizes the obligation of States to use the best practicable
means at their disposal and in accordance with their capabilities to ensure that
activities under their jurisdiction or control are conducted so as not to cause damage by anthropogenic greenhouse gas emissions to other States and their environment and to minimize anthropogenic greenhouse gas emissions to the fullest extent.

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

Viet Nam joins many States in expressing a strong belief that due diligence obligations have a wide scope of application in this area. In this regard, Viet Nam expects the Tribunal to examine a specific aspect of due diligence obligations relating to the transfer of those technologies which contribute to minimize anthropogenic greenhouse gas emissions. Many countries which contribute the least to climate change but suffer the most from it, including Viet Nam, have made strong commitments to reduce anthropogenic greenhouse gas emissions. Green technologies are crucial to the realization of these commitments and yet, under the argument that technologies are mainly developed and owned by private actors, very few measures, if any, were adopted by developed States to encourage or facilitate the transfer of such technologies to other States, particularly States with limited resources. As a result, technologies for the reduction of anthropogenic greenhouse gas emissions will be sold at market prices, in accordance with mutually agreed terms between the buyers and the sellers, even if the development of such technologies were sponsored and financed by the government. Consequently, in many instances, access to technologies reducing anthropogenic greenhouse gas emissions is out of reach of countries which contribute the least to climate change but suffer the most from it.

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

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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.

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

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

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

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

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

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

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

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¹⁶⁷ Ibid.
Third, the CBDR principle is a relevant rule of international law. This principle underpins all treaties dealing with anthropogenic greenhouse gas emissions and therefore must be considered “relevant” in the determination of the obligations of States in the protection and preservation of the environment, including the marine environment, from the deleterious impacts caused by anthropogenic greenhouse gas emissions.

Mr President, members of the Tribunal, that brings me to the end of my presentation today. Let me sum up the main points of Viet Nam’s argumentation. First, it is the view of Viet Nam that the Tribunal has jurisdiction to give the advisory opinion requested by COSIS and there are no compelling reasons for the Tribunal to decline the exercise of such jurisdiction.

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

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

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

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

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

THE CLERK OF THE TRIBUNAL: All rise.

(Lunch adjournment)